No. 85-3435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
AUG 03 1993
EONARD GREEN, Cle

JOHN DEMJANJUK, Petitioner-Appellant, v. JOSEPH PETROVSKY, et al., Respondent-Appellees.	BENCH RULING OF AUGUST 3, 1993

Before: MERRITT, Chief Judge; KEITH, Circuit Judge; and LIVELY, Senior Circuit Judge.

CHIEF JUDGE MERRITT: The Court has before it a complex and difficult case -- unique in legal history and unique in the annals of international law. Demjanjuk is in Israel as the result of the orders of this Court entered in 1985. But for the orders of this Court, he would not be there.

The Court has reopened its earlier proceeding in order to determine whether the integrity of the judicial process was violated in the earlier proceeding and whether the order previously entered allowing extradition should be set aside. Under Rule 60(b) of the Federal Rules of Civil Procedure, according to its express terms, that order should be set aside if it was procured by a fraud practiced upon the court or if it would be otherwise inequitable or unjust to leave the order in effect.

While this Court proceeds on the validity of our prior order of extradition, the Court clearly has the power and jurisdiction under the All Writs Act to issue a writ of Habeas

Corpus for the purpose of having a party to the litigation appear before us and participate personally and with counsel in the proceeding. There are citations which I will furnish to the Clerk of Court along with statements made here going back to Blackstone on that subject matter. The entry of such orders under the All Writs Act is an everyday, routine occurrence in the federal courts. It is only necessary that this court find and conclude that the presence of a party is needed in furtherance of an ongoing judicial proceeding. If the citation of precedent is needed for such an elementary principle of law, three Supreme Court cases discussing this point will suffice. United States v. New York Telephone Co., at 434 U.S. page 173, a case decided in 1978; United States v. Hayman, 342 U.S. at 220, a case decided in 1952; and Price v. Johnston, 334 U.S. at 282, a case decided in 1948.

The government says that there is no reason or purpose for a writ to issue bringing Demjanjuk before this Court. The government is incorrect in this proposition for four reasons:

First, Demjanjuk is the only person on his side of this proceeding who has been present throughout the entire series of proceedings, the long and laborious denaturalization, deportation and extradition proceedings. He now has new counsel. His present counsel were not present at the prior proceedings. It was the findings by courts in the denaturalization, deportation and extradition proceedings that he was at Treblinka that led to his current situation. He has now been found not guilty of these charges as he has consistently proclaimed. The Treblinka charges were the basic charges which led to his

denaturalization and extradition. Demjanjuk's lawyers claim that he is needed to render assistance in preparing his case. We agree.

Second, whatever the final outcome of this proceeding, it will not serve its purpose if Demjanjuk is killed or seriously injured in Israel or elsewhere. We are advised by the parties and by documents of which we may take judicial notice that a serious threat exists to the life of John Demjanjuk in Israel. Threats against his life have been voiced on a frequent basis. Members of his family have been stoned as they left the court proceedings in Israel. Acid has been thrown in his lawyer's face necessitating a substantial delay in the court proceedings in Israel. It is clear that Demjanjuk's life remains in serious jeopardy.

Third, hearings eliciting the direct testimony from Demjanjuk may be necessary on the question of whether a fraud has been perpetrated on this court in the procurement of the extradition order or whether it would otherwise unjust and inequitable under Rule 60(b) to retain the order in effect.

Fourth, this Court by its order caused Demjanjuk to be sent to Israel where he was placed under a death sentence and risked being executed for a crime of which the Supreme Court of Israel has found him not guilty. As a result, Demjanjuk is now stateless and homeless. While this Court proceeds to unravel the legal ramifications of this unprecedented case, unprecedented as all concede, basic humanitarian considerations embodied in our Constitution and in the Universal Declaration on Human Rights -- require that steps be taken to insure that Demjanjuk is not injured or rendered permanently homeless.

For these reasons we believe that a writ of Habeas Corpus should be entered to bring Demjanjuk before the Court. Article XIII of the Extradition Treaty between Israel and the United States signed December 10, 1962, and effective December 5, 1963, expressly provides that "A person extradited under the present convention shall not be detained, tried or punished in the territory of the requesting party for any offense other than that for which the extradition has been granted nor be extradited by that party to a third state." Under this doctrine of specialty -- a doctrine of long-standing in international law -- it would be improper for such a further prosecution to take place. In fact, such a prosecution would violate basic precepts of international law. Our previous order in this case was expressly subject to the understanding that Demjanjuk was to be tried only for the charges in the warrant against him and under which he was extradited, that is, charges based upon the allegation that he was "Ivan the Terrible" of Treblinka. The doctrine of specialty, fully applicable in American law and under the governing treaty, forbids him from being tried on any other charges.

Accordingly, we request the parties to present to us an order which carries out our ruling that Demjanjuk should be returned to the United States and that his motion to this effect should be granted.

JUDGE LIVELY: I just want to add to Judge Merritt's statement the fact that this Court is fully aware of the Separation of Powers issue that is involved in this case. We are cognizant of the fact that Congress has plenary power in immigration matters and that the Attorney General acts under delegation of Congress as does the Secretary of State in

dealing with these matters. We find, however, that this is an extraordinary case that requires this Court to vindicate its own judgments. We have had drawn into serious question now the validity of the judgment that we rendered in all good faith. In rendering that judgment we stated, of course, if we found any support for the claim that a deliberately forged document had been offered to Judge Battisti as part of the grounds for this man's deportation, denaturalization we would examine the entire record very closely. That is the opportunity that we need now, is to examine the entire record very closely. There are enough serious questions as to the procedure we are following, it seems to me that there is no question that under the All Writs Act as applied to Habeas proceedings that this Court has the authority to do precisely what the petitioner has requested and that is to direct respondents to put no obstacles in the way of Mr. Demjanjuk's return to this country at the earliest opportunity.

JUDGE KEITH: The interim relief that has been requested is granted and the Government's stay is denied, and from at least my standpoint, I think that in the search for the truth that we are all after, I think it is important that the petitioner be present in the United States as we get to the truth in this very difficult and complex matter.

CHIEF JUDGE MERRITT: The motion will be granted and the parties may file in the next two or three days, whenever they can, submit a suggested order and carry out

the actions of the Court. As Judge Keith said, the stay of our ruling will be denied. With that the court will stand in recess.