



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

FIFTH SECTION

CASE OF DEMJANJUK v. GERMANY

(Application no. 24247/15)

JUDGMENT

STRASBOURG

24 January 2019

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

In the case of Demjanjuk v. Germany,

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

Yonko Grozev, *President*,

Angelika Nußberger,

André Potocki,

Carlo Ranzoni,

Mārtiņš Mits,

Lətif Hüseynov,

Lado Chanturia, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 18 December 2018,

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

PROCEDURE

1. The case originated in an application (no. 24247/15) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two American nationals, Ms Vera Demjanjuk and Mr John Demjanjuk (“the applicants”), on 13 May 2015.

2. The applicants were represented by Mr U. Busch, a lawyer practising in Ratingen. The German Government (“the Government”) were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicants alleged, in particular, that the decision of the Munich Regional Court II of 5 April 2012 not to reimburse the necessary expenses (*notwendige Auslagen*) of the late accused John Demjanjuk in connection with the discontinuation of the criminal proceedings against him by reason of his death violated the presumption of innocence guaranteed by Article 6 § 2 of the Convention. They also alleged a violation of their right of access to a court under Article 6 § 1 of the Convention as a result of the Munich Court of Appeal’s decision of 4 October 2012 to dismiss their appeals against the decision of 5 April 2012 as inadmissible due to a lack of standing.

4. On 20 September 2016 the complaints concerning the right of access to a court and the refusal to reimburse the accused’s necessary expenses in connection with the discontinuation of the criminal proceedings were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant is the widow and the second applicant is the son of the late John Demjanjuk. They were born in 1925 and 1965, respectively, and live in Ohio, the United States of America.

6. On 12 May 2011 the Munich Regional Court II, after 91 days of trial, convicted John Demjanjuk on 16 counts as an accessory to the murder of at least 28,060 persons. It found it established that he had, in his capacity as a guard in the Sobibór extermination camp, aided and abetted the systematic murder of persons who had been deported to the said camp in 16 convoys between 27 March 1943 and September 1943. It sentenced him to a total of five years' imprisonment for these crimes. The judgment ran to 220 pages plus appendices.

7. Both the accused and the public prosecutor filed appeals on points of law against that judgment. Defence counsel submitted a brief containing the grounds for the appeal on points of law in November 2011 and subsequently submitted four additional briefs, the last of which was received by the Regional Court on 12 January 2012. On 24 February 2012, the public prosecutor's office instructed that the file, along with the submissions by the public prosecutor's office in response to the defence counsel's submissions, be transferred to the Federal Court of Justice, which was competent to examine the appeal on points of law.

8. John Demjanjuk died on 17 March 2012. At that time, the Federal Court of Justice had not yet received the case file.

9. By decision of 5 April 2012 the Munich Regional Court II discontinued the proceedings in accordance with Article 206a § 1 of the Code of Criminal Procedure due to the death of the accused (see paragraph 14 below). In that same decision, relying on Article 467 § 3, second sentence, number 2 of the Code (see paragraph 15 below), it ruled that the accused's necessary expenses were not to be borne by the treasury. The Regional Court reasoned as follows:

“... The accused had been convicted on 16 counts as an accessory to murder after 91 days of trial with a comprehensive taking of evidence. The conviction was based on a thorough examination of the evidence as to the facts and an assessment of all relevant legal aspects. Even though the conviction could not become final in the absence of a decision on the appeal on points of law, Article 467 § 1 of the Code of Criminal Procedure did not apply.

The procedural impediment occurred after the judgment convicting the applicant had been handed down. The duration of the trial, which had lasted for almost one and a half years, was attributable, to a significant degree, to the time-consuming strategy pursued by the defence. The defence had made excessive use of their right to make statements under Article 257 § 2 of the Code, often repeating arguments already made several times, and had filed around 500 applications for the taking of evidence, a large

number of which had been directed at evidence that had either already been taken or that was impossible to obtain, such as the examination of deceased persons. Likewise, the defence had filed more than twenty complaints alleging bias with regard to each of the professional judges sitting on the case, again often repeating arguments and considerations that had already been ruled on. It would have been possible to conclude the trial within a few months, while fully respecting defence rights, if the defence had exercised its procedural rights in a targeted, structured and technical manner.

