



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

FOURTH SECTION

CASE OF LUBOCH v. POLAND

(Application no. 37469/05)

JUDGMENT

STRASBOURG

15 January 2008

FINAL

15/04/2008

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 Luboch v. Poland,

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

Nicolas Bratza, *President*,

Giovanni Bonello,

Kristaq Traja,

Lech Garlicki,

Ljiljana Mijović,

Ján Šikuta,

Päivi Hirvelä, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 11 December 2007,

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

PROCEDURE

1. The case originated in an application (no. 37469/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Zbigniew Luboch (“the applicant”), on 7 October 2005.

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

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

4. On 14 March 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Rzeszów.

A. Background to the case

6. The applicant read law from 1981 to 1986. Subsequently, he did his four-year advocate training and in 1992 he began to practise as an advocate.

7. The applicant submits that from 1984 onwards he had often gone abroad to visit his family and to work.

8. On one occasion, after his return from abroad, the applicant met with his old colleague, W.C., who had offered his help in connection with a letter which had allegedly arrived from abroad and could have caused problems for the applicant. The applicant was not aware that W.C., who claimed to be working as a teacher, was in fact an officer of the Security Service (*Służba Bezpieczeństwa*).

9. In spring 1987 the applicant became aware of that fact. He then threw W.C. out of his flat and cut off all contacts with him. There were three witnesses to that event, T.L., B.M. and M.S.

B. Lustration proceedings

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

11. Following the entry into force of the 1997 Lustration Act the applicant declared that he had not been an intentional and secret collaborator of the communist-era security services.

12. On an unspecified date in 2000 the Commissioner of Public Interest (*Rzecznik Interesu Publicznego*) applied to the Warsaw Court of Appeal to institute proceedings in the applicant's case on the grounds that he had lied

in his lustration declaration by denying his collaboration with the security services. The Commissioner heard W.C. as a witness.

13. On 30 May 2000 the Warsaw Court of Appeal instituted lustration proceedings in the applicant's case. On 5 June 2000 the applicant was informed that the lustration proceedings had been instituted and that he could consult the case file in the court.

14. On 8 May 2001 the court held a hearing partly in camera. It examined some archived classified documents.

15. On 16 June 2001 the court held a hearing partly in camera at which it examined the applicant's personal record (*teczka osobowa*). The applicant stated that he would not make any statements and would not answer any questions put to him by the court. He requested the court to call W.C. and M.R. as witnesses.

16. The court held hearings in camera on 27 June, 25 September and 25 October 2001. Witness W.C. summoned by the court failed to appear.

17. On 25 October 2001 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 Service and had therefore lied in his lustration declaration. The operative part of the judgment was served on the applicant on 20 December 2001. At the same time, the reasoning was considered "top secret" and, in accordance with Article 100 § 5 of the Code of Criminal Procedure, could only be consulted in the Court of Appeal's secret registry.

18. On 3 January 2002 the applicant lodged an appeal. He argued that the Court of Appeal's judgment had been primarily based on the statements of W.C. who had not been heard by the court. The court had instead relied on the transcript of W.C.'s statements given before the Commissioner. Those statements had been given without the applicant or his lawyer being present. W.C. was an officer of the Security Service which had allegedly managed the applicant as a secret collaborator.

19. On 16 May 2002 the Warsaw Court of Appeal held a hearing at which it heard W.C. as a witness. The court notified W.C. that the Head of the State Security Bureau (*Urząd Ochrony Państwa*) had discharged him from the obligation of confidentiality in respect of the subject matter of the proceedings.

20. W.C. was heard again at the hearing held on 18 November 2003. The court refused the applicant's request to call two additional witnesses (M.S. and J.S.) on the ground that their evidence would not be relevant for the determination of the case.

21. On 3 September 2004 the court held a hearing. It refused the applicant's request to call two further witnesses (B.M. and T.L.), considering their evidence irrelevant for the case.

22. On 3 September 2004 the Warsaw Court of Appeal, acting as the second-instance lustration court, upheld the original decision. It appears that the judgment and its reasoning were served on the applicant.

23. On 15 November 2004 the applicant lodged a cassation appeal with the Supreme Court. He submitted, *inter alia*, that the Court of Appeal had refused to call three crucial witnesses for the applicant whose evidence was to rebut the fact of his alleged collaboration with the security services. The applicant further submitted that the Court of Appeal had disregarded his arguments to the effect that his contacts with W.C. had been of a private nature. He submitted that his contacts with W.C. had not constituted secret and intentional collaboration. He also challenged the fact that he could not consult the file in the proceedings before the Commissioner or adduce any evidence at that stage of the proceedings.

