CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 38184/03
by Tadeusz MATYJEK
against Poland

The European Court of Human Rights (IV Section), sitting on 30 May 2006 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr K. TRAJA,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having regard to the above application lodged on 15 October 2003,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Tadeusz Matyjek, is a Polish national who was born in 1935 and lives in Warsaw, Poland. He was represented before the Court by Ms M. Gąsiorowska, a lawyer practising in Warsaw. The respondent Government were represented by their Agent, Mr J. Wołąsiewicz, of the Ministry of Foreign Affairs.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. Following the entry into force of the Law of 11 April 1997 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") the applicant, who was a member of the *Sejm*[1] at the time, declared that he had not collaborated with the communist-era secret services.

4. On 1 June 1999 the Commissioner of the Public Interest (*Rzecznik Interesu Publicznego*) applied to the Warsaw Court of Appeal (*Sąd Apelacyjny*) to institute proceedings in the applicant's case on the grounds that he had lied in his lustration declaration by denying his cooperation with the secret services. On 14 June 1999 the applicant was notified that the lustration proceedings had been instituted.

On 16 September and 25 October 1999 the court held hearings in camera.

5. On 17 December 1999 the Warsaw Court of Appeal, acting as the first-instance lustration court, found that the applicant had submitted an untrue lustration declaration because he had been an intentional and secret collaborator with the State's secret services. The operative part of the judgment was served on the applicant on 3 January 2000. However, the reasoning was considered "secret" and, in accordance with Article 100 § 5 of the Code of Criminal Procedure could only be consulted in the secret registry of that court.

6. The applicant lodged an appeal.

7. On 17 February 2000 the Warsaw Court of Appeal, acting as the second-instance lustration court, dismissed the applicant's appeal. The court again informed the applicant that, due to the confidential nature of the case, the written reasoning for the judgment would not be served on him but could be consulted in the secret registry.

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[1] The Polish Parliament consists of two houses: the *Sejm* and the *Senat*

8. On 20 April 2000 the applicant lodged a cassation appeal (*kasacja*) with the Supreme Court (*Sąd Najwyższy)*. On 10 October 2000 the Supreme Court quashed the Court of Appeal's judgment and remitted the case to it. The Supreme Court found that the applicant's motion to hear two additional witnesses had been disregarded, which constituted a serious procedural shortcoming.

9. On 11 December 2000 the Commissioner of the Public Interest applied to the Warsaw Court of Appeal to request the Head of the State Security Bureau to lift the confidentiality restrictions in respect of all the documents in the case-file.

10. On 20 December 2000 the Head of the State Security Bureau lifted the confidentiality restrictions in respect of all the materials concerning the case.

11. On 19 January 2001 the Warsaw Court of Appeal held a hearing in public.

12. On 25 January 2001 the Warsaw Court of Appeal quashed the impugned judgment and remitted the case to the first-instance court.

13. On 1 June 2001 the Warsaw Court of Appeal, acting as the first-instance court, held a public hearing. Subsequently, on 28 June and 4 December 2001, the hearings were held at least partly in camera. On 4 December 2001 it gave judgment, finding that the applicant had lied in his lustration declaration.

14. The applicant appealed, but the Warsaw Court of Appeal dismissed his appeal on 2 October 2002.

15. On 16 May 2003 the Supreme Court dismissed an appeal by the applicant.

16. According to the applicant, he had been allowed to consult his case-file during the proceedings, but had been prevented from making any notes that he could take away with him.

B. Relevant domestic law and practice

1. The Lustration Act

17. 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 barristers..."

18. Section 4 provides the following definition of the term "collaboration":

"1. Collaboration within the meaning of this law is an 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. ..."

19. Section 6 concerns the obligation to submit a "lustration declaration":

"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 7 provides:

"Declarations shall be submitted by

...

2) candidates for election as deputy or senator..."

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.

20. Section 17 et seq. concern the office of the Commissioner of the Public Interest. Section 17 reads, in so far as relevant:

"1. The Commissioner of the Public Interest, hereafter called 'the Commissioner', represents the public interest in lustration proceedings.

Section 17d 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."

21. Section 17e 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."

22. 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 the 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 upon an application of the person subject to lustration. This provision replaced the one contained in section 21 (4), which provided that the court might decide to conduct the proceedings in camera, of its own motion or upon 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')."

23. 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;

2) the cassation appeal has been left unexamined;

3) the cassation appeal has been dismissed."

