

DECISION OF ISRAEL SUPREME COURT ON PETITION CONCERNING JOHN (IVAN) DEMJANUK ON AUGUST 18, 1993

UNOFFICIAL SUMMARY OF DECISION

(Source: Israel Ministry of Foreign Affairs)

On August 18, 1993 the Supreme Court of Israel sitting as the High Court of Justice gave its decision on 10 petitions brought by survivors of the Holocaust and others demanding that John (Ivan) Demjanjuk should be brought to trial on charges of war-crimes at Sobibor and other concentration camps. These petitions follow the decision of the Supreme Court to acquit Demjanjuk, by reason of doubt, of the brutal offenses attributed to Ivan the Terrible of Treblinka.

The court of three judges dismissed the petitions.

JUSTICE SHLOMO LEVIN considered in detail the reasons set out in the opinion of the Attorney-General which argued against bringing Demjanjuk to trial. This opinion was based on four arguments:

- 1) That a further trial would infringe the rule of 'double jeopardy' in that Demjanjuk would be standing trial for offenses in respect of which he had already been tried and acquitted.
- 2) That the Supreme Court, in acquitting Demjanjuk of charges attributed to Ivan the Terrible of Treblinka, had stated that it did not think it reasonable to commence new proceedings against him, in view of the seriousness of the offenses with which he had originally been charged and the nature and circumstances of the alternative charges.
- 3) That on the basis of the evidence available, it was unlikely that Demjanjuk would be convicted of the alternative charges, and that risking a further acquittal was not in the public interest.
- 4) That Demjanjuk was extradited from the United States specifically to stand trial for offenses attributed to Ivan the Terrible of Treblinka, and not for other alternative charges.

Justice Levin noted that under Israeli law, it was established that authority in criminal matters is vested with the Attorney-General, who is authorized to bring charges in any case where there is sufficient evidence, unless he believes that there is no public interest in bringing the case. He further noted that the Attorney-General has a wide discretion in making such a decision and that the Court should only intervene when the decision is so untenable as to be totally unreasonable.

Justice Levin went on to consider the arguments put forward by the Attorney-General. He found that it was not unreasonable to consider that bringing charges against Demjanjuk might infringe the 'double jeopardy' rule. Similarly, it was not unreasonable to estimate that chances of convicting Demjanjuk were small, particularly in view of the fact that none of the survivors of the Sobibor camp had identified him. Justice Levin also held that, although the opinion of the Supreme

Court as regards further proceedings only related to the case before it, the Attorney-General could not be criticized for giving weight to the Court's comments in this regard.

Justice Levin considered a number of other arguments raised by the petitioners, among them that a failure to bring Demjanjuk to trial would effectively broadcast a message that the time when Nazi war criminals could be brought to trial has passed. This, he said, was not so. The obligation to bring Nazis and collaborators to trial remains binding on every state, when there is evidence to substantiate the charges.

JUSTICE GAVRIEL BACH noted the difficulties involved in releasing a defendant who may be guilty of the barbaric and bestial offenses committed by the Nazis.

Justice Bach stated that he differed from his colleagues in that he did not attach any significant weight to some of the arguments put forward by the Attorney-General. Among these was the argument that the decision of the Supreme Court acquitting Demjanjuk of the crimes attributed to Ivan the Terrible contained a direction, express or implied, not to institute further proceedings against him. The relevant portion of the court's decision, stated Justice Bach, related only to the specific question whether the case should be referred back to the District Court. A case should be referred back to a lower court when new evidence which may cast light on the charge in question is presented to the court. This was not the situation before the Supreme Court; the question was whether the defendant should be convicted of offenses at Sobibor and Trawniki, charges substantially different from those in the indictment before the Court. For this reason, stated Justice Bach, the court was unable to refer the case back to the lower court. It was not the Court's intention, however, to instruct the prosecutorial system on the issue of whether to bring additional charges.

As regards the argument that Demjanjuk had been extradited specifically to stand trial for offenses attributed to Ivan the Terrible of Treblinka, Justice Bach found that this also was not persuasive. Even if the consent of the United States authorities was required in order to bring further charges, such consent could be requested. If the request was refused, no charges need be filed and the defendant could be deported.

Accordingly, if the decision of the Attorney-General had been based on these considerations alone, Justice Bach stated that there would have been grounds to intervene in the decision.

However, a number of other arguments put forward in favor of the decision were not unreasonable. Among these was the possibility that the 'double jeopardy' rule would be infringed. The Attorney-General's concern in this regard was supported by the fact that Demjanjuk's presence in the Sobibor camp had been mentioned in the indictment and in other documents submitted as evidence in the original trial and in the appeal. Moreover, the prosecution had argued in the appeal that the Court could convict Demjanjuk of offenses committed at Sobibor since these had been proved before the Court, and the defendant had had an opportunity to defend himself against these charges. Similarly, the presence of Demjanjuk at Trawniki had also been considered by the Court.

Justice Bach also considered the argument that bringing further charges would not serve the public interest, since evidentiary difficulties raised the likelihood of a further acquittal. He did not feel that this consideration was unreasonable.

Accordingly, Justice Bach concurred in dismissing the petitions. He emphasized, however, that this should in no way be taken to imply that war criminals can no longer be brought to trial. The Israeli legislator placed no statute of limitations on offenses committed by Nazis and their collaborators, and in many cases no evidentiary difficulties in proving the identity and activities of the defendant arise. Nazis and collaborators should continue to be found and brought to trial, as long as they live.

JUSTICE MISHAEL CHESHIN noted the grave responsibility that rests on the Court when deciding whether to intervene in an administrative decision. He also noted the inadequacy of the legal system, which is designed to deal with behavioral norms, when confronted with the scale of the atrocities committed by the Nazis.

Justice Cheshin then considered the decision of the Supreme Court not to convict Demjanjuk of the charges other than those relating to offenses committed at Treblinka. In this decision he saw more than a hint to conclude the proceedings against Demjanjuk. He concurred with Justice Levin in finding that the Attorney-General was entitled to take guidance from the comments of the court, even though strictly they related only to the proceedings actually before the Court.

Justice Cheshin stated that he saw no room to intervene in the decision of the Attorney-General, and that he concurred with the view and reasoning of Justice Levin.