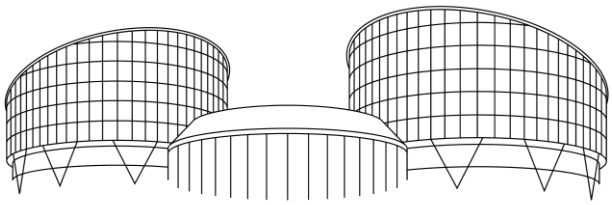

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF WELKE AND BIAŁEK v. POLAND

(Application no. 15924/05)

JUDGMENT

STRASBOURG

1 March 2011

FINAL

15/09/2011

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

In the case of Welke and Białek v. Poland**,**

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

Nicolas Bratza, *President,*
Lech Garlicki,
Ljiljana Mijović,
Sverre Erik Jebens,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 8 February 2011,

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

PROCEDURE

1. The case originated in an application (no. 15924/05) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Polish nationals, Ms Dorota Welke ("the first applicant") and Mr Paweł Białek ("the second applicant"), on 21 April 2005.

2. The applicants, who had been granted legal aid, were represented by Ms A. Massalska, a lawyer practising in Kielce. The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that their right to a fair trial had been violated.

4. On 6 December 2007 the President of the Fourth Section decided to give notice of the application to the Government. The Government were requested to produce copies of the bill of indictment and the judgments delivered in the case together with their written reasons.

5. On 21 April 2008 the Government provided the Court with the operative parts of the judgments given in the case and of the bill of indictment. It informed the Court that it could not submit copies of the written reasons for those decisions as that information was classified. On 14 October 2009 the President of the Section again requested the Government to produce the relevant documents under Rule 54 § 2(a) of the Rules of Court. On 15 December 2009 the Government submitted the requested documents, informing the Court that they had been declassified in October 2009 following the expiry of the statutory protection period applicable to the materials classified as confidential.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1974 and 1977 respectively and live in Kielce.

7. The first applicant (Ms D. Welke), had a school friend, Ms M.B., who was resident in the Netherlands.

8. In January 2003 the Central Investigation Bureau ("CIB"; *Centralne Biuro Śledcze*) of the Police was informed by the German authorities about a parcel containing cocaine, which had been dispatched in Brazil and addressed to Ms E.B. in Kielce, Poland. On 3 February 2003 the Chief Police Commissioner (*Komendant Główny Policji*) authorised the covert surveillance of the parcel on the basis of section 19b § 1 of the Police Act. On 4 February 2003 the parcel was intercepted by officers of the CIB. They opened the parcel and found that it contained, in particular, fourteen plastic bags containing a white powder substance hidden by twos in seven cases. The police experts tested the substance and established that it was cocaine. The officers replaced the drugs with a similar-looking substance.

9. On 5 February 2003 the Chief Police Commissioner ordered the covert operation (*kontrola operacyjna w postaci podsłuchu pomieszczeń*). It appears that the police placed a secret recording device in the parcel.

10. On 6 February 2003 the parcel was delivered to Ms E.B. She was a friend of Ms M.B.'s late mother. On the same day Ms E.B. informed the first applicant that she had received a parcel from Brazil addressed to M.B. The first applicant telephoned her friend who confirmed that she was expecting a parcel and asked the first applicant if she could keep it for her. The first applicant agreed.

11. On the same day the first applicant went to collect the parcel. She and Ms E.B. partly opened it and found tee-shirts and cardboard cases containing chain necklaces. They did not find anything else in the parcel.

12. Subsequently Ms Welke took the parcel home, where she met her boyfriend Mr Białek (the second applicant). The applicants opened the parcel and examined its contents. Later on, they both left the flat to call Ms M.B. from a phone box. The first applicant put all contents of the parcel in a plastic bag together with parts of the original parcel indicating the addresses of the sender and the recipient. Then the first applicant hid the plastic bag in her room.

13. On 6 February 2003 at around 8 p.m. the police arrested the applicants as they were leaving the flat. The officers then searched the flat. The first applicant, at the request of the officers, surrendered the plastic bag with all its contents. Examination of the contents revealed that in each of the seven cases containing chain necklaces were hidden two transparent plastic

bags containing a white powder substance. The applicants were charged with drug-trafficking offences.

14. On 8 February 2003 the Kielce Regional Prosecutor from the Organised Crime Department opened a criminal investigation into the alleged transfer of cocaine from Brazil to Poland. He relied on classified material provided by the Chief Police Commissioner and the information gathered by the CIB officers.

15. On 8 February 2003 the Kielce District Court remanded the applicants in custody on reasonable suspicion that they had committed the drug-trafficking offences. It had regard to the evidence obtained so far in the case, in particular the witnesses' statements, the classified evidence, the expert reports and the results of the search. The court noted that the applicants' statements contradicted the other evidence in the case. On 23 June 2003 the Kielce Regional Court decided to end the applicants' detention and to release them on bail. The bail was paid on the following day and the applicants were released. The court imposed non-custodial preventive measures on them.

16. A significant part of the evidence gathered in the case was classified as confidential (*poufne*). On 9 April 2003 both applicants consulted the classified evidence and other evidence. They did not lodge any motions in respect of the evidence and did not make any comments on the investigation.

17. On 18 April 2003 the prosecution filed a bill of indictment against the applicants with the Kielce Regional Court. They were charged with trafficking in 971 grams of cocaine. The prosecutor established the facts of the case on the basis of classified evidence, expert reports in chemistry and dactyloscopy, the results of the search of the flat and statements made by Ms E.B. and her friend Ms I.B., and partly on the basis of statements made by the applicants.

18. Part of the case file and the written reasons for the bill were classified as it contained information covered by professional secrecy (*tajemnica służbowa*). The prosecutor asked the court for the defendants and their counsel to be allowed to consult the reasons for the bill of indictment, in accordance with the rules laid down in the Protection of Classified Information Act. Furthermore, invoking Article 360 § 1 (3) of the Code of Criminal Procedure ("CCP"), the prosecutor requested that the entire hearing be conducted *in camera* on account of the important State interests involved.