24. On 14 April 2005 the Supreme Court dismissed the applicant's cassation appeal. The applicant was served with the operative part of the judgment. The written reasoning was designated "secret" by the Supreme Court and the applicant could consult it at the Institute of National Remembrance (*Instytut Pamięci Narodowej*).

25. On 19 May 2005 the President of the Court of Appeal, pursuant to the 1997 Lustration Act, ordered the publication in the Official Law Gazette (*Monitor Polski*) of the information that according to the Warsaw Court of Appeal's final judgment of 25 October 2001 the applicant had lied in his lustration declaration.

26. Consequently, on 9 June 2005 the President of the Rzeszów Regional Bar Council issued a decision depriving the applicant of the right to practise as an advocate.

27. On 11 November 2005 the applicant requested the President of the Republic of Poland to grant him a pardon. He was informed, however, that a pardon could only be granted in respect of a person who had been convicted of a criminal offence.

II. RELEVANT LAW

A. The Lustration Act

28. On 3 August 1997 the 1997 Lustration Act entered into force. The relevant provisions of this Act, in the version in force at the material time, are the following:

Section 3 reads, in so far as relevant:

"1. Persons exercising public functions within the meaning of this law are: the President of the Republic of Poland, deputies, senators ... judges, prosecutors and advocates..."

29. Section 4 provides the following definition of the term “collaboration”:

“1. Collaboration within the meaning of this law is intentional and secret collaboration with operational or investigative branches of the State's security services as a secret informer or assistant in the process of gathering information.

2. Collaboration within the meaning of this law is not an action which was obligatory under the law in force at the material time. ...”

30. Section 6 concerns the obligation to submit a “lustration declaration” (*oświadczenie lustracyjne*):

“1. Persons in the categories listed in section 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').”

Section 40 requires such a declaration to be submitted also by those who at the date of entry into force of the 1997 Lustration Act are holding a public function.

31. Section 17 et seq. concerns the office of the Commissioner of the Public Interest. It reads, in so far as relevant:

“1. The Commissioner of the Public Interest (*Rzecznik Interesu Publicznego*), hereafter called 'the Commissioner', represents the public interest in lustration proceedings.”

Section 17(d) provides, in so far as relevant:

“1. The duties of the Commissioner shall include in particular

i) analysing the lustration declaration submitted to the court;

ii) collecting 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 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.”

32. Section 17(e) provides:

“The Commissioner, his deputies and the authorised employees of his office shall have full access to documentation and other information sources, regardless of the form in which they were recorded, provided that they were created before 10 May 1990 by

1. The Minister of Defence, the Minister of the Interior, the Minister of Justice, the Minister of Foreign Affairs, or by the services under their authority; or

2. The Head of the State Security Bureau.”

33. Sections 19 and 20 refer to the Code of Criminal Procedure. Section 19 reads as follows:

“Matters not covered by this law and relating to lustration proceedings, including the appeal and cassation phase, shall be governed by the Code of Criminal Procedure.”

The amendment to section 19, which entered into force on 8 March 2002, provides that the proceedings can also be conducted in camera on an application by the person subject to lustration. This provision replaced the one contained in section 21(4), which provided that the court could decide to conduct the proceedings in camera of its own motion or on an application by a party.

Section 20 provides:

“The provisions of the Code of Criminal Procedure relating to the accused shall apply to the person subject to lustration (hereafter called 'the subject').”

34. Section 23 provides for service of the judgment:

“1. The court's judgment, together with the written reasons, shall be served on the parties to the proceedings without delay....”

Section 28, amended with effect from 8 March 2002, provides:

“A final judgment finding that the declaration submitted by the subject was untrue shall be published immediately in the Official Law Gazette (*Dziennik Urzędowy RP Monitor Polski*) if

- 1) no cassation appeal has been lodged within the prescribed time-limit; or
- 2) the cassation appeal has been left unexamined; or
- 3) the cassation appeal has been dismissed.”

