FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41448/98
by Hans-Jürgen **WITZSCH**
against Germany

The European Court of Human Rights (Fourth Section) sitting on 20 April 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr G. Ress,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mr J. Hedigan,
Mrs S. Botoucharova, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 December 1997 by Hans-Jürgen **WITZSCH** against Germany and registered on 2 June 1998 under file no. 41448/98;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a German national, born in 1939 and living in Fürth. He is a secondary school teacher.

He is represented before the Court by Mr W. Heim, a lawyer practising in Nürnberg.

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

A. Particular circumstances of the case

On 27 February 1996 the Fürth District Court (*Amtsgericht*) convicted the applicant of disparaging the dignity of the deceased (*Verunglimpfung des Andenkens Verstorbener*) pursuant to section 189 of the Penal Code (*Strafgesetzbuch*). It sentenced him to four months' imprisonment, suspended on probation.

In its decision, the District Court found that in November 1994 and February 1995, the applicant had written letters to Bavarian politicians, in which he had complained about a planned amendment of section 130 of the Penal Code on the punishment of incitement to hatred (*Anstachelung zum Rassenhass*), expressly penalising the denial of national socialist mass killing. To those letters, the applicant had attached a statement in which he had denied the existence of gas chambers and the mass killing therein and had thereby denied the victims' particular cruel fate. The court observed that, according to the case-law of the Federal Constitutional Court (*Bundesverfassungsgericht*) and the Federal Court of Justice (*Bundesgerichtshof*), the mass killing of Jews and other persons in gas chambers and inter alia in the Auschwitz concentration camp was a historical fact (*historische Tatsache*). The court further considered that, by denying this specific form of homicide, he had disparaged the dignity of the deceased. In this respect, it noted that the applicant had called the envisaged reform "antidemocratic special legislation" (*antidemokratisches Sondergesetz*), and had stated that political parties in the Federal Diet were "no longer abiding by the rule of law and encouraging an antidemocratic demon" (*so weit von rechtsstaatlichem Denken entfernt und einem antidemokratischen Ungeist Tür und Tor geöffnet haben*). He had further referred to "historical lies" (*Geschichtslügen*) and had qualified the gas chambers as "so-called gas chambers".

The court further noted that an application for prosecution had been lodged in time.

In fixing the sentence, the District Court noted that the applicant had previously been convicted of disparaging the dignity of the deceased, however, that conviction had not yet become final at the time of the material offence.

In these and the following proceedings, the applicant was assisted by defence counsel.

On 3 July 1996 the Nürnberg-Fürth Regional Court (*Landgericht*) dismissed the appeals lodged by the applicant and by the Public Prosecutor. As regards the applicant's argument that he had not intended to deny the existence of gas chambers, the Regional Court considered that the contents of the letters objectively amounted to such a denial. In particular, he had used the term "historical lies" concerning the gassing in concentration camps, which was a historical fact and commonly known (*offenkundig*). No taking of evidence had therefore

been necessary. Moreover, having regard to the documents before it, the Regional Court confirmed that the application for prosecution had been lodged in time.

On 31 July 1997 the Bavarian Court of Appeal (*Bayerisches Oberstes Landesgericht*) dismissed the applicant's appeal on points of law. The Court of Appeal confirmed the findings of the lower courts, in particular that, as the mass killing in the concentration camps was a notorious historical fact, no taking of evidence concerning this point was necessary. Moreover, the procedural questions relating to the application for prosecution had been correctly determined.

On 23 September 1997 the Federal Constitutional Court decided not to admit the applicant's constitutional complaint.

B. Relevant domestic law

Section 189 of the Penal Code provides as follows:

> "Anybody disparaging the memory of the deceased shall be punishable with imprisonment not exceeding two years or with a fine."

Pursuant to section 194 of the Penal Code, such an offence is prosecuted upon application by a relative of the victim of the offence.