19. The first applicant had two defence lawyers and the second applicant had one. On 12 and 26 May 2003 respectively the applicants and their counsel consulted the bill of indictment in the secret registry of the Kielce Regional Court.

20. On 27 May 2003 the President of the 3rd Criminal Division of the Regional Court authorised the applicants, their counsel and the prosecutor to

consult the record of the opening of the parcel, the transcript of the secret recordings and photographic evidence. On 28 May 2003 counsel for the first and second applicants consulted those materials in the secret registry. They were informed that they would be criminally liable in the event of their failure to respect the confidentiality of the information.

21. The first hearing was set for 27 May 2003. At that hearing the court allowed the prosecutor's request to conduct the trial *in camera*, having regard to the important State interests involved as provided for in Article 360 § 1 (3) of the CCP. The applicants' counsel did not object to the prosecutor's request. The court directed the persons present in the courtroom (the applicants, their counsel and three police officers) that they were under an obligation to keep confidential all information disclosed during the hearing. The applicants and their counsel could consult the case file in the secret registry of the court.

22. The Kielce Regional Court held six hearings on the following dates: 27 May, 12 and 23 June, 22 July, 10 September and 8 October 2003. The Regional Court's bench was composed of one professional judge and two lay judges.

23. At the first hearing, held on 27 May 2003, the applicants pleaded not guilty. They refused to testify, but answered some questions from the court and their counsel. The trial court heard as witnesses Ms E.B., Ms I.B. and two other persons, friends of the applicants, who had been arrested with them.

24. On 11 June 2003 the trial court received a copy of the decision of the Warsaw Regional Court of 12 February 2003 authorising the Chief Police Commissioner of 5 February 2003 to order the secret recordings.

25. On 12 June 2003 the court provided the applicants with the transcript of secret recordings, on which they refused to comment. At the hearing held on 22 July 2003 the trial court heard the secret recordings made by the CIB. According to the applicants, the recordings were of very poor quality. The conversation between the first applicant and Ms E.B. was completely incomprehensible, and only vague extracts of the conversation between the applicants could be heard, interrupted by noises and rattling.

26. At the hearings held on 10 September and 8 October 2003 the court heard CIB officers involved in the investigation, including those who had opened the parcel on 4 February 2003. The court authorised them to testify in respect of the facts covered by the duty of professional secrecy.

27. At the hearing held on 10 September 2003 the first applicant requested the trial court to reverse its earlier decision to conduct the proceedings *in camera*. She submitted that as a consequence of that decision her defence rights had been limited because she had not been allowed to make notes from the file. Her counsel did not take a stand on the request, stating that it was the first applicant's personal view. The prosecutor objected to the request, claiming that the grounds for the decision to exclude

the public remained relevant. He also argued that the first applicant's defence rights were duly respected as she could personally consult the classified part of the case file. The Regional Court dismissed the request to reverse the earlier decision to conduct the proceedings *in camera* as the grounds originally invoked for that decision remained fully valid.

28. On 15 October 2003 the Kielce Regional Court gave judgment. It found the applicants guilty of having participated in the transit of cocaine through Poland in concert with other persons, and sentenced them to one year and six months' imprisonment and a fine of PLN 1,500. It further ordered them to make a payment of 500 PLN to a local association fighting drug addiction and to reimburse the State's costs incurred in the proceedings. The written reasons for the judgment were classified as confidential and deposited in the secret registry of the court. The applicants' counsel were informed accordingly and notified of their right to consult the written reasons. They filed an appeal without consulting the written reasons for the judgment.

29. When establishing the facts, the Regional Court excluded the evidence obtained by means of the secret recordings ordered by the Chief Police Commissioner on 5 February 2003. The Regional Court observed that the Police Commissioner's order had not been endorsed by a court within five days as required by section 19 § 3 of the Police Act. Accordingly, the evidence obtained on the basis of that order was unlawful and could not be used in the criminal proceedings against the applicants. On the other hand, the Regional Court confirmed that the secret surveillance of the parcel and the replacement of the cocaine with an unspecified powder substance had been effected in accordance with the Police Act and the relevant Ordinance of the Minister of the Interior.

30. On the basis of the available evidence, in particular, various statements made by the applicants during the investigation and during the trial, the Regional Court found that at the time when the parcel had been at their disposal the applicants had known that it contained drugs. The court found that the applicants had acted intentionally with a view to transferring the drugs through Poland to the Netherlands. Thus, their guilt had been sufficiently established.

31. In their appeal, the applicants alleged breaches of several provisions of criminal procedure committed by the prosecution and the court, arbitrary assessment of evidence and disregard for the *in dubio pro reo* principle. They argued that the excluded evidence should have been omitted as the "fruit of the poisonous tree", whereas the court had actually based the conviction on that evidence. Further, they submitted that the applicants' right to defend themselves had been impaired because access to the classified evidence had been very difficult, and neither the applicants nor their lawyers had been allowed to make copies or notes of the written reasons for the judgment.

32. On 5 February 2004 the Kraków Court of Appeal held a hearing at which the prosecutor requested the court to conduct the proceedings *in camera*. The applicants' counsel left the issue to the court's discretion. The Court of Appeal decided pursuant to Article 360 § 1 (3) of the CCP to allow the prosecutor's request since the examination of the appeal would not be possible without consideration of the classified evidence. The Court of Appeal further decided to supplement the evidentiary material. It noted that the trial court had not determined the exact circumstances of the removal of the cocaine from the parcel and its replacement by a similar substance and decided, to this end, to hear four police officers who had been involved in the covert interception of the parcel.

33. On 10 March 2004 the Kraków Court of Appeal held a hearing *in camera*. It heard evidence from three police officers and established that the cocaine had been removed from the parcel and replaced with a similar substance by the police.

34. The prosecutor requested the Court of Appeal to hear the secret recordings and argued that the Regional Court had erred in excluding that evidence. The Court of Appeal rejected that request, noting that it could not examine the relevant decision of the Regional Court since the first-instance judgment had not been appealed against by the prosecutor (*reformatio in peius*).

