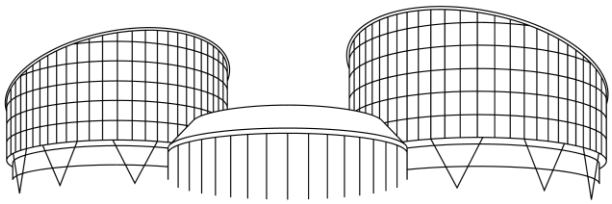

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF GÓRNY v. POLAND

(Application no. 50399/07)

JUDGMENT

STRASBOURG

8 June 2010

FINAL

08/09/2010

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

In the case of Górny v. Poland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 18 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 50399/07) 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 Kazimierz Górny ("the applicant"), on 8 November 2007.

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

3. The applicant alleged, in particular, that the lustration proceedings had been unfair, in breach of Article 6 of the Convention.

4. On 20 January 2009 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

6. On 11 April 1997 the parliament passed the Law on disclosing work for or service in the State's security services or collaboration with them between 1944 and 1990 by persons exercising public functions *(ustawa o ujawnieniu pracy lub służby w organach bezpieczeństwa państwa lub współpracy z nimi w latach 1944-1990 osób pełniących funkcje publiczne*;

"the 1997 Lustration Act"). It entered into force on 3 August 1997. Persons falling under the provisions of the 1997 Lustration Act, i.e. candidates or holders of public office such as ministers and members of parliament, were required to declare whether or not they had worked for or collaborated with the security services during the communist regime. The provisions of the Act extended to, *inter alia*, judges, prosecutors and advocates.

7. In December 1998 the applicant, who was an advocate, declared that he had not collaborated with the communist-era security services.

8. On 30 March 2004 the Commissioner of Public Interest (*Rzecznik Interesu Publicznego*) informed the applicant that he had doubts as to the truthfulness of his lustration declaration and invited him for an interview on 19 April 2004.

9. On 12 May 2004 the Commissioner dismissed the applicant's request for access to the case file.

10. On 8 December 2004 the Commissioner applied to the Warsaw Court of Appeal (*Sąd Apelacyjny*) to institute lustration proceedings against the applicant on the grounds that he had lied in his lustration declaration by denying that he had collaborated with the secret services.

11. On 20 December 2004 the Warsaw Court of Appeal decided to allow the Commissioner's request and instituted lustration proceedings against the applicant. The applicant was informed that he could consult the case file in the secret registry of the Court of Appeal.

12. On 9 March 2005 the Warsaw Court of Appeal, acting as the first-instance lustration court, found that between 1987 and 1989 the applicant had been an intentional and secret collaborator with the Security Service and had therefore submitted an untrue lustration declaration.

13. The applicant lodged an appeal in which he maintained, in particular, that the lustration proceedings had been in breach of the Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe. He also complained that the Commissioner had applied to the court to institute the lustration proceedings after the expiry of the time-limit of six months, calculated from the date he had notified the applicant about his doubts regarding the truthfulness of his declaration.

14. On 10 January 2006 the Warsaw Court of Appeal, acting as the second-instance lustration court, upheld the impugned judgment. In particular the court established that the time-limit had been of a non-binding nature and its expiry had not precluded the institution of the proceedings.

15. The applicant lodged a cassation appeal against the judgment. On 22 May 2007 the Supreme Court (*Sąd Najwyższy*) dismissed his cassation appeal.

16. The applicant was removed from the Bar Association with the result that he is unable to practise as an advocate for a period of ten years in application of the 1997 Lustration Act.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The relevant law and practice concerning lustration proceedings in Poland are set out in the Court's judgments in the case of *Matyjek v. Poland*, no. 38184/03, § 27-39, ECHR 2007-V.

THE LAW

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

18. The applicant complained about the unfairness of the lustration proceedings, the infringement of his right of defence and the lack of equality of arms. In particular, he alleged that the material in his case had been classified as confidential, which had limited his right of access to it. Before the institution of the proceedings he had had no access to the case file prepared by the Commissioner. After the lustration proceedings had been instituted by the Warsaw Court of Appeal the applicant could consult the documents only in the secret registry of the lustration court. The limitations on access were not applicable to the Commissioner of the Public Interest. Thus, the applicant was placed at a significant disadvantage vis-à-vis the Commissioner who had unlimited access to the file in his secret registry. The applicant invoked Article 6 of the Convention which, in so far as relevant, reads:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ...by [a] ... tribunal...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> ..."

