CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

CASE OF MATYJEK v. POLAND

(Application no. 38184/03)

JUDGMENT

STRASBOURG

24 April 2007

FINAL

24/09/2007

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

In the case of Matyjek v. Poland,

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

Sir Nicolas BRATZA, *President*,
Mr G. BONELLO,
Mr K. TRAJA,
Mr L. GARLICKI,
Ms L. MIJOVIĆ,
Mr J. ŠIKUTA,
Mrs P. HIRVELÄ, *judges*,
and Mr T.L. EARLY, *Section Registrar*,

Having deliberated in private on 30 May 2006 and 3 April 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 38184/03) 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 Tadeusz Matyjek ("the applicant"), on 15 October 2003.

2. The applicant was represented by Ms M. Gąsiorowska, a lawyer practising in Warsaw. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz 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. By a decision of 30 May 2006 the Court declared the application admissible.

5. The applicant and the Government each filed further written observations (Rule 59 § 1). In addition, third-party comments were received from the Helsinki Foundation for Human Rights (Warsaw, Poland), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The respondent Government replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1935 and lives in Warsaw, Poland.

7. 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.

8. 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.

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

10. On 17 December 1999 the Warsaw Court of Appeal, acting as the first-instance lustration court, found that the applicant had been a deliberate and secret collaborator with the Security Service (*Służba Bezpieczeństwa*, "the SB") and had therefore lied in his lustration declaration. The court relied, *inter alia*, on an expert opinion prepared by the Department of Criminology and Chemistry of the State Security Bureau (*Zakład Kryminalistyki i Chemii Urzedu Ochrony Państwa*) which had confirmed the authenticity of the applicant's signature on a document in his file. 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.

11. The applicant lodged an appeal. He argued that the SB must have registered him as a secret collaborator without his knowledge or consent. The applicant maintained that his contacts with the Civil Militia (*Milicja Obywatelska*) and an SB agent whom he had known personally had been purely private and had never taken the form of conscious collaboration. The applicant also requested to call more witnesses, in particular the friend on whom he had allegedly reported to the SB, and that an independent opinion

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

be ordered from an expert who did not belong to an agency of the State Security Bureau.

12. On 17 February 2000 the Warsaw Court of Appeal, acting as the second-instance lustration court, dismissed the applicant's appeal. The court established, inter alia, that it was impossible to hear the SB officer who had allegedly recruited the applicant as he had died. 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.

13. On 20 April 2000 the applicant lodged a cassation appeal (*kasacja*) with the Supreme Court (*Sąd Najwyższy)*.

14. On 10 October 2000 the Supreme Court quashed the Court of Appeal's judgment and remitted the case to the second-instance court. The Supreme Court found that the applicant's request to call two additional witnesses had been disregarded, which constituted a serious procedural shortcoming.

15. 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 the documents in the case file.

16. On 20 December 2000 the Head of the State Security Bureau lifted the confidentiality restrictions in respect of the applicant's personal record (*teczka osobowa*) that had been included in the case file.

17. On 19 January 2001 the Warsaw Court of Appeal held a hearing at which it examined the witnesses called by the applicant.

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

19. Subsequently, the court requested the State Security Bureau to submit additional documents to it. On 28 March 2001 the Bureau transmitted to the court personal information concerning some officers of the security services. On 30 May 2001 the court received from the State Security Bureau additional documents concerning the applicant, namely excerpts from the files of the former Civil Militia (*Milicja Obywatelska*).

20. On 1 June 2001 the court held a public hearing at which it heard the applicant. A subsequent hearing on 28 June 2001 was only partly public as the court decided to examine witnesses in camera on the ground that they would testify on matters involving State secrets. The court further ordered the preparation of an expert opinion by the Institute of Criminology of Warsaw University.

21. On 8 October 2001, on the Commissioner's request, the State Security Bureau submitted to the court more documents from the file of another secret collaborator, “R”, but which related to the applicant.

22. On 4 December 2001 another hearing was held, in camera. On the same day the Warsaw Court of Appeal gave judgment, finding that the applicant had lied in his lustration declaration.

23. The applicant appealed, reiterating *inter alia*, that as a member of the national sports team, he had automatically been employed at the Civil Militia, a fact which should have been taken into consideration by the trial court.