35. On the same date, after deliberations, the Court of Appeal amended the judgment of the Regional Court by changing the legal classification of the offence to one of "attempted" transit of drugs (*usiłowanie nieudolne*) as the police had secretly removed the drug from the parcel and replaced it with a similar substance. It accordingly reduced the applicants' sentence to one year's imprisonment. The judge rapporteur presented orally the main reasons for the judgment. The written reasons for the judgment were classified as confidential and could only be consulted in the secret registry of the court.

36. The Court of Appeal confirmed that the applicants had taken part in the transit of cocaine through Poland. The first applicant had collected the parcel from the addressee and kept it in order to hand it over to a person indicated by Ms M.B.. She had also informed Ms M.B. of the collection of the parcel. The second applicant had assisted the first applicant in the process.

37. The Court of Appeal held, *inter alia*, as follows:

> "The applicants' counsel are wrong to plead that the accused had no intention to take part in the transit of the drugs through Poland. This was sufficiently established by the [admitted] evidence, and in particular by the statements of the accused themselves. (...)
>
> The applicants' counsel are wrong to claim that the accused's right to defend themselves was restricted on account of the fact that part of the evidence was classified, or that the judgment was the result of the fact that the judges had retained

in their mind the content of excluded evidence. Both those situations are a simple consequence of the application of the relevant regulations, namely the regulation regarding classified information and the [regulation on] judicial review of the legality of evidence. ...

3. The assertion that there was no equality of arms because part of the evidence was classified is incorrect. Such evidence was not withheld from the counsel, as they were able to consult it in the same manner as the prosecutor, and the restrictions on disclosure of classified material were equally applicable to both parties.

4. (...) The consultation of classified evidence meant accepting certain conditions, including the prohibition on taking notes on the contents of such evidence; nonetheless those restrictions were not of such a nature that they could be considered to limit the rights of the defence. Counsel could memorise the content of the evidence they consulted, then use it, while respecting the requirements of confidentiality, either when pleading at the closed hearings or with due diligence in their written submissions. (...) Those were then not limitations on the rights of the defence, but rather certain impediments in conducting the defence, in any case impediments of a minor degree. In the Court of Appeal's view, those limitations were necessary since part of the evidence was classified. If they [those limitations] were not applied, the interests protected by the regulation on classified information would be affected. [Those limitations] are present in every case concerning classified information, and thus alleging shortcomings in this respect does not concern just this particular case but relates generally to the principle of the determination of criminal charges based on evidence covered by the regulation on classified information. That would then be a claim of unconstitutionality in respect of the determination of such cases due to the limitation by that regulation of the constitutionally protected rights of the defence (Article 42 § 2 of the Constitution), which is far-reaching, unjustified and – for the Court of Appeal – unconvincing. If those arguments (or rather groundless assertions) of the author of such allegations were to be shared, then the determination of cases involving classified material would be ruled out. (...)."

38. The Court of Appeal rejected the applicants' claim that the trial court had based the conviction on the excluded evidence. In this respect it noted, *inter alia*:

"The allegation that the Regional Court's ruling was influenced by the content of the excluded evidence, i.e. the evidence obtained secretly by the police and the explanations of the accused related to that evidence, is incorrect. Firstly, it is not uncommon in criminal proceedings that some evidence is removed from the scope of evidentiary material constituting the basis for a ruling. (...) Ensuring that judges did not know the evidence that was excluded would mean extinguishing those procedural acts in which such evidence was examined, removing the records of such information from the files and restarting every trial before a different panel of the court. That would not be reasonable and it is not provided for by law. (...) In other words, the Court of Appeal examines whether the evidence the Regional Court took as the basis for its ruling was sufficient for it to give the ruling or whether there was insufficient evidentiary basis for it. The Court of Appeal considers that there was sufficient evidence to give the judgment, and thus the judgment [of the Regional Court] has adequate evidentiary basis (with one reservation in respect of the presence of the drug in the parcel). The allegation that the judges [of the Regional Court] were influenced by the content of excluded evidence had no significance for the content of the judgment."

39. The applicants lodged cassation appeals. The second applicant's lawyer submitted, *inter alia*, that the Court of Appeal had not referred to the arguments raised in the appeals, that in its assessment of evidence the court had infringed the principles of impartiality, presumption of innocence and *in dubio pro reo*. They repeated their arguments, submitted to the Court of Appeal, that the unlawfully obtained evidence, although eventually excluded by the first-instance court, had been presented during the trial as admissible evidence, which must have unfairly prejudiced the outcome of the proceedings. The defence also argued that since the evidence obtained by means of the secret recordings had been excluded at first instance, there had been no reason to hold the appeal proceedings in private.

40. On 20 October 2004 the Supreme Court, sitting *in camera* in a single judge formation, dismissed the applicants' cassation appeals, finding both of them manifestly ill-founded.

II. RELEVANT DOMESTIC LAW

A. Hearing in camera

41. Article 360 § 1 of the Code of Criminal Procedure sets out an exception to the principle that court hearings should be held in public. Article 360 § 1 (3) of the Code provides for the court to order that all or part of the hearing be held *in camera* if a public hearing might disclose matters which should remain secret in the light of the State interests at stake.

Article 361 § 1 of the CCP stipulates that when a hearing is held *in camera* an accused may request that a person of trust of his choice be present at the hearing. That rule does not apply to cases where there is a risk of disclosure of a State secret (Article 361 § 2).

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

> "If the case has been heard *in camera* because of important State interests, instead of written reasons, notice will be served to the effect that the reasons have been prepared."

B. Protection of classified information

42. The 1999 Protection of Classified Information Act (*ustawa o ochronie informacji niejawnych*) establishes a comprehensive set of rules concerning, *inter alia*, definitions and categories of classified information, the authorities responsible for protecting classified information and the rules on access to it. Section 23 § 1 of the Act provides for two categories of classified information – state secret (*tajemnica państwowa*) and professional

secret (*tajemnica służbowa*). The latter information may be rated as confidential (*poufne*) or restricted (*zastrzeżone*).