35. Section 30 lists the consequences of the judgment for a person subject to lustration who has submitted an untrue declaration. It reads, in so far as relevant:

“1. A final judgment finding that the subject has submitted an untrue declaration shall result in the loss of the moral qualifications necessary for exercising public functions, described according to the relevant laws as: unblemished character, immaculate reputation, irreproachable reputation, good civic reputation, or respectful of fundamental values. After 10 years the judgment shall be considered to be of no legal effect.

2. A final judgment finding that the subject has submitted an untrue declaration shall entail dismissal from the functions exercised by that person if the moral qualifications mentioned above are necessary for exercising it.

3. A final judgment finding that the subject has submitted an untrue declaration shall deprive that person of the right to stand for election as President for a period of 10 years.”

On 8 March 2002 sub-section 4 was added, which provides:

“The consequences enumerated in sub-sections 1-3 above shall take place if

- 1) no cassation appeal has been lodged within the prescribed time-limit; or
- 2) the cassation appeal has been left unexamined; or
- 3) the cassation appeal has been dismissed.”

B. Code of Criminal Procedure

36. Article 100 § 5, which concerns 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 shall be served to the effect that the reasons have actually been prepared.”

37. Article 156, which deals with access to the case file, in so far relevant provides as follows:

“1. The court files pertaining to a case shall be made available to the parties, their defence counsels, legal representatives and guardians who shall have possibility to obtain copies from them. Other persons may access the case file provided that the president of the court agrees to it.

2. Upon a request from the accused or his defence counsel, photocopies of the documents of the case shall be provided at their expense.

3. The president of the court may on justifiable grounds, order certified copies to be made from the files of the case.

4. If there is a danger of revealing a state secret, inspection of files, making certified copies and photocopies shall be done under conditions imposed by the president of the court or by the court. Certified copies and photocopies shall not be released unless provided otherwise by law....”

C. Laws on classified information

38. Section 2 (1) of the 1982 Protection of State Secrets Act (*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) 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...”

39. Section 86 of the 1999 Protection of Classified Information Act (*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 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.”

D. Relevant international instruments

40. 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

A. The Government's submissions

41. The Government submitted that the applicant had not exhausted all relevant domestic remedies as required under Article 35 § 1 of the Convention. They argued that neither at the appellate nor at the cassation stage had the applicant alleged, even in substance, any infringement of his right to a fair hearing as presented in his subsequent complaint to the Court. In particular, the applicant had not questioned the alleged restrictions on his access to the case file and on taking notes from it. Nor had he complained that he could not present his arguments in accordance with the principles of an adversarial hearing and equality of arms.

42. The Government emphasised that Article 6 of the Convention was directly applicable under Polish law and the applicant could, therefore, have relied on that provision before the Polish courts, complaining of a violation thereof in his case. However, in his appeal on points of law to the Supreme Court the applicant had put forward arguments which had been based solely on domestic law, had concerned the merits of the case and had not been related to the question of access to the case file.

43. The Government further argued that the applicant had failed to lodge a constitutional complaint with the Constitutional Court. Had the applicant

been of the opinion that the legal provisions on which the courts had based their decisions or their interpretation – namely Articles 100 § 5 and 156 § 4 of the Code of Criminal Procedure in conjunction with section 52 § 2 of the Lustration Act – had breached his rights, in particular his right to a fair hearing enshrined in Article 45 of the Constitution, he should have lodged a constitutional complaint. In particular, the applicant should have requested the Constitutional Court to examine whether the rules imposed by those provisions had violated his right to a fair trial. The Government also maintained that the applicant could have requested the Constitutional Court to give a so-called “interpretative judgment” (*orzeczenie interpretacyjne*) which would indicate the correct way of construing the relevant provisions which, in turn, would have to be taken into consideration by the courts applying them.

B. The applicant's submissions

44. The applicant disagreed. As regards the argument that he had not relied on the Convention in the domestic proceedings, he maintained that he had raised in his appeal and cassation appeal the issue of restrictions in his access to the case file. He had contested the fact that he could not take notes from the file, make photocopies of documents and read hand-written documents produced by the Security Service. As regards the constitutional complaint, he submitted that the Constitutional Court had jurisdiction to examine the constitutionality of legal provisions which had served as a basis for a final ruling but not to examine the way in which those provisions had been applied in a given case.

C. The Court's assessment

45. The Court considers that 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 is linked to the Court's assessment of Poland's compliance with the requirements of a “fair trial” under Article 6 § 1 of the Convention (see *Matyjek v. Poland*, no. 38184/03, § 42, ECHR 2007-...).

