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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED

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John Demjanjuk,)

Petitioner,)

v.)

Eric H. Holder, Attorney General of)
the United States,)

Respondent.)

No. 09-3416

PETITIONER’S MOTION FOR STAY PENDING REVIEW

Petitioner, John Demjanjuk, by his undersigned attorneys, hereby moves for the entry of an order staying his removal from the United States pending this Court’s review of the April 10, 2009 decision of the Board of Immigration Appeals (“BIA”) denying Mr. Demjanjuk’s Motion for an Emergency Stay.¹ A Petition for Review was filed at the same time as with this motion.

BACKGROUND

Twenty-four years ago this Court permitted the extradition of John Demjanjuk to Israel to face charges of murder which carried a death sentence.

¹ Alternatively, Mr. Demjanjuk seeks a stay pending this Court’s review of an order of the Board of Immigration Appeals disposing of his Motion to Reopen now pending before the Board.

Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985). In Israel he was convicted, sentenced to death, and finally released after spending eight years in solitary confinement and six years under sentence of death. Sixteen years ago this Court vacated its 1985 order and permitted John Demjanjuk to return to the United States having found that the Office of Special Investigations of the Department of Justice (“OSI”) had committed a fraud on the court by withholding exculpatory evidence from Mr. Demjanjuk’s defense attorneys in the United States. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993).²

Once again, more than twenty years later, the OSI is preparing to send John Demjanjuk to a foreign country. Again, he will stand trial for his life -- not this time by hanging but by the cruel and inhumane condition of transport and the stress of arrest, confinement and trial of this now 89 year old man who is in poor health. Once again, the OSI says that there is reliable evidence that he is a murderer. Once again, that evidence is of one or more elderly witnesses. Once, again, they say that the courts have no business interfering. In a new wrinkle, the OSI this time invokes an utterly mistaken view of foreign law -- this time of German law -- seeking to say that involuntary service as a camp guard makes one

² In its 1993 decision, this Court did not comment on the fact that the same exculpatory materials OSI withheld from Mr. Demjanjuk’s defense in the United States were also withheld from the Israeli *prosecution* which proceeded to indict him, try him and convict him of multiple murders while exculpatory evidence rested in the files of OSI.

liable for murder under German law. And this time they are willing to accept a false portrayal of John Demjanjuk as a "resident" of Munich.

We seek a stay because this time, perhaps, judicial inquiry before the deed is done can prevent an injustice. The precise circumstances which bring Mr. Demjanjuk yet again to this Court are set out in the Statement of Jurisdiction.

STATEMENT OF JURISDICTION

Under 8 USC 1252(a) this Court has jurisdiction to review final orders of removal. The Court's jurisdiction extends to review of motion to reopen. *Ali v. U.S. Attorney General*, 443 F.3d 804, 809 (11th Cir. 2005).

On April 6, 2009 Mr. Demjanjuk filed with the BIA a Motion to Reopen an order of removal entered against him in 2005. At the same time, Mr. Demjanjuk filed with the BIA a Motion for an Emergency Stay asserting that the Immigration and Customs Enforcement Division of the Department of Homeland Security ("ICE") was prepared to execute the outstanding removal order. On April 10, 2009 the BIA denied the Motion for an Emergency Stay. The BIA has not yet ruled on the Motion to Reopen.

Mr. Demjanjuk contends that in the circumstances here the BIA's denial of his Motion for an Emergency Stay is in fact a reviewable final order of removal.

Under the BIA's regulations (8 CFR 1003.2(d)):

[A]ny departure from the United States, including the deportation or removal of a person who is the subject of

exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, *shall constitute a withdrawal of such motion.*

Because of this provision of the regulations, the BIA's denial of a stay without acting on the Motion to Reopen permits ICE to execute the outstanding removal order at any time. If ICE in fact removes Mr. Demjanjuk while the Motion to Reopen is pending, the BIA will treat the Motion to Reopen as withdrawn and obviate any need for the BIA to enter a decision on that motion that can be reviewed by this Court.

Execution of the removal order is imminent. Counsel for Mr. Demjanjuk inquired of counsel for the OSI, Mr. Eli Rosenberg, on Friday April 10, 2009, what the Department's intentions were with respect to executing the order of removal -- did they intend to execute the removal order while the Motion to Reopen was pending before the BIA? Mr. Rosenberg said that he could give counsel no information on that subject which was a matter for ICE.

Counsel for Mr. Demjanjuk on April 13, 2009 inquired of Mr. Ajay Bhatt, an attorney in the Human Rights Law Division of ICE who has been designated as the ICE point of contact with Mr. Demjanjuk, what the ICE plans were to execute the order of removal--specifically whether ICE intended to execute the order of removal *before* the BIA had ruled on the pending Motion to Reopen and *before* Mr. Demjanjuk had an opportunity to seek review in this Court. Mr. Bhatt agreed

to “check with his superiors.” Mr. Bhatt’s e-mail response is attached hereto as Attachment No. A. Mr. Bhatt’s answer, no doubt given at the direction of his “superiors,” can charitably be described as “we aren’t going to tell you.”