43. The Ordinance of the Minister of Justice of 18 June 2003 on the handling of transcripts of questioning and other documents or items covered by state secrecy, professional secrecy or secrecy related to the exercise of a profession or function (*Rozporządzenie Ministra Sprawiedliwości z dnia 18 czerwca 2003 r. w sprawie sposobu postępowania z protokołami przesłuchań i innymi dokumentami lub przedmiotami, na które rozciąga się obowiązek zachowania tajemnicy państwowej, służbowej albo związanej z wykonywaniem zawodu lub funkcji*) entered into force on 1 July 2003[1].

The Ordinance provides that in accordance with the 1999 Protection of Classified Information Act the president of a court or the head of the relevant prosecutor's office may classify a case file or particular parts of it as "top secret" (*ściśle tajne*), "secret" (*tajne*), "confidential" or "restricted" if it includes information classified as state secrets, professional secrets or secrets related to the exercise of a profession or function (§§ 7-8).

The case file, other documents or items classified as "top secret", "secret" or "confidential" are deposited in the secret registry (*kancelaria tajna*) of a court or prosecutor's office (§ 9.1).

The Ordinance provides that classified files, documents or items shall be made available to parties, counsel and representatives only at the order of a court (the president of a court) or the head of the relevant prosecutor's office (§ 10.1).

§ 10.3 of the Ordinance prohibits the making of copies of and taking of notes from classified files and documents.

A person authorised to consult the classified documents is notified of the obligation to respect secrecy and the prohibition on making copies and notes, and swears in writing to keep the information received confidential (§ 12).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION ON ACCOUNT OF THE UNFAIRNESS OF THE PROCEEDINGS

44. The applicants complained under Article 6 § 1 of the Convention that their right to a fair trial had been violated. They alleged that they had been convicted on the basis of unlawfully obtained evidence, notwithstanding its exclusion by the trial court. They also alleged that the

1. This Ordinance replaced the Ordinance of the Minister of Justice of 1 December 1998 r. on depositing transcripts of questioning related to information covered by state secrecy, professional secrecy or secrecy related to the exercise of a profession or function.

rights of the defence had been significantly impaired because they had had only restricted access to the case file and the written reasons for the judgments and could not take any notes of the contents of the case file. Article 6, in so far as relevant, provides:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights: ...
>
> (c) to defend himself in person or through legal assistance of his own choosing..."

A. Admissibility

45. The Government claimed that the applicants had not exhausted all remedies provided for by Polish law with reference to the complaint concerning restrictions on their access to the case file, as they had failed to lodge a constitutional complaint. Had they considered that the regulation on access to classified material was contrary to their right to a fair trial, they should have challenged the constitutionality of the relevant provisions of the Protection of Classified Information Act and of the relevant Ordinance of the Minister of Justice of 18 June 2003.

46. The applicants disagreed. Polish law did not provide for the filing of a constitutional complaint concerning wrongful application of the law or the lack of legal regulation, and the applicants' complaint concerned the application of the law by the courts in their particular case and not the content of the relevant provisions. They did not object to the rules established by the Protection of Classified Information Act, but they disagreed with the decision to conduct the entire proceedings, at all instances, *in camera*.

47. The Court notes that the Government's plea of inadmissibility concerns one aspect of the applicants' complaints under Article 6 § 1. It considers that the issue of restrictions on access to the case file is linked to the Court's assessment of compliance with the requirements of a "fair trial" under Article 6 § 1 of the Convention. 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.

48. The Court notes that this part of the application 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 applicants' submissions

49. The applicants argued that the trial court had heard the evidence obtained by means of secret recordings despite the fact that it had been obtained in breach of the Police Act. They admitted that the trial court had later decided to exclude this evidence and that the recordings had not proved that the applicants had committed the alleged offence and that they had been of poor quality. Nevertheless, they argued that the trial court judges had listened to the recordings and that when giving judgment they had been influenced by them. The applicants referred to the Constitutional Court's judgment of 12 December 2004 (case no. K 32/04) in which that court emphasised that the use of evidence obtained by the police as a result of their secret surveillance measures was allowed only when the police had strictly conformed to the relevant procedures laid down in the Police Act.

50. The applicants further submitted that the evidence in the case had been insufficient to secure their conviction even for attempted transit of drugs. There was no evidence to indicate that the first applicant had taken part in such an act or that there had been any cooperation between the persons who had collected the parcel. The role of the second applicant had been of even lesser importance.

2. The Government's submissions

51. The Government submitted that the evidence obtained by means of secret recordings on the basis of the decision of the Chief Police Commissioner of 5 February 2003 had been excluded by the trial court for failure to obtain the relevant court authorisation within the statutory time-limit. The trial court held that that evidence should be completely excluded and could not be relied on in the court proceedings. The applicants' conviction had been based on the assessment of all the factual and legal circumstances of the case and the overall body of evidence admitted in the whole proceedings.

52. As regards the restrictions on access to the case file and the taking of notes from it, the Government stressed that they had not caused any unfairness of the proceedings. In the present case the file contained mostly classified material. In consequence, the trial court had to apply the relevant provisions of the Protection of Classified Information Act and the Ordinance of the Minister of Justice of 18 June 2003.

53. The Government underlined that the applicants and their counsel had had access to all evidence and all decisions given in the case. The only limitations applied to them, as well as to the prosecutor, in this respect had been of a technical nature, namely that the consultation of the classified documents in the case file (the reasons for the bill of indictment, the written

reasons for the judgments and the records of the hearings) had to take place in the secret registry of the court.

54. The Government claimed that the applicants had been allowed to make notes from the case file but could not remove them outside the secret registry. In their opinion the present case should be distinguished from the case of *Matyjek v. Poland* since all the parties to the proceedings had been subjected to the same restrictions as regards access to classified documents. They emphasised that the same restrictions on access to classified documents were applied in all ordinary criminal proceedings where such documents were relied on. The restrictions on access in the instant case had been aimed at protecting vital State interests in the area of the operational procedures of the police. It had thus been of the utmost importance to ensure the secrecy of the classified information in the proceedings against the applicants.