24. 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 function 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;

2) the cassation appeal has been left unexamined;

3) the cassation appeal has been dismissed."

2. Criminal Code

25. Chapter XV of the Criminal Code, entitled "Relation to special statutes" (*stosunek do ustaw szczególnych),* provides in Article 116:

"The provisions of the General Part of this Code shall be applied to offences defined in other laws providing for criminal liability (*inna ustawa przewidująca odpowiedzialność karną)*, unless those laws specifically exclude the application of these provisions."

3. Code of Criminal Procedure

26. 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 will be served to the effect that the reasons have actually been prepared."

4. Relevant domestic practice

27. The Constitutional Court has on several occasions dealt with cases relating to lustration proceedings. In a judgment of 10 November 1998 the Constitutional Court recalled the historical background to the Lustration Act and explained the approach to lustration expressed in it. The court stated:

"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 is that the subject of scrutiny, decision-making and possible sanction in lustration proceedings is the truthfulness of the declaration submitted under section 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 that brings negative consequence for those affected."

28. In the same judgment the Constitutional Court dealt with a complaint lodged by a group of Members of Parliament that section 20 of the Act, in so far as it states that the provisions concerning the accused in criminal proceedings are applicable to persons subject to lustration proceedings, was unconstitutional. In this regard the court stated:

"According to the Constitutional Court, it follows from the obligation under section 19 of the Act to apply likewise the provisions of the Code of Criminal Procedure, that the person subject to lustration has the benefit of all procedural guarantees such as the application of the rule *in dubio pro reo*: doubts that cannot be dispelled shall benefit the person subject to lustration and the defence rights. The rule of presumption of innocence is of particular importance in this group of procedural guarantees; for the purpose of the lustration proceedings, this rule should be understood as one of the presumption of truthfulness of the declarations throughout all stages of the proceedings, starting with the proceedings before the Commissioner, through to the proceedings before the Court of Appeal, and ending at the cassation stage. It should be added that the rule of presumption of innocence has the rank of constitutional principle (Article 42 § 3 of the Constitution). Therefore, as regards the protection of rights and freedoms of individuals, it is always an established standard of the State governed by the rule of law.

The Constitutional Court, noting that section 20 of the Act had been formulated in an ambiguous manner, found it necessary to use an interpretation technique in compliance with the Constitution, and construed this provision in such a way as to regard it as constitutional. It established, therefore, that section 20 of the Lustration Act, in so far as it states that the provisions concerning the accused in criminal proceedings are applicable to persons subject to lustration proceedings, and is to be understood as securing procedural guarantees for such persons, complies with Article 2 of the Constitution of the Republic of Poland."

29. In a judgment of 28 May 2003 the Constitutional Court judged it necessary to clear up all the misapprehensions surrounding the Lustration Act.

"In 1998 the Constitutional Court clearly stated that the Lustration Act 'is not about scrutinising the past of persons who hold public functions or stand for election to posts involving the exercise of such functions, but only the truthfulness of the declarations made by them in this respect. It is not therefore about sanctioning the mere fact of collaborating, but about ensuring observance of the rules of truth and transparency by those who are vested with public trust...Lustration proceedings are ... a legal mechanism for examining the truthfulness of declarations about the existence

of certain connections and interactions of persons holding or applying to hold public positions demanding public trust, to which a special responsibility is attached (Constitutional Court's judgment of 21 October 1998, K 24/98)'...

Under the Lustration Act, public functions can be held by anybody, regardless of whether they served democratic or totalitarian Poland, provided that they have submitted a truthful lustration declaration. Recently there have been instances of appointments to prominent public functions of persons whose connection with the State security services had been admitted in the lustration declarations and had been known to the public."

30. The Warsaw Court of Appeal in a judgment of 16 January 2002, stated:

"Lustration proceedings belong to this group of repression-related proceedings (punitive and disciplinary), directly concerning the area of personal rights of citizens, to which stricter requirements but also stronger constitutional protection apply. There is therefore no justification for believing that in the lustration proceedings the general provisions of the Criminal Code concerning, *inter alia,* a mistake under Article 30 of the Code are not applicable. What is more, if it is to be accepted that the Lustration Act, since it belongs to the category of repression-related proceedings, is one such 'other law providing for criminal liability' (within the meaning of Article 116 of the Criminal Code) then, consequently, the rule under this provision should be applicable, which provides that the General Part of the Criminal Code – being of subsidiary character to other elements of the legal order – plays a particular role in the legal system. And in case of doubt as to whether a non-Code provision excludes application of the provisions of the General Part of the Criminal Code, it should be interpreted not to exclude its application (V AL 33/01; OSA 2002/9/74)."

