CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 7485/03
by Hans-Jürgen WITZSCH
against Germany

The European Court of Human Rights (First Section), sitting on 13 December 2005 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mrs E. STEINER,
Mr D. SPIELMANN,
Mrs R. JAEGER,
Mr S.E. JEBENS, *judges*,
and Mr S. NIELSEN, *Section Registrar*,

Having regard to the above application lodged on 4 February 2003,

Having deliberated, as follows:

THE FACTS

The applicant, Mr Hans-Jürgen Witzsch, a German national, was born in 1939 and when introducing the application lived in Fürth.

A. The circumstances of the case

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

In an article published in a German weekly review on 30 September 1999 a well-known historian, Professor Wolffson (thereafter "W.") made *inter alia* the following statements:

> "(...) Hitler wanted the murder of the Jews. He ordered it and certainly knew about it. Although he had not given a written order, there is evidence that he had given oral orders on several occasions. The murder of the Jews was wanted and organised from above and by NS-activists from the bottom (...)."

In a letter of 3 December 1999 the applicant wrote to Professor Wolffson in reply to this article:

> "(...) Your statements which are false and historically unsustainable shall not stand unanswered (...).
>
> It is actually established that there is no indication in party programs of the National Socialist German Workers' Party, the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*), that the NSDAP and Hitler intended to murder the Jews. Anybody who – with all the means at his disposal – fostered the emigration of the Jewish minority until late after the beginning of the Second World War can hardly be said to have prepared the murder of the Jews. A long time ago, the historian Irving has publicly proposed to pay a thousand pounds to any person who could prove that Hitler had ordered, for racial reasons, the murder of one single Jew. So far, nobody has produced evidence. After the war, tens of thousands of totally immaculate officials of the NSDAP have attested on oath not to have known until the end of the war about the murder of Jews. None of the dignitaries of the German Government accused in Nuremberg admitted to have known about the mass murder of Jews. Not even in their closing words under the gallows! (...)
>
> The normalisation of the relation between Germans and Jews depends on the will to historical truth and requires not only that one party is blamed for the responsibility it admits but also that the other party refrains from suppressing its negative contribution to history (...). Last but not least, the normalisation requires the Jews' clear distancing from the war and post-war atrocity propaganda (*Kriegs- und Nachkriegsgreuelpropaganda)* against Germany, directly or indirectly concerning the Jews.
>
> You, Professor Wolffsohn, would highly contribute to this if you would abandon the false or questionable statements against Germany and seriously endeavour to become acquainted with the actual academic discourse of contemporary history."

On 15 December 1999 W. submitted this letter to the police. On 6 April 2000 he explicitly refused to lodge an application for prosecution (*Strafantrag* - see "Relevant domestic law and practice" below).

On 21 June 2000 a police officer informed H. – whose grandparents had died in a concentration camp – about the letter and its content. On the same day, the latter lodged an application for prosecution.

On 27 July 2001 the Fürth District Court (*Amtsgericht*) convicted the applicant of disparaging the dignity of the deceased pursuant to Section 189 of the German Criminal Code (see "Relevant domestic law and practice"

below) and sentenced him to three months' imprisonment. With reference to the case-law of the Federal Constitutional Court (*Bundesverfassungsgericht*), it recalled that it was historically proven that the mass killing of Jews in concentration camps was planned and organised by Hitler and the NSDAP. Accordingly, no evidence in this respect had to be adduced, as requested by the applicant. Although the applicant had not denied the Holocaust as such, his denial of Hitler's and the NSDAP's responsibility in this respect was tantamount to a negative value judgment (*negatives Werturteil*). He had thereby denied the victims' extremely cruel and unique fate and accordingly disparaged the dignity of the deceased. Furthermore, as the pertinent passages of the applicant's letter did not express an opinion but had to be categorised as allegations of facts which had been proven untrue, they did not fall within the ambit of Article 5 § 1 of the German Basic Law which protects the freedom of opinion. Given their polemic nature, they neither fell within the ambit of Article 5 § 3 of the German Basic Law which protects the freedom of research. In fixing the sentence, the court took into account that the applicant had been convicted in 1995 and 1996 respectively of disparaging the dignity of the deceased for denying the existence of gas chambers and that the letter at issue had been written during the probationary period.

On 28 January 2002 the Nürnberg-Fürth Regional Court (*Landgericht*) dismissed the appeals lodged by the applicant and the Public Prosecutor. According to the Regional Court, it was not contested that the applicant had written and sent the letter to W. It further noted that a valid request for prosecution had been filed with the public prosecutor. Although W. had not lodged himself a request for prosecution, the circumstance that he had transferred the applicant's letter to the police showed that he had not considered its contents as unoffending.