A. Admissibility

19. The Government claimed that the applicant had not exhausted relevant domestic remedies. First, he had never raised before the domestic courts allegations regarding the unfairness of the proceedings as presented in his subsequent application to the Court. In particular, the applicant had not questioned the alleged restrictions on his access to the case file and on taking notes from it. Nor had he complained that he could not present his arguments in accordance with the principles of adversarial hearing and equality of arms. The Government submitted that Article 6 of the Convention was directly applicable under Polish law and the applicant could have relied on this provision before the domestic courts. However, in his appeals he had not put forward arguments related to the question of access to the case file.

20. It was hardly acceptable for the Government that the applicant would be exempted from the obligation to exhaust domestic remedies when other potential applicants in similar cases attempted to make use of them. They referred to the lustration case of a certain T.K. who had raised in his appeals the issue of the alleged hindrance in access to the case file. In that case the appellate lustration court and the Supreme Court had not upheld that argument. Subsequently, T.K. lodged a constitutional complaint in which he challenged, *inter alia*, certain provisions of the Protection of Classified Information Act. On 9 December 2008 the Constitutional Court discontinued the proceedings on formal grounds as the complaint had been filed outside the statutory three-month time-limit (no. SK 94/06). The Government argued that a constitutional complaint should be considered an adequate domestic remedy in the applicant's case.

21. The applicant disagreed. He referred to the Court's judgments in the cases of *Matyjek v. Poland* and *Bobek v. Poland* in which similar arguments had been rejected. As regards the constitutional complaint, the applicant contended that the Constitutional Court had no jurisdiction to review the manner in which the courts had applied statutory law to an individual case. The 1997 Lustration Act was unsuccessfully challenged before the Constitutional Court on numerous occasions. In his view, the Government did not demonstrate that he had had any domestic remedy whereby he could effectively challenge the legal framework governing the lustration proceedings. The applicant maintained that he had raised the issue of restricted access to the case file in his cassation appeal and other grievances before the Court of Appeal.

22. The Court recalls that it has already considered the question of whether the applicant could effectively challenge the set of legal rules governing access to the case file and setting out the features of the lustration proceedings. The Court notes that the arguments raised by the Government are similar to those already examined and rejected by the Court in previous cases against Poland (see, *Matyjek v. Poland*, no. 38184/03, § 64, ECHR 2007-V; *Luboch v. Poland*, no. 37469/05, §§ 69-72, 15 January 2008; *Rasmussen v. Poland*, no. 38886/05, §§ 52-55, 28 April 2009) and the Government have not submitted any new arguments which would lead the Court to depart from its previous findings. In so far as the Government argued, relying on the Constitutional Court's decision of 9 December 2008, that a constitutional complaint could be regarded as an adequate remedy, the Court notes that in the above decision the Constitutional Court discontinued the constitutional complaint proceedings on formal grounds and thus it is not persuaded by the Government's argument. For these reasons, the Government's plea of inadmissibility on the ground of non-exhaustion of domestic remedies must be dismissed.

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

24. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

25. The applicant argued that the proceedings in his case had been unfair. The Commissioner of Public Interest and the officials employed in his office had access to all the classified materials concerning him. The applicant and his lawyers, on the other hand, had restricted access to those materials. They were allowed to consult them only in the secret registry of the lustration court. The notes taken in the secret registry could not be removed and the applicant was not allowed to make copies of any classified documents with a view to conducting his defence.

2. The Government's submissions

26. The Government submitted that each case had to be assessed by the Court taking into account its special circumstances. In the present case, the applicant had never raised before the domestic authorities the issue of unfairness, allegedly caused by the confidentiality of the case file, limitations on his access to it and the restrictions on taking notes from it. Secondly, the applicant had access to all evidence and all decisions given in the case. The only limitations which applied to him with regard to taking notes were of a technical nature. The applicant could consult the case file in the secret registry but could not use his notes based on the file outside the secret registry. The same restrictions applied to the Commissioner of Public Interest and the judges examining the case.