The Warsaw Court of Appeal, in a judgment of 25 September 2003, stated:

"The Lustration Act, belonging to the category of repression-related proceedings, must be considered as an 'other law providing for criminal liability' within the meaning of Article 116 of the Criminal Code (VAL 42/01 OSA 2004/7/55)."

C. Relevant international instruments

31. 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."

COMPLAINT

32. The applicant complained that he had been deprived of a fair trial contrary to Article 6 of the Convention. In particular, he complained that he had been unable to defend himself adequately as he had been prevented from taking notes during the proceedings before the domestic courts and did not have proper access to the case-file.

THE LAW

33. The applicant alleged a violation of Article 6, which provides:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

> 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."

34. The Government disputed the admissibility of the case. They first contended that the application was incompatible *ratione materiae* with the provisions of the Convention. They maintained that Article 6 was not applicable to lustration proceedings as they did not relate to "the determination of civil rights and obligations" or of a "criminal charge". Secondly, they submitted that the applicant had failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention.

Lastly, the Government invited the Court to find that the application was in any event inadmissible as being manifestly ill-founded or, should the case be examined on the merits, that there had been no violation of Article 6 of the Convention.

35. The applicant asked the Court to dismiss the Government's pleas of inadmissibility.

A. General considerations

36. The Court observes that there is no uniform approach among High Contracting Parties as to the measures to dismantle the heritage of former communist totalitarian systems. In many post-communist countries restrictions have been imposed with a view to screening the employment of former security agents or active collaborators in the former regimes. In Lithuania persons who have been given the statutory status of "former KGB officers" have been precluded from employment in the public sector and from some private-sector jobs until 2009 (see *Rainys and Gasparavičius v. Lithuania*, nos. 70665/01 and 74345/01, § 36, 7 April 2005, and *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII). In Latvia the State Civil Service Act 2000 and the Police Act 1999 prohibit the employment of persons who worked for or with the Soviet security services (see *Rainys and Gasparavičius v. Lithuania*, cited above, § 30). In

Slovakia persons who collaborated with the Czechoslovak communist State Security Agency and were issued with a negative security clearance could be prohibited from exercising some public functions for a certain period of time (see *Turek v. Slovakia*, no. 57986/00, § 110, 14 February 2006).

37. The approach which prevailed in Poland and manifested itself in the Lustration Act did not impose a prohibition on taking up or holding public functions on the grounds of former collaboration with the communist-era secret services. The Act introduced an obligation to inform the public, in the form of a lustration declaration, of any collaboration with the secret services between 1944 and 1990. The Act further provides for a mechanism of checking whether the above-mentioned declarations are true. Among the most important reasons for such regulation the Constitutional Court pointed to transparency of public life and information about the past of those who carry out public functions (see paragraph 28 above).

38. The Act provides for sanctions if the lustration court finds that the submitted declaration was untrue. Having been considered a "lustration liar" entails dismissal from public functions exercised by him or her and prevents the person concerned from applying for the posts in question for a period of 10 years. The public functions, which the person who has lied in the lustration declaration cannot exercise, include legal professions such as those of barrister, judge, prosecutor and public servant and political ones such as those of Member of Parliament or President of the Republic of Poland.

B. Applicability of Article 6 of the Convention

39. As a preliminary issue, the Court has to determine whether Article 6 of the Convention is applicable to the proceedings in issue.

1. The parties' submissions

40. The applicant submitted that Article 6 of the Convention was applicable to lustration proceedings. He argued, firstly, that the lustration proceedings concerned his civil rights and obligations as they had had a direct impact on the enjoyment of his social and economic rights relating to performing public functions and holding public positions. The applicant claimed, secondly, that in spite of the fact that the proceedings were not criminal in nature, they were based on the provisions of the Code of Criminal Procedure and therefore the fair-trial guarantees enumerated in Article 6 of the Convention should be applicable to them.