It would thus have been possible to conclude the proceedings, with a final verdict, during the lifetime of the accused. Against this backdrop, it is not equitable, even in the absence of a conclusive finding of guilt, in the context of the discretionary decision to be made, to order that the accused's necessary expenses be reimbursed by the treasury. ...”

10. Counsel for the late accused filed an immediate appeal against the Regional Court's decision of 5 April 2012. He submitted, *inter alia*, that the decision not to reimburse the accused's necessary expenses, and its reasoning, breached the presumption of innocence guaranteed by Article 6 § 2 of the Convention. On 17 April 2012 counsel submitted powers of attorney from the applicants in the present case.

11. On 4 October 2012 the Munich Court of Appeal dismissed the immediate appeal as inadmissible due to a lack of standing. The procedural status as an accused in criminal proceedings was personal in nature and could not be transferred, including by way of inheritance. In respect of the late accused, it had ceased because of his death. The Court of Appeal went on to state that the immediate appeal was, in addition, ill-founded. Article 6 § 2 of the Convention had not been breached. Having regard to the Court's judgment in the case of *Nölkenbockhoff v. Germany*, 25 August 1987, Series A no. 123, it considered that the decision not to reimburse the late accused's necessary expenses did not breach that provision, as it did not contain a finding of guilt, which the decision itself explicitly stated. It was permissible, in view of the establishment of the late accused's guilt by the trial court, to find that there continued to be, at the time the proceedings were discontinued, a state of suspicion against the late accused, and to apply Article 467 § 3, second sentence, number 2, of the Code of Criminal Procedure on that basis.

12. On 12 October 2012 counsel filed a complaint to be heard, which the Court of Appeal dismissed as ill-founded on 15 November 2012.

13. On 18 December 2014 the Federal Constitutional Court declined to consider the applicants' constitutional complaint (no. 2 BvR 2397/12), without providing reasons.

II. RELEVANT DOMESTIC LAW AND PRACTICE

14. In German criminal procedural law the death of the accused is qualified as an impediment to the proceedings. Where an accused dies during appeal proceedings, the criminal proceedings have to be discontinued

by decision in accordance with Article 206a of the Code of Criminal Procedure, with a ruling on costs and expenses (see Federal Court of Justice, no. 4 StR 595/97, decision of 8 June 1999). As a general rule, an immediate appeal lies against a decision to discontinue the criminal proceedings under that provision.

15. Article 467 § 1 of the Code provides that the costs of the proceedings and the defendant's necessary expenses are, as a rule, borne by the treasury, *inter alia*, if the proceedings against the accused are discontinued. However, the competent court may decline to charge the accused's necessary expenses to the treasury where he was not convicted for a criminal offence only because there was an impediment to the proceedings (Article 467 § 3, second sentence, number 2 of the Code). There has to be at least a significant state of suspicion (see Federal Court of Justice, no. 3 StE 7/94 – 1 (2) StB 1/99, decision of 5 November 1999). The competent court is required to exercise discretion (*muss das ihm eingeräumte Ermessen pflichtgemäß ausüben*) and there have to be additional factors, besides the impediment, which render the refusal to reimburse the accused's necessary expenses equitable, such as that the impediment arose only after the trial had been opened (see Federal Constitutional Court, no. 2 BvR 388/13, decision of 29 October 2015, with further references).

16. Once the court competent to examine an appeal on points of law has become seized of the case – that is, once it has duly received the case file (see Federal Court of Justice, no. 5 ARs 30/92, decision of 2 June 1992) –, that appeal's prospects of success, or lack thereof, are a relevant aspect to be considered by that court when determining whether or not it would be equitable that the accused's necessary expenses be borne by the treasury (see Federal Court of Justice, no. 1 StR 358/09, decision of 15 September 2009).

17. Where the accused's necessary expenses are not reimbursed in the event of the discontinuation of the criminal proceedings, it must become sufficiently clear that this does not occur out of the intention to establish or allocate guilt, but out of the intention to describe and assess a state of suspicion (see Federal Constitutional Court, no. 2 BvR 1542/90, decision of 16 December 1991). This distinction must be expressed in the decision's wording in a sufficiently clear manner, regard being had to the context of the reasoning as a whole (*ibid.*).