46. The Court accordingly joins the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies to the merits of the case.

47. 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-... and *Bobek v. Poland* (dec.), no. 68761/01, 24 October 2006).

48. 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.

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

49. The applicant complained under Article 6 of the Convention that the lustration proceedings had been unfair. He contested their outcome and alleged that the courts had refused to call all his witnesses. The applicant further complained that he had been required to formally undertake that everything which he had learned during the proceedings would be kept confidential. In this respect he submitted that all notes taken from the case file and during the hearings had to be deposited with the court and could not be taken away.

Article 6 of the Convention 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 applicant's submissions

50. The applicant argued that the principle of equality of arms had not been respected in his case. He had been hindered in his access to the case file and thus could not defend himself properly against the allegations raised by the Commissioner of the Public Interest. Furthermore, he had been entirely deprived of a possibility to participate in the proceedings before the Commissioner who had failed to inform him about the institution of the

proceedings against the applicant. He could not question witnesses heard by the Commissioner and had had no access to the case file at that stage. The applicant averred that the evidence obtained by the Commissioner, without any knowledge or possibility of mounting a challenge on his part, had been of crucial importance in the lustration proceedings. The applicant's situation had been more detrimental than that of a suspect in the pre-trial investigation. The applicant had been placed at a significant disadvantage vis-à-vis the Commissioner who had had access to all documents and archives.

51. As regards the judicial stage of the proceedings, the applicant complained that all his requests to call important witnesses, who were to rebut the allegation of his supposed collaboration with the security services, had been refused. As a result, he could not challenge the version of events put forward by the Commissioner. He contested the fact that a key witness W.C. had not been heard in the first-instance lustration proceedings. Furthermore, he argued that the rights of the defence in the lustration proceedings had been severely curtailed. In this respect, he submitted that the notes made in the secret registry of the lustration court could not be taken away and that he had not been allowed to make any copies. At hearings he could not use any notes or other materials. The applicant maintained that the classified evidence in his case covered documents produced by the former security services which had concerned trivial information, such as his results at university, his material status, whether he had been going to restaurants and church etc.

B. The Government's submissions

52. The Government argued that the applicant's right to a fair trial had been respected in the instant case. They admitted that at the relevant time the Lustration Act had not provided for a possibility that a person concerned be heard by the Commissioner of the Public Interest and be allowed to consult the documents underlying the Commissioner's request for the lustration proceedings to be instituted. However, all the materials relied on by the Commissioner had been subsequently accessible to the applicant in the court proceedings.

53. The Government submitted that part of the evidentiary material in the applicant's case had been classified as "top secret" under the 1982 Protection of State Secrets Act. Afterwards, the State Security Bureau upheld the "secret" classification of those documents on the basis of the 1999 Protection of Classified Information Act. The classified character of those documents had influenced the course of the proceedings; however it had had no adverse effect on the fairness of the proceedings.

54. The Government argued that under the 1999 Protection of Classified Information Act and Article 156 § 4 of the Code of Criminal Procedure, the

evidence in the case, having been regarded as classified information, had been available to the parties only in the secret registry of the lustration court. They maintained that both parties to the proceedings, that is, the applicant and the Commissioner of the Public Interest, had been subject to the same strict rules governing access to the file deposited in the secret registry, in particular those regarding the taking of notes. The notes from the case file had to be made in a special notebook which was subsequently placed in an envelope, sealed and deposited in the secret registry. The same procedure applied to any notes made during hearings. The envelope with the notebooks inside could be opened only by the person who had made the notes in it. The Government emphasised that the above rules had enabled the applicant to actively participate in the hearings.

55. Furthermore, the Government observed that the need to protect the public interest may justify withholding certain evidence from the defence in criminal proceedings (*Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, § 53, 22 July 2003). However, they underlined that in the present case all evidence had been disclosed to the applicant. The only difficulty had been related to the classified nature of the evidence which had resulted in application of particular arrangements as far as access to the case-file had been concerned.

56. The Government submitted that, having regard to the nature of the evidence in the case, the reasoning for the Court of Appeal's judgment of 25 October 2001 and for the Supreme Court's judgment of 14 April 2005 had been also classified. Consequently, the applicant could consult the written reasoning for those judgments in the Court of Appeal's secret registry. That procedure was applied in all cases involving State secrets. The Government submitted that the reasoning for the judgments had been also served on the secret registry of the Commissioner of the Public Interest's Office. The staff of the Commissioner's Office who had been preparing pleadings on his behalf had been subject to the same rules concerning access to the reasoning as the applicant. On account of the above considerations, the Government could not produce, despite the Court's request, copies of the reasoning for those judgments.