41. The Government submitted that the proceedings instituted against the applicant involved the determination neither of "his civil rights and obligations" nor of "any criminal charge against him". The Government thus primarily argued that the proceedings in issue did not attract *ratione materiae* protection under Article 6 of the Convention. They stressed that

the aim of the lustration declaration was to inform the public about the past collaboration with the State's security services of persons occupying public positions or applying for them. A final judgment finding that the person in question had submitted an untrue declaration entailed the loss of the moral qualification necessary to exercise certain public functions, which in the applicant's case had resulted in his being stripped of his status as a Member of Parliament. In the Government's opinion, the Court's jurisprudence excluding the applicability of Article 6 of the Convention to disputes between the State and its officials should preclude this Article from being applicable to the instant case (they relied on the following cases: *Massa v. Italy*, judgment of 24 August 1993, Series A no. 265-B, p. 20, § 26, and *Pellegrin v. France* [GC], no. 28541/95, § 65, ECHR 1999-VIII).

2. The Court's assessment

42. It has to be determined whether the proceedings in issue in the instant case involved "the determination of … civil rights and obligations" or of a "criminal charge". The Court will first investigate whether the proceedings in issue can be considered as determining a "criminal charge" against the applicant.

(a) Principles deriving from the Court's case-law

43. The Court reiterates the autonomous notion of "criminal charge" under Article 6. The starting-point, for the assessment of the applicability of the criminal aspect of Article 6 of the Convention to the present proceedings, is the criteria outlined in *Engel and Others* (see *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, pp. 34-35, §§ 82-83, and *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80, p. 35, § 68).

44. Accordingly, in order to determine whether an offence qualifies as "criminal" for the purposes of the Convention the Court must have regard to three criteria, namely, the classification of the proceedings under national law, the essential nature of the offence and the nature and degree of severity of the penalty that the applicant risked incurring (see, among other authorities, *Phillips v. the United Kingdom*, no. 41087/98, § 31, ECHR 2001-VII, and *Garyfallou AEBE v. Greece,* judgment of 24 September 1997, *Reports of Judgments and Decisions* 1997-V, p. 1830, § 32).

45. The three criteria were reaffirmed in its *Öztürk* judgment in which the Court further reiterated that the Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention. If the Contracting States were

able at their discretion, by classifying an offence as "regulatory" instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, pp. 17-18, §§ 48-50; *mutatis mutandis*, *Engel and Others*, cited above, p. 33, § 80; and *Campbell and Fell v. the United Kingdom*, cited above, § 68).

46. As explained above, it must first be ascertained whether the provisions defining the offence in issue belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. However, the indication so afforded by the national law has only a formal and relative value; this factor serves only as a starting-point (see *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, § 31, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 91, ECHR 2003-X).

47. It is the Court's established jurisprudence that the second and third criteria laid down in *Engel* are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as "criminal" from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere (see *Öztürk v. Germany*, cited above, p. 21, § 54, and *Lutz v. Germany*, judgment of 25 August 1987, Series A no. 123, p. 23, § 55). This does not exclude that a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Bendenoun v. France*, judgment of 24 February 1994, Series A no. 284, p. 20, § 47; *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports* 1996-III, p. 756, § 56; *Garyfallou AEBE v. Greece,* cited above, p. 1830, § 33; and *Lauko v. Slovakia,* judgment of 2 September 1998, *Reports* 1998-VI, pp. 2504-05, § 57).

(b) Application of the above principles to the present case

(i) The Engel criteria

48. As regards the first of the Engel criteria – the classification of the proceedings under domestic law – the Court notes that the facts alleged against the applicant amounted to submission by him of an untrue lustration declaration in which he stated that he had not cooperated with the State's security services. This did not fall within the ambit of Polish criminal law but of the Lustration Act. It appears that neither the domestic law nor the established judicial interpretation consider the Lustration Act as criminal law; however, the Warsaw Court of Appeal assumed, at least on some

occasions, that it is a "repression-related proceedings" and must be considered as an "other law providing for criminal liability" (see paragraphs 25 and 30 above).

49. The Court observes that there exists a close connection between lustration proceedings and the criminal-law sphere. In particular, the Lustration Act provides that matters not regulated by it are subject to the relevant provisions of the Code of Criminal Procedure. Consequently, the Commissioner of Public Interest, who is empowered to initiate the lustration proceedings, has been vested with powers identical to those of the public prosecutor, which are set out in the rules of criminal procedure (section 17 (d) (2) of the Act). Similarly, the position of the person subject to lustration has been likened to that of an accused in criminal proceedings, in particular in so far as the procedural guarantees enjoyed by him or her are concerned, even though the Lustration Act does not refer to the person subject to lustration as an "accused", and does not use the term "charge" (see paragraphs 22 and 28 above). On the latter point the Court would refer back to its well-established case-law that "charge," for the purposes of Article 6, may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", although "it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect" (see *Öztürk v. Germany*, cited above, § 55).