The Regional Court considered that the extermination of the Jews in gas chambers is a clearly established historical fact. It is also common knowledge that Hitler had wanted and initiated the murder of the Jews in Germany and that the NSDAP had planned and organised the systematic extermination of Jewish people. It was therefore not necessary to adduce the requested evidence. The applicant's allegations that none of the accused dignitaries of the German Government in the Nuremberg Trials had known of the extermination of the Jews, was absurd and monstrous and offended the Jews murdered by the Nazis. The applicant's statement that the opinion expressed by W. was part of the war propaganda and after-war atrocity propaganda combined with the denial of Hitler's and the national Socialists' responsibility in the extermination of the Jews showed the applicant's disdain towards the Jews, the principal victims of the systematic extermination. The court concluded that statements concerning facts which had been proven untrue were not protected by Article 5 of the German Basic Law.

On 10 July 2002 the Bavarian Court of Appeal *(Bayerisches Oberstes Landesgericht*) dismissed the applicant's appeal on points of law as not disclosing any legal errors to the detriment of the applicant.

On 28 November 2002 the Federal Constitutional Court (*Bundesverfassungsgericht*), sitting as a bench of three judges, refused to admit the applicant's constitutional complaint.

The applicant was represented by defence counsel throughout the proceedings.

B. Relevant domestic law and practice

Section 189 of the Criminal Code provides as follows:

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

Section 194 of the Criminal Code determines that, with few exceptions, such an offence can only be prosecuted upon application by a relative of the victim of the offence.

In 1992 the Federal Constitutional Court established that the denial of the existence of gas chambers was an allegation of facts which had been proven untrue and that this allegation can be prohibited on account of their offending nature. In 1996 the Bavarian Court of Appeal confirmed that the denial of the existence of gas chambers was punishable under Section 189 of the Criminal Code.

COMPLAINTS

1. The applicant complained under Article 6 §§ 1 and 3 a) of the Convention that his right to a fair trial by an impartial tribunal had been breached. He maintained that the courts had arbitrarily considered certain facts as clearly established and declared his version of the facts a criminal offence while disregarding the opinion of accredited historians. He further complained that the courts had refused to order an expert opinion in that respect.

2. The applicant further complained under Article 7 of the Convention that there was no legal provision in Germany prohibiting historians to do research work on the question of the persecution and the extent of the persecution of Jews with exception of the question relating to gas chambers. His conviction accordingly violated the principle of "*nulla poene sine lege*".

3. The applicant further complained under Articles 9 and 10 of the Convention that his freedom of expression as a historian had been infringed, in particular because the German courts had not taken into account that the impugned statements had been made in a private letter.

4. The applicant finally complained under Article 14 of the Convention that he had been convicted for his views as a historian whereas W. had not been convicted for his statements.

THE LAW

1. Invoking Article 6 §§ 1 and 3 a) of the Convention, the applicant complained that he did not have a fair trial before the German courts. He complained in particular that the courts had considered certain facts as being clearly established while refusing his version of historical facts without ordering an expert opinion in this respect. He also complained, albeit under Article 10 of the Convention, that he had been found guilty of an offence for statements made in a private letter. The Court has examined these complaints under Article 6 § 1 of the Convention which, insofar as relevant, reads as follows:

> "In the determination 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. ..."

The Court recalls that, while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46; and *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I4).

The Court considers that in the present case the reasons on which the courts based their decisions are sufficient to exclude the assumption that the evaluation of evidence and the interpretation of the law were arbitrary. Furthermore, the Court cannot, in the circumstances of the present case, find that the applicant, assisted by defence counsel throughout the proceedings, was prevented from arguing his case in an effective manner.

Insofar as the applicant complained that the police had forwarded his letter to H. with a view to providing a basis for the procedural conditions for his prosecution, as required by Section 194 of the Criminal Code (see "Relevant domestic law and practice" above), the Court recalls that, pursuant to its case-law, an intervention of the police and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined when this intervention appears to have instigated the offence and where there is nothing to suggest that it would have been committed without this intervention (see *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1463-64, §§ 38-39). However, by writing the letter to W., the applicant had already committed the offence under Section 189 of the Criminal Code.

Accordingly, it cannot be said that the police, when informing H. of the content of the letter, had incited the applicant to commit the offence he was convicted of. The Court further observes that W., the addressee of the applicant's letter, had explicitly refused to file an application for prosecution, though he could have done this because he fulfilled the requirement in Section 194 of the Criminal Code. He had nevertheless handed the letter to the police. This circumstance shows, as confirmed by the Nürnberg-Fürth Regional Court, that W. did not consider this letter as unoffending.

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

2. The applicant further complained that his conviction violated the principle of *nulla poene sine lege*. He relied on Article 7 of the Convention which provides as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The Court recalls that, according to its case-law, Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable (see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 36, ECHR 1999-IV). However, the Court's task is not to rule on the applicants' individual criminal responsibility, that being primarily a matter for the assessment of the domestic courts (see *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 51, ECHR 2001-II).