55. The Government, referring to the Court's case-law, argued that protecting the public interest could justify withholding evidence from the defence when such evidence concerned sensitive information deserving special protection. It should not be the Court's task to examine the reasons for classifying certain documents as confidential. Certain limitations in respect of the equality of arms were compatible with the requirements of a fair trial if they were justified by the need to protect the public interest or the fundamental rights of other participants in the proceedings.

3. The Court's assessment

56. The applicants alleged that they had been convicted on the basis of unlawfully obtained evidence, namely the evidence obtained by means of secret recordings, notwithstanding its exclusion by the trial court. They further claimed that the rights of the defence had been unduly curtailed as a result of the restrictions on access to the case file.

57. The Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function 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. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see, *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140; *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports* 1998-IV; and *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-96, ECHR 2006-IX).

58. It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which

the evidence was obtained, were fair (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Bykov v. Russia* [GC], no. 4378/02, § 89, ECHR 2009-...; and *Gäfgen v. Germany* [GC], no. 22978/05, § 163, ECHR 2010-...).

59. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicants were given an opportunity to challenge the authenticity of the evidence and to oppose its use (see, *Gäfgen*, cited above, § 164).

60. As the requirements of Article 6 § 3 concerning the rights of the defence are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1, the Court will examine the complaints under those two provisions taken together (compare, among other authorities, *Windisch v. Austria*, 27 September 1990, § 23, Series A no. 186; *Edwards v. the United Kingdom*, 16 December 1992, § 33, Series A no. 247-B; *Funke v. France*, 25 February 1993, § 44, Series A no. 256-A; and *Matyjek v. Poland*, no. 38184/03, § 54, ECHR 2007-V).

61. The Court notes that in the instant case the applicants alleged that the trial court had relied on the information obtained by means of covert recordings ordered by the Chief Police Commissioner on 5 February 2003, notwithstanding its decision to exclude that evidence. On the basis of the available material it is not possible for the Court to establish what technical means were used by the police to obtain the recordings in issue. The Government submitted in their observations that the secret recordings in question were of the applicants' phone calls, while the applicants mentioned a recording device installed in the parcel. Be that as it may, the Court observes that the impugned evidence was excluded by the trial court on the ground that the recordings had not been authorised by a court within the time-limit prescribed by the Police Act (see paragraph 29 above).

62. The Court observes that the applicants' misgivings about the fact that the trial court actually heard this evidence and excluded it only towards the end of the trial were convincingly rejected by the Court of Appeal. That court found that there was no merit in the allegation that the trial court judges had been influenced by the excluded evidence (see paragraph 38 above). Accordingly, that evidence did not form any part of the evidence on which the applicants' conviction and sentence was based. Moreover, the applicants themselves admitted that the secret recordings had not been incriminating (see paragraph 49 above). For those reasons the Court finds that the procedure followed by the trial court did not in any way affect the fairness of the proceedings.

Furthermore, even assuming that the excluded evidence might have had a prejudicial impact on the safety of the applicants' conviction, the Court observes that any irregularity was remedied by the Court of Appeal. That

court found the applicants' conviction safe and, moreover, reclassified the offence to their favour. At no stage did the Court of Appeal advert to the excluded evidence in reaching its judgment. What is more, the Court of Appeal stated that it was formally barred from re-examining the trial court's decision to exclude the evidence at issue and did not hear it (see paragraph 34 above). Having regard to the above, the Court is fully satisfied that the applicants were not deprived of a fair trial in relation to the alleged use in evidence of the disputed secret recordings.

63. In respect of the alleged limitations of the rights of the defence, the Court observes that the restrictions on access to the case file were related to the fact that a significant part of the evidence was classified. The Court does not find that the authorities' decision to maintain the confidentiality of the evidence obtained by means of secret police methods of investigation may be considered arbitrary or otherwise unjustified in the present case. Here, in contrast to Polish lustration proceedings which concerned materials classified as confidential under the former regime (see, *Matyjek*, cited above, § 56), there exists for the Court an actual public interest in maintaining the confidentiality of the evidence obtained by secret police methods of investigation related to the prosecution of drug-related offences.

64. It is also important to note in this connection that, as underlined by the Court of Appeal, no evidence was withheld from the defence (contrast, *Edwards and Lewis v. the United Kingdom*, nos. 39647/98 and 40461/98, §§ 52-54, 22 July 2003). The Court recalls that Article 6 § 1 requires that prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see, *Jasper v. the United Kingdom* [GC], no. 27052/95, § 51, 16 February 2000, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 206, ECHR 2009-...). The applicants and their defence counsel had access to all the evidence in the case and had every opportunity to oppose its use. The Court is satisfied that the defence were kept informed and permitted to make submissions in respect of any material forming part of the prosecution's case.

65. The Court finds that the obligation to consult the case file exclusively in the secret registry and the related restrictions did constitute a limitation on the exercise of the rights of the defence. However, it takes the view that in the circumstances of the case the measures applied can be considered permissible under Article 6 § 1 as strictly necessary restrictions of the rights of the defence. The issue of the alleged breach of the rights of the defence on account of the restricted access to the case file, including the prohibition on taking notes on the contents of classified evidence, was put before the Court of Appeal, which examined it and found that the restrictions did not affect the rights of the defence to any significant degree (see paragraph 37 above). Moreover, the Court attaches significant weight to the fact, as confirmed by the Court of Appeal, that both parties to the proceedings – the prosecution and the defence – were subjected to the same

restrictions as regards access to the case file, including the lack of possibility of taking notes from the case file (contrast the privileged position of the Commissioner of the Public Interest in the lustration proceedings, *Matyjek*, cited above, § 63).

The Court would stress however that its decision on this matter is confined to the specific circumstances of the applicants' case. To deny an accused or his lawyer the opportunity to compile notes and to rely on them in the course of argument may give rise to unfairness (see, for example, *Pullicino v. Malta* (dec.), no. 45441/99, 15 June 2000), and, depending on the circumstances, it may not be an answer to a complaint of such that both parties laboured under the same handicap or that the applicant or his lawyer could rely on their memories to compensate for their inability to take and rely on notes.