50. The Court also notes that the organisation and the course of lustration proceedings, as governed by the Act, are based on the model of a Polish criminal trial and that the rules of the Code of Criminal Procedure are directly applicable to lustration proceedings. Lustration proceedings are conducted before a lustration court, which consists of appeal and regional court judges delegated from among judges sitting in the Criminal Divisions of those courts. The Act provides for an appeal against the first-instance judgment and a cassation appeal to the Criminal Division of the Supreme Court. The conduct of both the appellate and cassation phase, and the reopening of the proceedings, are governed by the relevant provisions of the Code of Criminal Procedure (sections 19 and 27 of the Act).

51. In sum, although under the domestic law the lustration proceedings are not qualified as "criminal", the Court considers that they possess features which have a strong criminal connotation.

52. The Court reiterates that the second criterion stated above – the very nature of the offence, considered also in relation to the nature of the corresponding penalty – represents a factor of appreciation of greater weight. In this regard the Court finds that the misconduct committed by the applicant consisted of his having lied in a declaration which he had a statutory obligation to submit. The Court first notes that an obligation to submit a declaration is rather a common one, embracing for example

declarations of means submitted by members of parliament and many other public officials and tax returns obligatory for all taxpayers. Secondly, a breach of the obligation to state the truth on such occasions is regarded as an offence under the domestic law and normally leads to sanctions, including those of a criminal nature. The Court considers that the offence of making an untrue statement in a lustration declaration is very similar to the above-mentioned offences. Moreover, according to the ordinary meaning of the terms, it is analogous to the offence of perjury, which, outside the lustration context, would normally have led to prosecution under the criminal-law provisions.

53. The Court also notes that the legal provision infringed by the applicant is not directed at a small group of individuals possessing a special status - in the manner, for example, of disciplinary law. It is directed at a vast group of citizens, born before May 1972, who not only hold many types of public functions, but also wish to exercise professions such as those of barrister, public servant, judge and prosecutor, or intend to stand for presidential or parliamentary election. In this context the Court finds it necessary to stress that the subject of proceedings before the lustration court is the establishment of the truthfulness of the lustration declaration. Contrary to its title, 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 is not about scrutinising the past of those persons, and the historical findings relating to past collaboration with the communist-era security services remain in the background of the proceedings. The lustration court decides whether the person subject to lustration violated the law by submitting a false declaration. If such a finding is made, the statutory sanctions are imposed. Thus, the lustration procedure in Poland is not aimed at punishing acts committed during the communist regime. This approach distinguishes the nature of lustration in Poland from the solutions adopted in other countries (for the nature of lustration in Lithuania, see *Sidabras and Džiautas v. Lithuania*, (dec), nos. 55480/00 and 59330/00, 1 July 2003). In the light of the above, the Court considers that the offence in question is not devoid of purely criminal characteristics.

54. As regards the nature and degree of severity of the penalty that the applicant suffered in the application of the Act, the Court first notes that the Act provides for an automatic and uniform sanction if the person subject to lustration has been considered by a final judgment to have lied in the lustration declaration. A final judgment to that effect entails the dismissal of the person subject to lustration from the public function exercised by him or her and prevents this person from applying for a large number of public posts for the period of 10 years. The Court observes that the moral qualifications, of which the person who has lied in the lustration declaration is automatically divested, are described broadly as: unblemished character,

immaculate reputation, irreproachable reputation, good civic reputation, or respectful of fundamental values. The obligation to demonstrate those qualifications is necessary in order to exercise many professions, such as those of prosecutor, judge and barrister. That list is not exhaustive however as the Act refers to other statutes that may, as a prerequisite for exercising a public function, require one of the above-mentioned moral qualifications.

55. It is true that neither imprisonment nor a fine can be imposed on someone who has been found to have submitted a false declaration. Nevertheless, the Court notes that the prohibition on practising certain professions (political or legal) for a long period of time may have a very serious impact on a person, depriving him or her of the possibility of continuing professional life. This may be well deserved, having regard to the historical context in Poland, but it does not alter the assessment of the seriousness of the imposed sanction. This sanction should thus be regarded as having at least partly punitive and deterrent character.