In the present case, the applicant was convicted for the statements he made in his letter to W. According to the case-law of the German courts, the denial of the existence of gas chambers is punishable under Section 189 of the Criminal Code as denying the true reasons for the suffering and the death of the Holocaust's victims. These decisions give an indication as to what kind of statements are covered by the offence and established that not

only the denial of the Holocaust as such but also the denial of certain circumstances of the Holocaust might be considered a crime under that Section. Accordingly, the applicant's conviction is consistent with the essence of the offence and the progressive development of its judicial interpretation. Bearing moreover in mind that the applicant had already been convicted of the same offence in 1995 and 1996 respectively, *inter alia* for denying the existence of gas chambers, he was able to foresee, with a reasonable degree of certainty, that his remarks at issue would fall within the ambit of Section 189 (see *Witzsch v. Germany* (dec.), no. 41448/98, 20 April 1999). Accordingly, there is nothing to support the applicant's assertion that he had been found 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.

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

3. The applicant also complained under Articles 9 and 10 of the Convention of an infringement of his right to freedom of expression, in particular because the German courts had not taken into account that the statements at issue had been made in a private letter.

The Court holds that the complaint falls to be examined under Article 10 of the Convention, which provides:

> "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, in the interests of national security, territorial integrity ..., for the prevention of disorder or crime, ... for the protection of the reputation or rights of others ..."

The Court notes that, according to the findings of the German courts, the applicant had denied an established historical fact relating to the responsibility of Hitler and the NSDAP as regards the Holocaust and thereby disparaged the dignity of the deceased. In this connection, the Court has regard to Article 17 of the Convention, according to which:

> "Nothing in [the] 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 observes that the general purpose of Article 17 is to make it impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention. The Court, and previously, the European Commission of Human Rights, have

found that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in conflict with Article 17, in particular in cases concerning Holocaust denial and related issues (see, *inter alia*, *Glimmerveen and J. Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, Decisions and Reports (DR) 18, p. 187; *Kühnen v. Germany*, no. 12194/86, Commission decision of 12 May 1988, DR 56, p. 205; *B.H., M.W., H.P. and G.K. v. Austria,* no. 12774/87, Commission decision of 12 October 1989, DR 62, p. 216; *Ochsenberger v. Austria*, no. 21318/93, Commission decision of 2 September 1994; *Walendy v. Germany*, no. 21128/92, Commission decision of 11 January 1995, DR 80, p. 94; *Remer v. Germany*, no. 25096/94, Commission decision of 6 September 1995, DR 82, p. 117; *Honsik v. Austria*, no. 25062/94, Commission decision of 18 October 1995, DR 83-A, p. 77; *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany*, no. 25992/94, Commission decision of 29 November 1995, DR 84, p. 149; *Rebhandel v. Austria*, no. 24398/94, Commission decision of 16 January 1996; *Nachtmann v. Austria*, no. 36773/97, Commission decision of 9 September 1998; *Witzsch v. Germany* (dec.), no. 41448/98, 20 April 1999; *Schimanek v. Austria* (dec.), no. 32307/96, 1 February 2000; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; Norwood *v. United Kingdom* (dec.), 23131/03, 16 November 2004). Abuse of freedom of expression is incompatible with democracy and human rights and infringes the rights of others.

As regards the circumstances of the present case, the Court notes that the applicant denied neither the Holocaust as such nor the existence of gas chambers. However, he denied an equally significant and established circumstance of the Holocaust considering it false and historically unsustainable that Hitler and the NSDAP had planned, initiated and organised the mass killing of Jews. The applicant's statement that the opinion expressed by W. was part of the war propaganda and after-war atrocity propaganda combined with the denial of Hitler's and the national Socialists' responsibility in the extermination of the Jews showed the applicant's disdain towards the victims of the Holocaust. The Court finds that the views expressed by the applicant ran counter to the text and the spirit of the Convention. Consequently, he cannot, in accordance with Article 17 of the Convention, rely on the provisions of Article 10 as regards his statements at issue. The fact that they were made in a private letter and not before a larger audience is irrelevant insofar. The applicant's allegation that he did not intend to have a public debate on his views is in any event questionable in the particular circumstances of the instant case.

It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.

4. The applicant complained that he had been discriminated against in that he had been convicted and sentenced for his views as a historian. He alleged a violation of Article 14 of the Convention which provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Assuming Article 14 to be applicable, the Court finds no indication that the measure complained of can be attributed to a difference in treatment based on the applicant's views or any other relevant ground.

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

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren NIELSEN
Registrar

Christos ROZAKIS
President