In this context the requirement of fairness would be duly satisfied if a defendant's lawyer were allowed to take notes in the secret registry and then use them in the course of a hearing, even if he subsequently had to return them to the secret registry. The Court cannot but note in this connection that the Court of Appeal in its judgment indicated the possibility of putting before the Constitutional Court the issue of the alleged limitations on the rights of the defence flowing from the use of classified information in the case and the resultant restrictions on access to the file. The applicants did not pursue that possibility.

66. Having regard to its conclusion that the fairness of the proceedings has not been infringed in the present case, the Court finds that it is not necessary to rule on the Government's objection of non-exhaustion in respect of the applicants' complaint concerning limitations on their access to the case file.

67. The Court concludes that the applicants' trial as a whole must be considered to have been fair. Accordingly, there has been no violation of Article 6 §§ 1 and 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE RIGHT TO A PUBLIC HEARING

68. The applicants complained under Article 6 § 1 of the Convention about the exclusion of the public from the proceedings, which they alleged had not been "strictly necessary". They claimed that the secret character of the hearing had been upheld throughout the whole proceedings although all the classified evidence had been obtained unlawfully and excluded for that reason by the trial court. Article 6 § 1 provides, in so far as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing by [a] tribunal ... 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."

A. The Government's submissions

69. The Government submitted that in accordance with Article 360 § 1 (3) of the CCP a court could order that part or all of a hearing be held *in camera* if a public hearing might disclose matters which should remain secret in the light of significant State interest. In the present case that interest concerned the secrecy of police investigation procedures. In the Government's view, it remained within the State's margin of appreciation to order part or all of the hearing to be held *in camera* or to classify the evidence. The Government underlined that the exclusion of the public from the hearing had been indispensable in order to protect the secrecy of police investigation procedures and ensure their efficacy. The exclusion in the present case had been "strictly necessary" within the meaning of Article 6 § 1 of the Convention.

70. Furthermore, the Government argued that under Article 361 § 1 of the CCP each applicant had the right to choose two trusted persons to be present at a hearing held *in camera*. However, neither of them had made such a request despite the fact that they had been represented by defence counsel of their choice. The Government submitted that the materials in the case file had been classified as confidential (*poufne*) or restricted (*zastrzeżone*) and that in accordance with section 23 § 2 of the Protection of Classified Information Act they had therefore contained professional secrets (*tajemnica służbowa*). Consequently, if a request under Article 361 § 1 had been made in the applicants' case it would have been impossible under Article 361 § 2 for the domestic court to lawfully dismiss it as State secrets (*tajemnica państwowa*) had not been at stake in the proceedings.

B. The applicants' submissions

71. The applicants argued that the rules on exclusion of the public from a hearing should be construed narrowly and that such exclusion should occur only when it was strictly necessary in the circumstances of a case. They maintained that in their case the exclusion of the public from the entire trial and the appeal proceedings had been unjustified and that the courts should have opted for partial exclusion. The trial had been held entirely *in camera*, even though some evidence heard by the Regional Court was not classified. The Court of Appeal had not held a public hearing either, despite the fact that the classified evidence had been excluded.

72. The applicants maintained that the arbitrary exclusion of the public had significantly hindered the exercise of their defence rights. They had had

access to the case file and the written grounds for the judgments only in the secret registry of the court. They had not been allowed to take notes from the case file and use them outside the secret registry.

C. The Court's assessment

73. The Court recalls that it is a fundamental principle enshrined in Article 6 § 1 that court hearings should be held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the principles of any democratic society (see, amongst many other authorities, *Stefanelli v. San-Marino*, no. 35396/97, § 19, ECHR 2000-II, and *Olujić v. Croatia*, no. 22330/05, § 70, 5 February 2009).

74. Article 6 § 1 does not, however, prohibit courts from deciding, in the light of the special features of the case submitted to them, to derogate from this principle: in accordance with the actual wording of this provision, "... 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"; holding proceedings, whether wholly or partly, *in camera*, must be strictly required by the circumstances of the case (see, *Diennet v. France*, 26 September 1995, § 34, Series A no. 325-A, and *Martinie v. France* [GC], no. 58675/00, § 40, ECHR 2006-...).

75. The Court's task is to establish whether the exclusion of the public from the hearing was justified. In the present case the trial court, at the request of the prosecutor, decided to hold the entire hearing *in camera* on the basis of Article 360 § 1 (3) of the CCP, considering that a public hearing might disclose matters which should remain confidential in the light of the State interests at stake. The Court observes that the counsel for the first applicant did not object to the prosecutor's request and the counsel for the second applicant left it to the court's decision. The trial court did not specify what particular circumstances justified its decision. However, the Court accepts that the decision at issue – as submitted by the Government – was based on the need to keep secret certain police methods of investigation. The Court of Appeal also decided to hold the hearing *in camera* and stated clearly that the reasons for doing so were related to the examination of classified evidence. In the Court's view, the domestic courts had reason to consider that "publicity would prejudice the interests of justice" within the meaning of Article 6 § 1 of the Convention, having regard to the covert

police operations carried out in the case, and the need to examine the resultant classified evidence and to hear police officers involved in the covert operations.

76. Next, the Court has to examine whether the exclusion of the public was "strictly necessary" in the circumstances of the case. In this connection, it notes that it appears that, at all but the first hearing, the trial court examined classified evidence related to the secret recordings and the interception of the parcel, or heard police officers who had been involved in the covert interception of the parcel, the examination of its content and the search of the first applicant's flat. In respect of the secret recordings, the Court notes that the trial court heard that evidence and subsequently, after the close of the trial, decided to exclude it. The applicants argued that since all classified evidence was excluded there was no reason to hold the hearing *in camera*. However, the Court does not subscribe to this argument. It notes that after the close of the trial, the Regional Court decided to exclude as unlawful part of the classified evidence obtained by means of secret recordings. But that evidence was not the only classified evidence heard by the trial court, which also examined evidence related to the covert interception and surveillance of the parcel and heard police officers involved in the covert interception. The Court of Appeal excluded the public from the hearing precisely in order to examine the circumstances related to the covert interception of the parcel and the replacement of the cocaine.