24. On 2 October 2002 the Warsaw Court of Appeal dismissed his appeal.

25. On 16 May 2003 the Supreme Court dismissed a cassation appeal lodged by the applicant.

26. According to the domestic law in force at the material time, the judgment of the Court of Appeal of 17 February 2000 was considered final. Therefore, on that date the applicant lost his mandate as a Member of Parliament. The applicant is prevented from being a candidate in elections and from holding other public functions for a period of 10 years.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Lustration Act

27. 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..."

28. 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. ..."

29. 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.

30. 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."

31. 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."

32. 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')."

33. 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."

34. 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

35. 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."

36. 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

37. 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..."

38. 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."

III. RELEVANT INTERNATIONAL INSTRUMENTS

39. 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

40. The Government alleged that the applicant had not exhausted 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 had been unable to submit his arguments in accordance with the principles of an adversarial hearing and equality of arms.

41. The applicant contested this view. He submitted that the rules governing access to the case file and the manner in which the lustration proceedings had been conducted could not have been effectively challenged in an appeal or cassation appeal as they were provided for by the domestic law. The applicant observed that the Government had not pointed to any particular additional domestic remedy that would have been effective in challenging the fairness of the proceedings.

42. In its decision on admissibility the Court considered that the question of whether the applicant could effectively challenge the legal rules governing access to the case file and setting out the features of lustration proceedings was linked to the Court's assessment of Poland's compliance with the requirements of a “fair trial” under Article 6 § 1 of the Convention and that it should therefore be joined to the examination of the merits of the case. The Court confirms its approach to this issue.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

43. The applicant alleged a violation of Article 6, which provides in so far as relevant:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ...by [a] ... tribunal...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

A. The applicant's submissions

44. The applicant challenged before the Court the very essence of the lustration proceedings, in particular their allegedly unequal and secret nature, the confidentiality of the documents and the unfair procedures governing access to the case file and the conduct of hearings.

45. The applicant argued that the lustration proceedings had been unfair, that the principle of equality of arms had not been respected, and that he had not been able to defend himself properly. Moreover, he had been placed at a significant disadvantage *vis-à-vis* the Commissioner of the Public Interest given that the State had access to all the archives and had at its disposal the technical and financial means to examine the necessary materials and to choose those that were to be included in the file. Most of the documents were considered secret and lifting the confidentiality of materials was in itself arbitrary. 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 Commissioner or call independent experts.

46. The applicant complained that, while acquainting himself with his file in the secret registry of the lustration court he had not been allowed to make any copies, to take the notes made in the registry away with him, to

show the notes to anyone or to use them at the hearings. This had not changed after December 2000, when the confidentiality of his personal file had been lifted, as other documents added to the file at a later stage had continued to be regarded as classified.

B. The Government's submissions

47. The Government submitted that the difficulties that the applicant might have encountered during the proceedings were a consequence of the fact that some documents concerning the case were considered as State secrets according to section 2 (2) of the 1982 Protection of State Secrets Act. Afterwards, the State's Security Bureau upheld the "secret" classification of those documents on the basis of section 86 (2) of the 1999 Protection of Classified Information Act taken together with section 21 of the appendix No. 1 (see paragraphs 37 – 38 of the domestic law above).

48. The Government argued that the principle of equality of arms had been respected in the instant case. They submitted that under section 52 (2) of the Protection of Classified Information Act and Article 156 § 4 of the Code of Criminal Procedure, the evidence concerning the case was 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.

49. The Government further submitted that on 20 December 2000 the Head of the State Security Bureau had lifted the confidentiality classification in respect of the materials in the applicant's file, namely his personal record. Nevertheless, after that date further documents had been added as they had been provided by the State Security Bureau on the order of the court. Those documents had been classified, placed in the secret registry and had been accessible to the parties in accordance with the above-mentioned rules.

50. Finally, the Government maintained that the lustration proceedings in the applicant's case had been conducted diligently. The court had examined evidence adduced by both parties, examined numerous witnesses and ordered opinions from two handwriting experts. At the end of the trial neither the applicant nor the Commissioner had lodged an application to adduce further evidence.

C. The third party's submissions

51. The third party maintained that the general purpose of the Lustration Act was to reveal the truth about the collaboration of certain categories of public officials with the State's security organs. Given the social importance of the lustration proceedings and severe consequences for an individual who had made an untrue declaration, the principles of the rule of law and procedural guarantees for the lustrated person must be scrupulously observed. In the light of the principles embodied in Article 6 of the Convention, which was obviously applicable to lustration proceedings, they should comply with the following standards: impartial and independent tribunal, reasonable time, presumption of innocence, giving the defendant the benefit of the doubt, public hearings, access to the files and possibility of making notes.