56. In the instant case the applicant, who is a politician, as a result of having been deemed a "lustration liar" by a final judgment, lost his seat in Parliament and cannot be a candidate for future elections for 10 years. In this connection the Court reiterates that the purpose of lustration proceedings is not to prevent former employees of the communist-era secret services from taking up employment in public institutions and other spheres of activity vital to the national security of the State, since admitting to such collaboration - the so-called "affirmative declaration" - does not entail any negative effects, but to punish those who have failed to comply with the obligation to disclose to the public their past collaboration with those services (see, *a contrario*, *Sidabras and Džiautas v. Lithuania*, cited above).

57. The Court considers that, given its nature and duration, the sanction provided by the Lustration Act must be considered as detrimental to and as having serious consequences for the applicant.

58. Having weighed up the various aspects of the case, the Court notes the predominance of those which have criminal connotations. In such circumstances the Court concludes that the nature of the offence, taken together with the nature and severity of the penalties, was such that the charges against the applicant constituted criminal charges within the meaning of Article 6 of the Convention.

(ii) Conclusion

59. Article 6 thus applies to the lustration proceedings under its "criminal" limb. It follows that the application cannot be rejected as being incompatible *ratione materiae* with the provisions of the Convention.

Having regard to the above finding, there is no need to examine whether the lustration proceedings involved a "determination" of "civil rights" (see, *Campbell and Fell v. the United Kingdom,* cited above, § 74).

C. Exhaustion of domestic remedies

1. The parties' submissions

60. The Government submitted that the applicant had failed to exhaust the domestic remedies available to him, as required under Article 35 § 1 of the Convention. The Government argued that the applicant had failed to exhaust the domestic remedies as he had not raised before the domestic courts, even in substance, the particular allegations regarding the unfairness of the lustration proceedings. In particular, neither at the appellate nor at the cassation stage had the applicant questioned the restrictions imposed on him concerning access to the case-files nor had he complained that he could not present his arguments in accordance with the principles of an adversarial hearing and equality of arms. The Government pointed out that Article 6 of the Convention could be directly relied on in the proceedings before the domestic courts.

61. Furthermore, the Government submitted that all the restrictions on the applicant's access to his court file had been imposed pursuant to the relevant provision of the Code of Criminal Procedure and had been necessary due to the danger of revealing state secrets. In spite of that, during this secret stage of the proceedings all the evidence had been disclosed to the applicant (see *Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, § 53, 22 July 2003). The Government further submitted that on 20 December 2000 the Head of the State Security Bureau had lifted the confidentiality clause with respect to all materials included in the applicant's file. The Government maintained that after that date the case had been completely reheard and the proceedings conducted publicly, and that the lustration court had sent the applicant the written reasons for its judgments. In sum, during this second stage of the proceedings the applicant had not suffered any hindrance as regards access to his case file.

62. The applicant submitted that there was no additional remedy by which he could have challenged the organisation of the secret registry of the lustration court and the procedural rules concerning organisation of the lustration proceedings. He maintained that by pursuing the appeal proceedings to the extent available, he had exhausted all effective domestic remedies that could be expected of him. The applicant referred finally to the Court's case law which requires Article 35 of the Convention to be applied with some degree of flexibility and without excessive formalism (see *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, § 72).

63. The applicant complained that he had not had unlimited access to his files. While acquainting himself with his file in the secret registry of the court, he had not been allowed to make any copies, take any notes from it or show the documents to an expert he trusted. During the hearings he had been prevented from using any notes based on the information gathered in

the secret registry and had only been able to rely on his memory. Consequently, and despite the fact that he had been represented by a lawyer, the applicant had been unable to defend himself properly. The applicant further argued that the lustration court had failed to examine the case diligently and that he had not been allowed to challenge the evidence adduced by the prosecutor or call independent experts. All this had placed him at a significant disadvantage *vis-à-vis* his opponent, the Commissioner of the Public Interest.

2. The Court's assessment

64. 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. That being so, these matters are more appropriately examined at the same time as the substance of the applicant's complaint under Article 6 of the Convention.

65. 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.

D. Compliance with Article 6

66. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Joins to the merits of the complaint under Article 6 of the Convention the question of exhaustion of domestic remedies;

Declares the application admissible, without prejudging the merits of the case.

T.L. EARLY
Registrar

Nicolas BRATZA
President