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

28. The situation where the lustration court had to apply the rules concerning the use of classified documents had been assessed by the Supreme Court in the above-mentioned case of T.K. There, the Supreme Court in its judgment of 9 December 2004 stated that the application of those rules could somewhat hinder the preparation of an appeal by the lustrated person; however it rejected the view that the procedure followed could deprive or even restrict the rights of the defence. The Supreme Court further stressed that the application by the lustration court of a procedure provided for by the law could not be considered as infringement of the rights of the defence.

29. The Government observed that the applicant had benefited from an examination of his case at two instances by ordinary courts with full jurisdiction to assess the relevant facts and law. He further availed himself of an extraordinary appeal to the Supreme Court. For the Government there had been no appearance of a violation of the applicant's right to a fair trial in the impugned proceedings.

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

3. The Court's assessment

31. The Court recalls that the procedural guarantees of Article 6 of the Convention under its criminal head apply to lustration proceedings (see paragraph 26 above). It further observes that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial set forth in general in paragraph 1. For this reason it considers it appropriate to examine the applicant's complaint under the two provisions taken together (see, *Edwards v. the United Kingdom*, 16 December 1992, § 33, Series A no. 247-B).

32. 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, *Bulut v. Austria*, 22 February 1996, § 47, *Reports* 1996-II; *Foucher v. France*, 18 March 1997, § 34, *Reports* 1997-II). The Court 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*, 26 March 1996, *Reports* 1996-II, § 72; *Van Mechelen and Others v. the Netherlands*, 23 April 1997, Reports 1997-III, § 54).

33. The Court had already dealt with the issue of lustration proceedings in *Turek v. Slovakia* (no. 57986/00, § 115, ECHR 2006-... (extracts)) and in *Ādamsons v. Latvia* (no. 3669/03, § 116, 24 June 2008). In the *Turek* case the Court held in particular that, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency's version of the facts will be severely curtailed. Those considerations remain relevant to the instant case despite some differences with the lustration proceedings in Poland (see, *Matyjek*, § 56; *Luboch*, § 61; *Rasmussen*, § 43, all cited above).

34. Turning to the instant case, the Court observes firstly that the Government have admitted that part of the evidence had been secret. In the previous cases concerning lustration proceedings in Poland the Court observed that under the series of successive laws the communist-era security services' materials continued to be regarded as a State secret. The confidential status of such materials had been upheld by the State Security Bureau. Thus, at least part of the documents relating to the applicant's lustration case had been classified as "top secret". The Head of the State Security Bureau was empowered to lift the confidentiality rating. However, the Court recalls that it has considered the existence of a similar power of a State security agency inconsistent with the fairness of lustration proceedings, including with the principle of equality of arms (see, *Turek*, § 115; *Matyjek*, § 57; *Luboch*, § 62; *Rasmussen*, § 44, all cited above).

35. Secondly, the Court notes that, at the pre-trial stage, the Commissioner of Public Interest had a right of access, in the secret registry of his office or of the Institute of National Remembrance, to all materials relating to the lustrated person created by the former security services. After the institution of the lustration 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.

36. 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. 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.

37. The Court reiterates that the accused's effective participation in his criminal trial must equally include the right to compile notes in order to facilitate the conduct of his defence, irrespective of whether or not he is represented by counsel (see, *Pullicino v. Malta* (dec.), no 45441/99, 15 June 2000 and *Matyjek*, cited above, § 59). The fact that the applicant could not remove his own notes, taken in the secret registry, in order to show them to an expert or to use them for any other purpose, effectively prevented him from using the information contained in them as he had to rely solely on his memory. Regard being had to what was at stake for the applicant in the lustration proceedings – not only his good name but also his right to practise as an advocate – the Court considers that it was important for him to have unrestricted access to those files and unrestricted use of any

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

38. Thirdly, the Court is not persuaded by the Government's argument that at the trial stage the same limitations as regards access to confidential documents applied to the Commissioner of Public Interest. Under the domestic law, the Commissioner, who was a public body, had been vested with powers identical to those of a public prosecutor. Under section 17(e) of the 1997 Lustration Act, the Commissioner of Public Interest had a right of access to full documentation relating to the lustrated person created by, *inter alia*, the former security services. If necessary, he could hear witnesses and order expert opinions. The Commissioner also had at his disposal a secret registry with staff 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.