Under the circumstances, the BIA order denying an emergency stay entered on April 10, 2009 is a final order of removal. The BIA’s order will permit Mr. Demjanjuk’s removal without entry of any decision by the BIA on the pending Motion to Reopen, a motion that raises substantial issues that could not have been raised at the time of the hearing in the original removal case.

APPLICABLE LAW FOR GRANTING A STAY

A motion for a stay pending review of an order of the BIA is governed in this circuit by the traditional standards applied to stays pending appeal: (i) likelihood of success on the merits; (ii) irreparable harm to the applicant if the stay is not granted; (iii) that the potential harm to the applicant outweighs the harm to the opposing party if a stay is not granted; and (iv) that the granting of the stay would serve the public interest. *Bejjani v. Immigration and Naturalization Service*, 271 F.3d 670 (6th Cir. 2001). *See also Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005); *Douglas v. Ashcroft*, 374 F.3d 230 (3d Cir. 2004), *but see Teshome-Gebreegiabher v. Mukasey*, 528 F.3d 330 (4th Cir. 2008).

APPLICATION OF LAW TO THE FACTS OF THIS CASE

1. Irreparable Injury

Failure of this Court to grant a stay pending review to Mr. Demjanjuk would present a substantial probability of causing him irreparable injury. In the absence of a stay, ICE is likely to execute the outstanding order of removal. This will result in the BIA treating the Motion to Reopen as having been withdrawn. There will be no decision on the Motion to Reopen and this Court will have no opportunity to review the BIA's disposition of the Motion to Reopen. Mr. Demjanjuk will have been denied his right to administrative adjudication of his claim and to this Court's review of that administrative adjudication.

Attached to this Motion as Attachment B is the Motion to Reopen that Mr. Demjanjuk filed with the BIA, attached to this Motion as Attachment C is the Emergency Motion to Stay Removal that Mr. Demjanjuk filed with the BIA, and attached to this Motion as Attachment D is Mr. Demjanjuk's Reply to the government's Opposition to his Motion to Reopen. As the Court will see from that Motion to Reopen and the supporting exhibits, Mr. Demjanjuk is an 89 year old man who is in poor health. He is suffering from a variety of ailments including:

- Myelodysplastic Syndrome (MDS)
- Chronic Kidney Disease (CKD Stage 3)
- Hyperoxaluria
- Kidney Stones
- Anemia (secondary to MDS)
- Leucopenia (secondary to MDS)
- Arthritis
- Severe Spinal Stenosis

On April 2, 2009 ICE sent a doctor to examine Mr. Demjanjuk to determine whether he was in a medical condition suitable to endure an airplane flight from Cleveland to Munich, Germany. That medical examination was video taped by John Demjanjuk, Jr., Mr. Demjanjuk's son. A video clip (11 minutes) made from that tape was submitted to the BIA in support of the Motion to Reopen. The Court need only review that clip to see that Mr. Demjanjuk is a very sick man and completely unable to withstand the rigors of travel to Germany, arrest, incarceration and trial in Germany. Subjecting him to such treatment in his current medical condition would cause him extreme and prolonged pain and suffering.

Even ICE, in denying Mr. Demjanjuk's application for an administrative stay of removal under 8 U.S.C. 1231(c)(2)(A), concluded (emphasis added):³

On April 2, 2009, an ICE Division of Immigration Health Services (DIHS) physician conducted a physical examination and concluded that Mr. Demjanjuk is *medically stable* to travel from the United States to the FRG. *A DIHS physician and nurse will be available to assist him during the flight. Medical personnel will monitor his medical condition while en route from Cleveland, Ohio, to Munich, FRG.*

Interestingly, notwithstanding Mr. Demjanjuk put the medical exam in issue before the BIA, ICE did not submit its own doctor's medical report nor has ICE

³ The ICE decision denying the administrative stay is attached as Attachment No. 2 to the Emergency Motion to Stay Removal filed with the BIA.

made it available to Mr. Demjanjuk. Mr. Demjanjuk does not understand the meaning of “medically stabile” in this context. Some indication that it could apply to a person who is very ill can be drawn from the fact that ICE representatives have told Mr. Demjanjuk’s family that ICE plans to transport Mr. Demjanjuk from Cleveland to Munich in a G4 private plane in which he will be accompanied by a physician, a nurse, and a guard.

It is not clear whether Mr. Demjanjuk’s severe spinal stenosis, the pain of which is obvious on the video clip, will require that Mr. Demjanjuk be carried on a stretcher on the plane and heavily medicated. The precise meaning of “medically stabile” in these circumstances could only be determined by examination of the complete medical report. The Court’s review of the video clip, however, will be sufficient to convince it that this is not a deportation but a medical evacuation of an extremely sick man.