77. The Court has considered that the mere presence of classified information in the case file does not automatically imply a need to close a trial to the public, without balancing openness with other public interest considerations (see, *Belashev v. Russia*, no. 28617/03, § 83, 4 December 2008). However, in the instant case the Court finds that the exclusion of the public was necessary, having regard to the classified character of the evidence and the State's legitimate interest in prosecuting drug-related offences. The exclusion of the public was further warranted by the need to keep secret police methods of investigation that had been used in the applicants' case and to take evidence from police officers who had carried out the covert operations. Moreover, the exclusion of the public needs to be seen in the context of the fact that no evidence was withheld from the defence and the Court's finding that the fairness of the proceedings had not been infringed. The Court also notes that the applicants' counsel did not object to the decision to hold the hearing *in camera*. This must be seen as a weighty consideration (see, *Boyle and Ford v. the United Kingdom* (dec.), nos. 29949/07 and 33213/07, 22 June 2010, § 49). Having regard to the above, the Court considers that the exclusion of the public in the present case can be considered to have been strictly necessary.

78. Furthermore, the Court observes that, in accordance with Article 361 § 1 of the CCP, in the case of a hearing held *in camera*, a defendant has the right to indicate a person of trust to attend the hearing. It

appears that the applicants, who were represented by counsel, did not make use of that possibility. The Court notes the Government's submission that if the applicants had made such a request the domestic court would have had no basis to reject it.

79. Having regard to the foregoing, the Court considers that the particular circumstances of the present case justified dispensing with a public hearing. Consequently, the complaint concerning the alleged breach of the right to a public hearing is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS PUBLIC PRONOUNCEMENT

80. The applicants alleged a breach of Article 6 § 1 of the Convention in that the judgments of the trial court and of the Court of Appeal had not been pronounced publicly.

A. The parties' submissions

81. The Government submitted that in the present case the judgments of the first and second instance courts had been pronounced publicly. Article 364 § 1 of the CCP provided that judgments were pronounced in open court, while § 2 of the same provision stipulated that if all or part of the trial were held *in camera*, the pronouncement of the reasons for the judgment could also be made *in camera*. The written reasons for the judgments in the present case were classified as confidential and could have been consulted in the secret registry of the court.

82. The applicants admitted that the operative part of the judgments had been pronounced publicly in accordance with Article 364 § 1 of the CCP. However, they maintained that under Article 364 § 2 of the CCP the courts could have pronounced the reasons for their judgment orally in open court, but wrongly decided not to do so.

B. The Court's assessment

83. The Court has applied the requirement of the public pronouncement of judgments with some degree of flexibility. Thus, it has held that despite the wording which would seem to suggest that reading out in open court is required, other means of rendering a judgment public may be compatible with Article 6 § 1. As a general rule, the form of publicity to be given to the judgment under domestic law must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1. In making this assessment, account must be taken of the entirety of the proceedings (see, *Pretto and Others v. Italy*,

8 December 1983, § 25-27, Series A no. 71; *Axen v. Germany*, 8 December 1983, § 30-32, Series A no. 72; and *B. and P. v. the United Kingdom*, nos. 36337/97 and 35974/97, § 45, ECHR 2001-III).

84. In the present case, the Court has found that the trial court and the Court of Appeal were justified in dispensing with a public hearing. It notes that in such a situation and in accordance with Article 364 § 2 of the CCP, the oral pronouncement of the reasons for their judgment could also be made *in camera*. The Court observes that the applicants admitted that the operative parts of the trial and appeal courts' judgments were pronounced publicly. The operative part of the trial court's judgment included, among other things, information about the applicants, the charges against them and their legal classification, the findings as to their guilt and sentence and the order for costs. Having regard to the specific features of the criminal proceedings in question and the reasons which underlay the courts' decisions to conduct the proceedings *in camera*, the Court finds that limiting the public pronouncement to the operative parts of the judgments cannot not be considered to have contravened Article 6 § 1 of the Convention (compare and contrast, *Raza v. Bulgaria*, no. 31465/08, § 53, 11 February 2010).

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

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

86. The applicants complained under Article 13 of the Convention that the domestic law had not provided an effective remedy against a court order to exclude the public from all or part of the hearing. Article 13 provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

87. The Government argued that the lack of a possibility to lodge a separate interlocutory appeal (*zażalenie*) against a court order (*postanowienie*) on the exclusion of the public was not in breach of Article 13. They were of the view that an order to exclude the public was simply of a procedural and incidental nature. The exclusion of the public merely meant the exclusion of the audience except for any persons indicated by the parties as their persons of trust, in accordance with Article 362 §§ 1 and 3 of the CCP. Furthermore, an order which was not subject to an interlocutory appeal could have been challenged by the applicants when challenging the judgment in their case by means of appeal or cassation

appeal. Moreover, the applicants could at any time have challenged the decision to exclude the public and the court would have had to examine those requests.

88. The applicants submitted that under domestic law the exclusion of the public from the hearing was effected by means of an order and that no interlocutory appeal lay against such an order. The decision was also arbitrary as the court was not required to provide reasons for it. The applicants argued that if the court decided to hold the entire hearing *in camera*, when the public should have been excluded only from part of the hearing, there was no possibility to appeal against the court's decision. Moreover, the second-instance court, when examining an appeal, would not consider such an order to constitute a breach of procedural provisions which could affect the outcome of the case.

B. The Court's assessment

89. The Court recalls that Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52).

90. The Court has found above that the applicants' complaint under Article 6 § 1 concerning the alleged breach of their right to a public hearing is manifestly ill-founded. For those reasons, the applicants did not have an "arguable claim" for the purposes of Article 13 of the Convention (see, *Younger v. the United Kingdom* (dec.), no. 57420/00, ECHR 2003-I, and *Vrábel v. Slovakia* (dec.), no. 77928/01, 19 January 2010).