39. The Court has held that lustration measures are by their nature temporary and the necessity to continue such proceedings diminishes with time (see, *Ādamsons*, cited above, § 116). It has recognised that at the end of the 1990s the State had an interest in carrying out lustration in respect of persons holding the most important public functions. However, it reiterates that if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures (see, *Turek*, § 115 and *Matyjek*, § 62, both cited above).

40. The Court accepts that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. Nevertheless, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created. It is for the Government to prove the existence of such an interest in the particular case because what is accepted as an exception must not become a norm. The Court considers that a system under which the outcome of lustration trials depended to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remained classified as secret and the decision to maintain the confidentiality was left within the powers of the current secret services, created a situation in which the lustrated person's position was put at a clear disadvantage (see, *Matyjek*, § 62; *Luboch*, § 67; *Rasmussen*, § 50, all cited above).

41. In the light of the above, the Court considers that due to the confidentiality of the documents and the limitations on access to the case file by the lustrated person, as well as the privileged position of the Commissioner of the Public Interest in the lustration proceedings, the applicant's ability to prove that the contacts he had had with the communist-era secret services did not amount to "intentional and secret collaboration" within the meaning of the 1997 Lustration Act were severely curtailed. Regard being had to the particular context of the lustration proceedings, and to the cumulative application of those rules, the Court considers that they placed an unrealistic burden on the applicant in practice and did not respect the principle of equality of arms (see, *Matyjek*, cited above, § 63).

42. Having regard to the foregoing, the Court concludes that the lustration proceedings against the applicant, taken as a whole, cannot be considered as fair within the meaning of Article 6 § 1 of the Convention taken together with Article 6 § 3. There has accordingly been a breach of those provisions.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

43. The applicant alleged that the Commissioner of Public Interest had breached the domestic law as he had lodged an application for institution of the proceedings after the expiry of the six-month time-limit provided by the 1997 Lustration Act. The applicant also complained about the principles of lustration, claiming that the 1997 Lustration Act had been incompatible with the rule of law and breached Resolution 1096 (1996) of the Parliamentary Assembly of the Council of Europe. He maintained that lustration of persons exercising public functions after 31 December 1999 should have been forbidden.

44. The Court notes that the applicant's argument as to the alleged breach of the domestic law in the lustration proceeding was examined and dismissed by the domestic courts. It recalls that it is not the Court's function to act as a court of appeal and to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I, with further references). In so far as the applicant contests the principles of lustration process, the Court recalls that it has examined and declared inadmissible as manifestly ill-founded similar allegations raised in the case of *Chodynicki v. Poland* ((dec.), no. 17625/05, 2 September 2008).

45. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed 5,000 Polish zlotys (PLN) (approximately 1,200 euros (EUR)) in respect of pecuniary damage. This sum corresponded to the loss of his earnings related to the participation in the lustration hearings. He also claimed PLN 20,000 (approximately EUR 5,100) in respect of non-pecuniary damage.

48. The Government submitted that there was no causal link between the alleged violation and the claim for pecuniary damage. In respect of claim for non-pecuniary damage, they invited the Court to rule that the finding of a violation constituted in itself sufficient just satisfaction.

49. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore rejects this claim. The Court also considers that in the particular circumstances of the case the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage which may have been sustained by the applicant (see, *Matyjek*, § 69; *Luboch*, § 83, both cited above).

B. Costs and expenses

50. The applicant also claimed PLN 5,000 for travel expenses related to hearings which took place in Warsaw and PLN 1,585,76 (approximately EUR 400) for costs of the lustration proceedings.

51. The Government requested the Court to make an award, if any, only in so far as the costs and expenses were actually and necessarily incurred and were reasonable as to quantum.

52. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The Court notes that the applicant produced copies of documents related to the costs which he was ordered to pay by the Court of Appeal (PLN 1,585,76). On the other hand, he did not submit any documents to substantiate his claim for travel expenses. Consequently, regard being had to the information in its possessions and the above criteria, the Court considers it reasonable to award the sum of EUR 400 for costs and expenses in the domestic proceedings.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 6 of the Convention regarding the unfairness of the proceedings admissible and the remainder of the application inadmissible;

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

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

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 400 (four hundred 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 8 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President