57. The Government maintained that the applicant's requests to call certain witnesses had not been – contrary to his submissions – aimed at rebutting the allegation of his assumed collaboration. They had been refused by the court since they had concerned the facts that had been already established or that had not been in dispute. In any event, the question of admissibility of evidence was primarily a matter for national courts to assess.

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

C. The Court's assessment

59. The Court recalls that the procedural guarantees of Article 6 of the Convention under its criminal head apply to lustration proceedings (see paragraph 47 above). It further observes 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).

60. 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 case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (see, for example, *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 380-81, § 47 and *Foucher v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, § 34). The Court further reiterates 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, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p. 712, § 54).

61. 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 case 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.

62. Turning to the instant case, the Court observes firstly that the Government have pointed to the series of successive laws on the basis of which the communist-era security services' materials continued to be regarded as a State secret (see paragraphs 38-39 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 classified as "top secret". The Head of the State Security Bureau was also 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*, cited above, § 115 and *Matyjek*, cited, § 57).

63. Secondly, the Court notes that, at the pre-trial stage, the Commissioner of the 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 (see paragraphs 37, 39 and 54 above).

Furthermore, it has not been disputed by the parties that, when consulting his case file, the applicant had been authorised to make notes. However, any notes he took could be made only in special notebooks that were subsequently sealed and deposited in the secret registry. The notebooks could not be removed from this registry and could be opened only by the person who had made them. Similarly, the notes taken during the hearings, of which some were held in camera, were to be made in special notebooks which were later kept in the court's secret registry. The Government acknowledged that the applicant could not remove the notes taken during the hearings from the courtroom and that he had to hand them to a designated person after the hearing. The Court further observes that although the applicant had been represented in the lustration proceedings, it has not been disputed that identical restrictions applied to his lawyer.

Moreover, the applicant also maintained that he could not use before the lustration court the notes he had made in the secret registry. The Court observes that the Government did not contest the applicant's allegation and agreed that the notebooks could not be removed from the secret registry. Nor did they invoke any provision of domestic law that would give him a right to do so.

64. 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 either at the hearing or in the secret registry, in order to show them to an expert or to use them for any other

purpose, effectively prevented him from using the information contained in them as he had to rely solely on his memory.

Regard being had to what was at stake for the applicant in the lustration proceedings – not only his good name but also his right to practise as an advocate – the Court considers that it was important for him to have unrestricted access to those files and unrestricted use of any notes he made, including, if necessary, the possibility of obtaining copies of relevant documents (see *Foucher*, cited above, § 36).

65. 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 the 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 the 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 (see paragraphs 31 and 32 above).

66. Finally, the Court notes that as regards the judgments given on 25 October 2001 and 14 April 2005, only their operative part was notified to the applicant. The written reasons, albeit prepared, could only be consulted in the secret registry of the court. Furthermore, the Government did not produce copies of the written reasons in the proceedings before the Court, invoking their classified character.

67. The Court 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*, cited above, § 115 and *Matyjek*, cited above, § 62). 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's position was put at a clear disadvantage (see *Matyjek*, cited above, § 62).

68. 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 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).

69. It remains to be ascertained whether the applicant could have successfully challenged the features of the lustration proceedings in his 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 Article 156 of the Code of the Criminal Procedure and that those legal provisions were complied with in this case, the Court is not persuaded that the applicant, in his appeals or cassation appeals, could have successfully challenged the domestic law in force.

70. In so far 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 *Matyjek v. Poland* (dec.), cited above). 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; *Więcek v. Poland* (dec.), no. 19795/02, 17 January 2006; *Palusiński v. Poland* (dec.), no. 62414/00, ECHR 2006-... and *Tereba v. Poland* (dec.), no. 30263/04, 21 November 2006).

71. 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, Article 156 § 4 of the Code of Criminal Procedure, allowing the President of the Lustration Court to limit the applicant's access to the case file and his possibilities of taking notes and copying documents (see *Bobek*, cited above, § 73). In that

connection the Court points to the established case-law of the Constitutional Court, according to which constitutional complaints based solely on the allegedly wrongful interpretation of a legal provision are excluded from its jurisdiction (see *Palusiński v. Poland* (dec.), cited above). The Government did not refer to any other domestic remedy which could have been successful in this case.