52. The third party stressed the crucial importance of the right of access to relevant files in lustration proceedings. If a party, to whom classified materials related, was denied access to all or most of the materials in question, his or her ability to contradict the security agency's version of the facts would be severely curtailed. Lack of access to the file and the impossibility of obtaining a copy of a document contained in it violated the right to prepare an adequate defence and the principle of equality of arms. Finally, the third party maintained that taking into account the importance of the right to a fair trial for a person accused of cooperation with the secret services, the right to a public hearing and access to the relevant files should be restricted only in exceptional cases.

D. The Court's assessment

1. Scope of the case before the Court

53. The scope of the case before the Court is to determine whether in the proceedings instituted against the applicant under the 1997 Lustration Act he had a "fair trial" within the meaning of Article 6 of the Convention. The Court recalls that in its admissibility decision of 30 May 2006 it established, in the light of the Engel criteria, that the applicant was facing a criminal charge. Accordingly, the procedural guarantees of Article 6 of the Convention under its criminal head applied to his lustration proceedings (see *Matyjek v. Poland* (dec.), no. 38184/03, ECHR 2006-...).

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

2. Compliance with Article 6 of the Convention

55. 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, *Jespers v. Belgium*, no. 8403/78, Commission decision of 15 October 1980, Decisions and Reports (DR) 27, p. 61; *Foucher v. France*, judgment of 18 March 1997, *Reports of Judgments and Decisions* 1997-II, § 34; and *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 380-81, § 47). 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).

56. 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.

57. 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 paragraph 47 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, which, with respect to some materials relating to the applicant's case, took place in December 2000. The Court observes 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).

58. 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 36, 38 and 48 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, the great majority of which 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.

59. 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). 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 a ban on being a Member of Parliament or holding public office for 10 years - 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).

60. 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 30 and 31 above).

61. Finally, the Court notes that as regards the judgments given on 17 December 1999 and 17 February 2000, 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. The Court observes that this first stage of the proceedings was crucial for the applicant as the judgment of 17 February 2000 was considered final under the domestic law. On that date the sanctions provided by the Lustration Act were imposed on the applicant, entailing, most notably, loss of his seat in Parliament.

Afterwards, in December 2000, the confidentiality of some documents was lifted. However, although the applicant's access to his personal record appeared to be without restrictions after that date, the limitations were still applicable to newly included documents (see paragraphs 19 and 21 above). The Government acknowledged that after this date some new documents had been added to the case file and deposited with the secret registry of the lustration court.

62. The Court recognises that at the end of the 1990s the State had an interest in carrying out lustration in respect of persons holding the most important public functions. However, it reiterates that if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures (see *Turek*, cited above, § 115). 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.

63. 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.

64. 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. The Court points out that the Lustration Act had on several occasions been unsuccessfully challenged before the Constitutional Court (see *Matyjek v. Poland* (dec.), cited above). The Government did not refer to any other domestic remedy that could have been successful in this case.

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.

65. 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. APPLICATION OF ARTICLE 41 OF THE CONVENTION

66. 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

67. The applicant claimed 58,000 euros (EUR) in respect of pecuniary damage. This sum covered loss of remuneration as a Member of Parliament for the period between the loss of his seat due to the final judgment given in the lustration proceedings and the end of the parliamentary term. The applicant also claimed EUR 60,000 in respect of non-pecuniary damage.

68. The Government contested the claim in respect of pecuniary damage and considered the claim in respect of non-pecuniary damage excessive. Alternatively, they invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

69. 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 Article 6 of fairness requirements (*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.

B. Costs and expenses

70. The applicant also claimed EUR 20,000 for the costs and expenses incurred before the domestic courts and before the Court.

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

72. 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 although the applicant's lawyer submitted her claim together with the written observations of 31 July 2006 she failed to differentiate between the amount sought in respect of the costs incurred in the domestic proceedings and those incurred before the Court. The claim was not accompanied by any documents, other than one invoice of 31 October 2005 in the amount of EUR 1,220 for lawyer's fees for the proceedings before the Court.

Regard thus being had to the information in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic

proceedings and considers it reasonable to award the sum of EUR 1,220 for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3;

3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for non-pecuniary damage;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,220 (one thousand two hundred and twenty euros) in respect of costs and expenses, plus any tax that may be chargeable, to be converted into Polish zlotys at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Registrar

Nicolas BRATZA
President