Section 130 of the Penal Code concerns the criminal offence of incitement to hatred. According to section 130(1), in the version as amended on 28 October 1994 and entered into force on 1 December 1994, anybody who incites to hatred, or violence or arbitrary acts, against parts of the population in such a manner as to disturb the public peace shall be punishable by imprisonment for a term of three months to five years. Section 130(2) relates to publications inciting to hatred. Section 130(3) makes it a punishable act to approve, deny or minimise acts of genocide under the national socialist regime in public or at an assembly.

COMPLAINTS

The applicant complains under Articles 9 and 10 of the Convention that his freedom of speech as a historian had been infringed. Furthermore, he complains under Article 6 § 3 (d) that the Courts had not duly established whether his prosecution had been requested in due time. Moreover, he claims under Article 7 that the amendment of section 130 of the Penal Code was not yet in force when he wrote the first of his letters and that he had therefore been convicted without a legal provision.

THE LAW

1. The applicant complains that his conviction of disparaging the memory of the deceased amounted to a violation of Article 10 of the Convention.

Article 10, as far as relevant, provides as follows:

> “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the prevention of disorder or crime, ... for the protection of the reputation or rights of others ...”

The applicant’s conviction amounted to “interference” with the exercise of his right to freedom of expression. Such interference is in breach of Article 10, unless it is justified under paragraph 2 of Article 10 as being prescribed by law and necessary in a democratic society for one of the aims mentioned therein.

The Court notes that the applicant’s conviction was based on section 189 of the Penal Code. The applicant was aware of the scope of this provision due to the preceding criminal proceedings concerning similar conduct. As regards his argument that the amended version of section 130 had not yet been in force at the time of the first of the offences in question, the Court observes that his conviction only indirectly related to this provision. Accordingly, the interference was prescribed by law.

The interference also pursued a legitimate aim under the Convention, i.e. “the prevention of disorder and crime” and the “protection of the reputation or rights of others”. It remains to be ascertained whether the interference can be regarded as having been “necessary in a democratic society” for the achievement of those aims.

The Court, referring to the fundamental principles which emerge from its judgments relating to Article 10 (see the Zana v. Turkey judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2547-2548, § 51) recalls in particular that the adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision.

The Court notes the findings of the German courts that the applicant’s statements denying the existence of gas chambers and mass killing therein and his reference to “historical lies” amounted to disparaging the dignity of the deceased who had a particularly cruel fate.

In this context, the Court had also regard to Article 17 of the Convention, according to which

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

The Court has previously held that the negation or revision of clearly established historical facts - such as the Holocaust - would be removed from the protection of Article 10 by Article 17 (see the Lehideux and Isorni v. France judgment of 23 September 1998, to be published in *Reports* 1998, § 47; see also Eur. Commission HR, no. 25062/94, Dec. 18 October 1995, DR 83-A, p. 77).

Against this background, the Court finds that the public interest in the prevention of crime and disorder due to disparaging statements regarding the Holocaust, and the requirements of protecting the interests of the victims of the nazi regime, outweigh, in a democratic society the applicant's freedom to impart views denying the existence of gas chambers and mass murder therein. These were relevant and sufficient reasons for the applicant's conviction. The interference at issue could, therefore, be regarded as necessary in a democratic society.

Accordingly, there was no appearance of a breach of Article 10.

This part of the application is, therefore, manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

2. As regards the applicant's complaint under Article 6 of the Convention, the Court finds that the applicant's submissions do not disclose any appearance of unfairness of the proceedings at issue. In particular, there is nothing to show that, assisted by defence counsel, he could not duly exercise his defence rights, or that the taking and assessment of evidence, including the procedural issue of the application for prosecution, could be objected to under Article 6.

It follows that this aspect of the case is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

3. The applicant further complains under Article 7 of the Convention that his conviction was based on an amended version of the Penal Code which had not yet entered into force at the time of the first of the incriminated letters.

The Court, referring to its above findings as to the lawfulness of the interference with the applicant's right to freedom of expression under Article 10 of the Convention, observes that his conviction was based on section 189 of the Penal Code, which was not affected by the 1994 reform. There is nothing to support the applicant's assertion that he had been guilty of a criminal offence on account of an act which did not constitute a criminal offence under German law at the time when it was committed.

Accordingly, this part of the application is likewise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger Matti Pellonpää
Registrar President