72. It follows that it has not been shown that the applicant had an effective remedy at his 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 should be rejected.

73. In these circumstances 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.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION REGARDING LACK OF PUBLIC HEARING

74. The applicant also complained under Article 6 § 1 of the Convention that the proceedings in his case had not been public. Article 6 § 1 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...”

75. The Government contested that argument. They submitted that partial exclusion of the public in the present case had been justified on national security grounds. The Government argued that the course of the proceedings had been determined by the fact that a part of the evidence examined by the court had been considered “top secret” under the applicable legislation. Consequently, some of the hearings, at which the court had examined classified documents or heard witnesses whose statements had to be kept confidential, had been held without the public. On the other hand, other hearings had been public. Furthermore, W.C., the main witnesses in the case, had been discharged from the obligation of confidentiality in respect of the subject matter of the proceedings, so he could be heard during a public hearing. The applicant disagreed with the Government's submissions.

76. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

77. Having regard to the finding of a violation of Article 6 § 1 on account of unfairness of the lustration proceedings, and the reasons underlying that finding (see paragraphs 62-68 and 73 above), the Court

considers that it is not necessary to examine whether, in this case, there has been a violation of this provision as regards the lack of a public hearing.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

78. Lastly, the applicant alleged that the Lustration Act had violated Article 7 of the Convention. Relying on the Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems of the Parliamentary Assembly of the Council of Europe, the applicant complained that the lustration process should not have lasted longer than 10 years after the fall of the communist regimes and that there had been no statute of limitations in the Lustration Act. He further alleged a violation of Articles 1, 4, 8, 13 and 17 of the Convention.

79. The Court has examined the remainder of the complaints as submitted by the applicant. However, having regard to all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that the applicant has failed to substantiate his complaints. It follows that this part of the application must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. 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

81. The applicant claimed 840,000 Polish zlotys ((PLN); approximately 210,000 euros (EUR)) in respect of pecuniary damage. This sum corresponded to the loss of his earnings during the next 10 years covered by the ban on his practising as an advocate. He also claimed EUR 20,000 in respect of non-pecuniary damage.

82. The Government contested the claim in respect of pecuniary damage and considered the claim in respect of non-pecuniary damage excessive. If the Court were to find a violation in the present case, 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. Alternatively, they asked to assess the amount of just satisfaction on the basis of its case-law in similar cases and having regard to national economic circumstances.

83. 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 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 may have been sustained by the applicant (see, *Matyjek*, cited above, § 69).

B. Costs and expenses

84. The applicant claimed 11,573.07 Polish zlotys (approximately EUR 3,000) for the costs and expenses incurred in the domestic proceedings. This amount included PLN 6,732.07 for costs of the proceedings before the Court of Appeal, PLN 750 for court fees before the Supreme Court and PLN 4,100 for his lawyer's fees. The applicant also claimed PLN 1,800 (approximately EUR 450) for the costs of translation incurred in connection with the proceedings before the Court.

85. The Government submitted that the applicant had not shown that the costs and expenses claimed had been incurred in order to prompt the domestic courts to comply with the requirements of Article 6 § 1.

86. According to the Court's case-law, an applicant is entitled to reimbursement of his 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 produced copies of invoices documenting his claim in respect of the costs which he was ordered to pay by the Court of Appeal (PLN 6,732.07) and in respect of the costs of translation (PLN 1,800). He did not submit any document to substantiate his claim as regards the order for costs issued by the Supreme Court. In respect of the lawyer's fees incurred in the domestic proceedings, the Court notes that the applicant produced copies of postal transfers made to a private address of his lawyer in the amount of PLN 4,100. However, it observes that he did not submit a copy of the invoice issued by the lawyer.

87. Consequently, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,100 covering costs under all heads.

C. Default interest

88. 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. *Joins* to the merits the Government's preliminary objection;
2. *Declares* the complaints under Article 6 of the Convention regarding the unfairness of the proceedings and the lack of a public hearing admissible and the remainder of the application inadmissible;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 and *dismisses*, in consequence, the Government's preliminary objection;
4. *Holds* that there is no need to examine the complaint under 6 § 1 of the Convention regarding the lack of a public hearing;
5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained;
6. *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 2,100 (two thousand one 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;
7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 January 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President