THE LAW

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

18. The applicants complained of a violation of their right of access to a court under Article 6 § 1 of the Convention as a result of the Munich Court of Appeal's decision of 4 October 2012 to dismiss their appeal against the decision of the Munich Regional Court II of 5 April 2012 as inadmissible due to a lack of standing. They relied on Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

19. The Government contested that argument.

A. The parties' submissions

20. The applicants submitted that the Court of Appeal's decision of 4 October 2012, by which it declared their appeal against the decision of the Regional Court of 5 April 2012 inadmissible for lack of standing, was in plain contradiction to the Court's judgment in the case of *Nölkenbockhoff v. Germany* (25 August 1987, Series A no. 123). In that case, the Court had recognised the victim status of a widow in respect of the presumption of innocence, as guaranteed by Article 6 § 2 of the Convention, concerning, *inter alia*, statements relating to her late husband in connection with the discontinuation of criminal proceedings against him by reason of his death. It did not remedy this manifest breach of the applicants' right of access to a court that the Court of Appeal went on to state that their appeal was, in the alternative, ill-founded.

21. The Government acknowledged that the Court of Appeal's decision not to consider the heirs of a deceased accused to have standing in proceedings concerning the accused's necessary expenses may, if viewed in the abstract, raise an issue under Article 6 § 1 of the Convention. They emphasised that this was, however, not decisive. In its decision of 4 October 2012, the Court of Appeal had examined the applicants' appeal in substance, despite declaring it inadmissible, as evidenced by its finding that it was, in any event, ill-founded and that there had been no breach of Article 6 § 2 of the Convention. There had thus been no breach of the applicants' right of access to a court.

B. The Court's assessment

1. Admissibility

22. The Court notes that the applicants are the widow and the son of the late John Demjanjuk. In line with its well-established case-law, it considers that they may, as his close relatives and heirs, have a legitimate material interest in the reimbursement of the costs and expenses for his defence in the criminal proceedings against him as well as a non-pecuniary interest, on behalf of themselves and of the family, in having their late relative exonerated from any finding of guilt (see *Vulakh and Others v. Russia*, no. 33468/03, §§ 26-28, 10 January 2012; *Nölkenbockhoff*, cited above, § 33). The Court finds that the applicants may claim to be “victims” of the alleged violation of Article 6 § 2 of the Convention and were, therefore, entitled to access to a court under Article 6 § 1 of the Convention.

23. It also considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. As no other grounds for inadmissibility have been established, the Court declares it admissible.

2. Merits

24. The Court observes that, while the applicants may claim to be “victims” of an alleged violation of Article 6 § 2 of the Convention, they did not face a criminal charge. They may have a legitimate material interest in the reimbursement of the late accused's necessary expenses as well as a non-pecuniary interest in having him exonerated from any finding of guilt. Their interests are thus, in part, pecuniary in nature and, in part, aimed at the maintenance or restoration of the late accused's good reputation, either of which concern the civil limb of Article 6 § 1 of the Convention (see *Rupp v. Germany* (dec.), nos. 60879/12 and 60892/12, § 53, 17 November 2015; and *Madaus v. Germany*, no. 44164/14, § 15, 9 June 2016).

25. The Court reiterates that the right of access to a court guaranteed by Article 6 § 1 of the Convention does not consist only of a right to institute proceedings, but also of a right to obtain a “determination” of the dispute or, in other words, to have the claims examined by a court (*Khamidov v. Russia*, no. 72118/01, § 167, 15 November 2007). While the right of access to the courts must be “practical and effective”, it may be subject to limitations (see *Zubac v. Croatia* [GC], no. 40160/12, §§ 77-78, 5 April 2018). It is not the Court's function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (*ibid.*, § 79).

26. In the present case the Court of Appeal, in its decision of 4 October 2012, declared the applicants' appeal against the Regional Court's decision of 5 April 2012 inadmissible due to their lack of standing (see paragraph 11

above). This decision may, as the Government acknowledged, raise issues in respect of the applicants' right to have their claim as victims of an alleged violation of Article 6 § 2 of the Convention examined. However, the Court of Appeal then went on to state that the immediate appeal was, in addition, ill-founded and that Article 6 § 2 of the Convention had not been breached (see paragraph 11 above). It follows that the Court of Appeal examined – and dismissed – the applicants' claim in substance.