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

FOR THESE REASONS, THE COURT

1. *Joins* unanimously to the merits the Government's preliminary objection on the ground of non-exhaustion and *declares* the complaint under Article 6 §§ 1 and 3 of the Convention regarding the unfairness of the proceedings admissible;

2. *Declares* unanimously the complaint under Article 6 § 1 of the Convention concerning the alleged infringement of the right to a public hearing inadmissible;

3. *Declares* by a majority the complaint under Article 6 § 1 of the Convention regarding public pronouncement of the judgments in the applicants' case inadmissible;

4. *Declares* unanimously the complaint under Article 13 of the Convention inadmissible;

5. *Holds* unanimously that there has been no violation of Article 6 §§ 1 and 3 of the Convention and *decides* that it is not necessary to answer the Government's above-mentioned preliminary objection.

Done in English, and notified in writing on 1 March 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Nicolas Bratza President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Bratza is annexed to this judgment.

N.B.
T.L.E.

CONCURRING OPINION OF JUDGE BRATZA

I have voted with the majority of the Chamber on all of the Convention issues raised by the case, but with serious hesitations on the question of the restrictions on the applicants' access to the case-file.

It is undisputed that part of the case-file and the written reasons for the bill of indictment were classified as containing information covered by professional secrecy. The President of the 3rd Criminal Division of the Regional Court authorised the applicants, their counsel and the prosecution to consult the record of the opening of the parcel, the transcript of the secret recordings and the photographic evidence but this had to be done in the secret registry in which the classified material was held. Moreover, the parties were informed that they would be criminally liable in the event of their failure to respect the confidentiality of the information.

What is less clear from the written pleadings of the parties is the extent to which, if at all, the applicants and their counsel were authorised to make notes of the contents of the files in the secret registry. In the observations of the Government it is suggested that, in accordance with Article 156 § 4 of the Code of Criminal Procedure, the applicants were allowed to take notes from the case-file but that they were not permitted to remove those notes from the secret registry of the Court. However, this is difficult to reconcile with the terms of paragraph 10.3 of the Ordinance of the Ministry of Justice of 18 June 2003, set out in paragraph 43 of the judgment, which explicitly prohibits the making of copies of, and the taking of notes from, classified files and documents. It would also appear to be inconsistent with the judgment of the Court of Appeal in the present case, in which it was noted that the consultation of classified evidence meant "accepting certain conditions, including the prohibition on taking notes on the contents of such evidence". As to the provisions of the Criminal Code referred to by the Government, I have doubts as to its application in a case such as the present, where the case-file is classified as containing information covered by professional secrecy and thus subject to the special provisions in the Ordinance of the Ministry of Justice.

I have great difficulty in seeing a justification for a system which, in addition to enabling hearings in criminal proceedings to be held *in camera* and requiring the participants, under the threat of penal sanctions, to keep classified information confidential, imposes additional restrictions on defendants and their counsel by obliging them to consult classified files in a secret registry and precluding them from copying or making any notes on their contents for use in defending the proceedings. The Court has, on previous occasions, emphasised that an accused's effective participation in a 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, for example, *Pullicino v. Malta* (dec.), no.

45441/99, 15 June 2000; *Matyjek v. Poland*, no. 38184/03, § 59, ECHR 2007/05).

The restrictions imposed on the present applicants were more substantial than those considered by the Court to be objectionable in the *Matyjek* case, in which the applicant had been authorised to make notes when consulting his case-file, although such notes could be made only in special notebooks that were sealed and could not be removed from the secret registry. It is pointed out by the Government that, in contrast to the *Matyjek* case, in which the Commissioner of the Public Interest was found by the Court to have had privileged access to confidential documents in the lustration proceedings, the prosecution and defence in the present case were subject to the same restrictions as regards access to the case-file, including the lack of possibility of taking notes on its contents. Even accepting this to be the case, it is, in my view, no answer to the principal complaint of the applicants, which is not that the restrictions upset the equality of arms between the parties but that they were an impediment to the effective conduct of the defence in their criminal trial. As the Court observed, in the different context of lustration proceedings in the *Matyjek* case, when regard is had to what is at stake for defendants in a criminal trial, it is in principle important for the defendant to have unrestricted access to the files and unrestricted use of any notes which they made, including the possibility of obtaining copies of relevant documents.

The Court of Appeal in the present case accepted that the restrictions amounted to "impediments in conducting the defence" but held that they were not to be seen as limitations on the rights of the defence: it was said that counsel could memorise the content of the evidence which they had consulted and use that evidence, while respecting the requirement of confidentiality, either when pleading at the closed hearings or with due diligence in their written submissions.

I am wholly unpersuaded that reliance by counsel on his or her memory of the contents of a file which had previously been read in a secret registry could in general be regarded as an effective substitute for direct access during the trial to the file itself or to notes taken from it; nor can I accept that to require counsel to argue the case on the sole basis of his or her recollection of the contents of the file would not in general be seen as a serious limitation on the rights of the defence.

What, in the end, has persuaded me that there was here no violation of Article 6 is the fact that it has not been convincingly shown that the rights of the defence were in practice prejudiced by the restrictions imposed in the particular circumstances of the present case. In this regard, I place emphasis not merely on the finding of the Court of Appeal, which was able to examine the case as a whole, that the impediments on the conduct of the defence were of a minor degree but on the fact that none of the applicants' counsel appear at any stage to have claimed that they had experienced

particular difficulty in presenting their defence as a result of having to rely on their memory of the contents of the classified files, which they had examined on 28 May 2003. Indeed, when on 10 September 2003 the first applicant requested the trial court to reverse its earlier decision to conduct the proceedings *in camera* and complained that her defence rights had been limited because she had not been allowed to make notes from the classified file, her counsel did not take a stand on the request, stating that it was the first applicant's personal view on the matter.

However, as is correctly stressed in the judgment, this conclusion is confined to the specific circumstance of the applicants' case. The restrictions currently imposed under domestic law may well in a different case, where the classified case-file is more substantial, lead the Court to a different conclusion. The concerns to which this case gives rise are such that in my view the current system of classification of documents, and the measures restricting effective access to classified material by defendants and their counsel in a criminal trial, should be urgently reviewed to ensure their full compliance with the requirements of a fair trial in Article 6 of the Convention.