Irreparable injury consists of denying Mr. Demjanjuk any review of the claims made in his Motion to Reopen, and subjecting him to the pain and suffering of transportation in his condition and to a period of arrest and incarceration in Germany.

2. Probability of success on the merits

Mr. Demjanjuk’s contention is straightforward. Putting a sick 89 year old man through the rigors of arrest, incarceration and trial in Germany will inflict pain

and suffering on him that rise to the level required by the regulations (8 CFR 1208.18) to constitute torture as the United States has implemented the United Nations Convention Against Torture. Moreover, it is clear that the *purpose and intent* of the German authorities in accepting Mr. Demjanjuk's deportation and then subjecting him to this abusive treatment is to punish him (or, perhaps more accurately, to be seen to be punishing him) for alleged offenses committed during World War II. This meets the standard of "torture" under the Convention as implemented by the United States, severe physical and mental pain intentionally inflicted by an official for the purpose of punishing him for suspected offenses. *See* 8 CFR 1208.18.

As Mr. Demjanjuk pointed out in his Motion to Reopen, the German authorities are unlikely to advertise in the press their intent and purpose in subjecting Mr. Demjanjuk to the severe pain and suffering they clearly are planning for him. The Court must draw reasonable inferences from the facts. In this case the facts are compelling.

Even the government in its opposition to Mr. Demjanjuk's Motion to Reopen noted the fact that the German authorities have been less than aggressive in prosecuting "Nazi cases." As the government put it in its Opposition to Mr. Demjanjuk's Motion to Reopen:

Any argument that Demjanjuk wishes to make about capacity to stand trial is properly made to the German

authorities after arrival in Germany. German courts have the authority to dismiss prosecutions on health grounds. Indeed, in Nazi cases, such outcomes have been commonplace in Germany for many decades. [citation omitted]

We now have the unusual circumstance of the German authorities reaching out to the United States to accept the deportation of a sick 89 year old man, with the objective of arresting him when he arrives in Germany, incarcerating him and prosecuting him. It is a fair question to ask why the German authorities feel it necessary now to reach across 3000 miles of ocean to prosecute a sick 89 year old Ukrainian former POW of the Germans. Because “torture” as defined by the regulations includes a purpose and intent component, the Court must consider the motives of the German authorities.

As the government recognizes, it is more or less common knowledge (though perhaps not arising to a level where a court could take judicial notice) that the German authorities have not been aggressive in prosecuting the numerous German authors of the many horrors of their World War II occupation of much of Europe, including their deliberate extermination of over 12 million people--Jews, Poles, Russians, Ukrainians and others in concentration camps, death camps, “prisoner of war” camps, intentional starvation, and garden-variety mass shootings. What accounts for the newly found zeal of the German authorities? It is politically easier for the German authorities to reach out to arrest, incarcerate and prosecute

an 89 year old, sick former Ukrainian POW -- for the first time to show vigor in prosecuting a "Nazi case" -- to demonstrate their seriousness about dealing with the horrors inflicted on Europe during World War II than to look closer to home, in their own backyards, for their "quiet neighbors" who clearly are culpable?

3. Harm to third parties

Granting a stay of removal to permit review of the BIA's April 10 decision denying a stay, or to permit review of a BIA order on the pending Motion to Reopen will harm no third parties. Mr. Demjanjuk poses no threat to the United States or anyone in it. He has lived a blameless life here and there is no contention otherwise.

4. The public interest

Congress has clearly expressed its intent that the United States not remove people to countries or environments where they will be subjected to torture. In the case of Mr. Demjanjuk, it is particularly appropriate that this intent be respected. In 1977-1993 a terrible wrong was done to Mr. Demjanjuk. He and his family were subjected to extraordinary stress, pain and suffering. Mr. Demjanjuk spent five years on death row, sentenced to hang for a crime he did not commit. He was

sent to Israel by the same OSI that now wants to send him to Germany to be tried again, apparently on some of the same charges that were laid against him in Israel.⁴

Whatever the interest of OSI in seeking to remove Mr. Demjanjuk again, this time to Germany, the source of the horrors of World War II, the public interest does not require this Court to further them. The public interest, as opposed to the parochial interest of the OSI, is in an orderly and careful consideration of Mr. Demjanjuk's claims, not in hustling him off in the middle of the night in a private plane attended by medical personnel interested only in keeping him "medically stabile" in order to deliver him to the German authorities who clearly have their own agenda.

CONCLUSION

For the foregoing reasons, John Demjanjuk, the petitioner, respectfully requests that the Court:

1. Enter a stay pending review of the April 10, 2009 decision of the Board of Immigration Appeals; or in the alternative
2. Enter a stay pending review in this Court of a decision by the BIA on his Motion to Reopen.

⁴ The Israeli Supreme Court itself noted the "double jeopardy" concerns that counseled the Israeli Attorney General not to bring additional charges against Mr. Demjanjuk in Israel. Apparently, double jeopardy concerns are not to be allowed to stand in the way of German prosecution of Mr. Demjanjuk.

Respectfully submitted,

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