27. The Court therefore considers that the Court of Appeal's determination of the applicants' lack of standing did not affect their right to have their claims examined and determined in substance. Their right of access to a court has not been infringed in practice.

28. There has accordingly been no violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

29. The applicants complained that the Regional Court's decision of 5 April 2012 not to reimburse the late accused's necessary expenses in connection with the discontinuation of the criminal proceedings, and in particular the wording of the impugned decision, violated the presumption of innocence. They relied on Article 6 § 2 of the Convention, which reads as follows:

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

30. The Government contested that argument.

A. Admissibility

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

B. Merits

1. *The parties' submissions*

(a) **The applicants**

32. The applicants submitted that Article 6 § 2 of the Convention required that the late accused's necessary expenses be borne by the treasury, given that his conviction had not become final. The decision of the Regional Court of 5 April 2012 to discontinue the proceedings and to refrain from charging his necessary expenses to the treasury reinforced the finding of guilt contained in the trial judgment. It clearly endorsed that judgment's findings and fully attributed the absence of a final conviction to the defence

strategy. Thereby, an image of the finality of the late accused's conviction was created while eliminating any possibility for his effective defence, notably the examination of the grounds of his appeal on points of law. In fact, the provision applied by the Regional Court (Article 467 § 3, second sentence, number 2 of the Code of Criminal Procedure), as interpreted by the domestic courts, itself was bound to infringe the presumption of innocence by requiring that the procedural impediment be the sole reason for the absence of a final conviction, which would otherwise have been certain.

33. Contrary to the requirements set out by the Court in the case of *Nölkenbockhoff* (cited above), warranting an assessment of the case as a whole, including the grounds advanced by the defence and not assessed prior to the discontinuation of the criminal proceedings, the Regional Court did not examine the grounds advanced by the late accused in his appeal on points of law. To have these grounds examined only where the case-file had already been transmitted to the competent court could not be reconciled with Article 6 § 2 of the Convention. The necessary transfer of the case file had been unduly delayed in the present case and the Regional Court was no longer competent when it decided on the discontinuance of the proceedings for the reimbursement of the late accused's necessary expenses.

(b) The Government

34. The Government submitted that the Regional Court's decision that the late accused's necessary expenses should not be borne by the treasury did not breach the presumption of innocence. It did not constitute a penalty or similar measure, nor did it contain a finding or attribution of guilt. The Regional Court had, in accordance with domestic law, made a prognosis based on an assessment of the remaining state of suspicion and had legitimately referred to the trial judgment which constituted a reliable basis for such prognosis. The Regional Court was competent to make this prognosis under domestic law, given that the case file had not yet been received by the Federal Court of Justice. It was not required to assess the grounds advanced by the defence for the appeal on points of law when making the prognosis as to the existence of a significant state of suspicion against the late accused. Even if the Federal Court of Justice had been competent, it would not have been required to engage in a full assessment of the appeal on points of law either, as the decision on the accused's necessary expenses was an auxiliary one and only required a comprehensible and soundly founded prognosis, which was clearly distinguishable from a conclusive finding of guilt.

35. The decision was carefully worded in a way to avoid it being understood as a finding of guilt. It made clear that the Regional Court's judgment of 12 May 2011, and the applicant's conviction, were not final and explicitly stated that the judgment did not contain a "conclusive

attribution of guilt". Remarks contained in the decision pertaining to the extensive exercise of defence rights did not alter that.

2. *The Court's assessment*

36. The Court reiterates that the presumption of innocence enshrined in Article 6 § 2 of the Convention will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion, even in the absence of any formal finding of guilt, that he is guilty before he has been proved guilty according to law; it suffices that there is some reasoning suggesting the accused's guilt (see *Cleve v. Germany*, no. 48144/09, §§ 32 and 53, 15 January 2015, with further references). This concerns, for example, a decision on the reimbursement of an accused's defence costs (see *Rupp*, cited above, § 62; *Lutz v. Germany*, 25 August 1987, §§ 56-57, Series A no. 123), as in the present case.

37. A finding of guilt in the absence of a final conviction must be distinguished, in that context, from the description of a "state of suspicion". While the former infringes the presumption of innocence, the latter has been regarded as unobjectionable in various situations examined by the Court (see *Rupp*, § 63, and *Cleve*, § 53, both cited above). The language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 of the Convention (*Rupp*, § 63, and *Cleve*, § 54, both cited above). Regard must be had, in this respect, to the nature and context of the particular proceedings in which the impugned statements were made (*Cleve*, cited above, § 55). Depending on the circumstances, even the use of some unfortunate language may thus be found not to be in breach of Article 6 § 2 of the Convention (*ibid.*, with further references). The Court has drawn a distinction between cases where a final acquittal judgment has been handed down and those where criminal proceedings have been discontinued, with a more lenient standard applied in the latter cases (see *Bikas v. Germany*, no. 76607/13, § 44, 25 January 2018, with further references).

38. The Court furthermore reiterates that a decision whereby reimbursement of an accused's necessary expenses was refused in connection with the discontinuation of criminal proceedings does not in itself breach Article 6 § 2 of the Convention (see *Nölkenbockhoff*, §§ 36 and 40, and *Rupp*, § 72, both cited above). The issue that needs to be determined in the present case is, thus, whether the reasons advanced for the decision not to reimburse the late accused's necessary expenses, and notably the language used, contained a finding of the late accused's guilt.

39. The Court sees no reason to doubt the competency of the Regional Court to take the decision at issue and cannot discern any undue delays in transferring the case file, not least in the light of the multiple submissions made by the defence until shortly before the accused's death (see paragraphs 7, 8 and 16 above). For the purposes of the decision at issue, the

Regional Court was required to determine whether there was at least a significant state of suspicion against the late accused (see paragraph 15 above). It made that determination after it had, acting as the trial court, found the late accused guilty after a trial of 91 days, setting out its assessment of the factual and legal aspects of the case in a judgment of 220 pages (see paragraph 6 above). Therefore, having regard to the nature and context of the Regional Court's decision, the Court finds that it does not raise, in the circumstances of the present case, an issue under Article 6 § 2 of the Convention that the Regional Court found there to be a significant state of suspicion against the late accused, based on the trial judgment against him (compare and contrast the cases of *Cleve*, cited above, and *Yassar Hussain v. the United Kingdom*, no. 8866/04, ECHR 2006-III, in which the applicants had been acquitted by the trial court).

40. At the same time, the Court considers that some of the wording contained in the Regional Court's decision may be considered unfortunate, notably, that the conviction could not become final in the absence of a decision on the appeal on points of law and that it would have been possible to conclude the proceedings, with a final verdict, during the lifetime of the accused, if the defence had exercised its procedural rights in a targeted, structured, and technical manner (see paragraph 9 above). These statements could be understood as attributing responsibility to the defence for the absence of a final guilty verdict against the late accused. However, again having regard to the nature and context of the decision, the Court notes that domestic law required there to be additional factors, besides the significant state of suspicion, rendering the refusal to reimburse the accused's necessary expenses equitable in the event of a discontinuation of the proceedings (see paragraph 15 above). It thus understands the statement at issue to relate primarily to the existence of such an additional factor, as required by domestic law, which is taken into account in the exercise of discretion for determining who is to bear the accused's necessary expenses.

41. This view is supported by the Regional Court's explicit statement that the decision regarding necessary expenses was taken "in the absence of a conclusive finding of guilt" (see paragraph 9 above). Thereby, the Regional Court made it unequivocally clear that its decision was based on a state of suspicion against the late accused, but that it did not contain a finding or allocation of guilt. The Court of Appeal referred to that part of the decision to conclude that it was compatible with Article 6 § 2 of the Convention and the standards following from the judgment in the case of *Nölkenbockhoff* (cited above) (see paragraph 11 above).

42. Having regard to the reasoning as a whole and, in particular, the language used, as well as to its case-law, notably *Nölkenbockhoff* and *Rupp* (both cited above) on the one hand, and *Yassar Hussain* and *Cleve* (both cited above) on the other hand, the Court concludes that the Regional Court's decision, which was upheld by the Court of Appeal (see

paragraph 11 above), did not contain a finding of the late accused's guilt. These decisions thus did not infringe the presumption of innocence

43. There has accordingly been no violation of Article 6 § 2 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;
3. *Holds* that there has been no violation of Article 6 § 2 of the Convention.

Done in English, and notified in writing on 24 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Yonko Grozev
President