

Justice at last for the heirs of Holocaust victims?

Questions and comments regarding the Federal Administrative Court decision from April 24, 2013, BVerwG 8 B 81.12

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Over the years, this magazine has published numerous articles about the rights of the heirs of Holocaust victims who, for various reasons, failed to comply with the deadlines specified in the Property Act.¹ These articles expressed the viewpoint that the JCC should only be regarded as a trustee² and is obligated to share proceeds from property assets or compensation with the entitled parties. As a means of supporting this, I proposed further clarification of § 2 para 1 sentence 3 of the Property Act³. This proposal was supported by more than thirty petitions submitted to German Parliament (Bundestag). Unfortunately, the Bundestag rejected all of the petitions as recommended by the Petitions Committee.⁴ The Bundestag Legal Affairs Committee also refused to support the proposals.⁵

Numerous letters to the responsible federal ministers of finance and justice failed to change the situation. Germany's Federal President expressed compassion, but nothing more.

In my published articles I expressed constitutional objections to Property Act regulations that led to an expropriation of heirs who did not file a claim on time.

¹ For example, Fritz Enderlein: „§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional?“ ZOV 2008 [6] 277, and „Restitution bypasses victims: Why the German government needs to take immediate action!“ ZOV 2010 [4]. 170

² Stegemann: „The Conference on Jewish Material Claims Against Germany as legal trustee of the heirs of property owners expropriated by the Nazis“ ZOV 2012 [6] 313

³ Fritz Enderlein: „Is the Federal Republic of Germany responsible for the JCC's use of compensation funds it receives?“ Berliner Anwaltsblatt 10/2009, p. 354

⁴ Bundestag publication 17/8911

⁵ „Missed application deadlines – Correspondence“ ZOV 2010 [4] 175

Now, as a result of an appeal against denial of leave to appeal with constitutional objections, the Federal Administrative Court has addressed several issues, including the following:

1. Time limits specified in § 30a para 1 sentence 1 of the Property Act
2. Legal succession of the Jewish Claims Conference pursuant to § 2 para 1 sentence 3 of the Property Act
3. Article 3 para 1 of Basic Constitutional Law
4. § 30 para 1 sentence 4 of the Property Act
5. Article 14 of Basic Constitutional Law and Article 1 of the first ECHR protocol

Citing a number of earlier decisions, the Federal Administrative Court dismissed the appeal against denial of leave to appeal. At the same time, the court came to a notable decision with yet unforeseen consequences. (Quotations from the Federal Administrative Court decision shown in italics. Text highlighted in bold by FE.)

The sole asserted reason for accepting the fundamental importance of the case (§ 132 para 2 No. 1 of the German Code of Administrative Procedure – VwGO) is not present.

A legal matter shall be of fundamental importance within the meaning of § 132 para 2 No. 1 of the German Code of Administrative Procedure [VwGO] only if within the scope of the appeal proceedings clarification of an unsettled legal issue of appealable law by the highest court may be expected, which in its significance goes beyond the individual case on which the complaint is based.

What about cases in which new information becomes available? When previous decisions have been repeatedly criticized because they contained untenable arguments and weak justification? For example, the idea that destitute and impoverished heirs living in far off lands should hire a lawyer to keep an eye on German federal legislative actions to determine whether new restitution laws have been passed and filing deadlines established?⁶

The issues are fundamentally important and go far beyond individual cases. This is made obvious by the fact that, up until December 31, 2011, the JCC paid out approximately €37 million to

⁶ Fritz Enderlein: „Expropriation resulting from Federal Constitutional court decisions and pursuant to § 30a of the Property Act” ZOV 2010 [5] 212

heirs who filed claims too late⁷ and other heirs waiting for compensation from the Goodwill Fund.

In the following discourse, I will focus on the first two issues.

1. Time limits specified in § 30a para 1 sentence 1 of the Property Act

*To the extent that claims based on the Property Act are protected within the context of Article 14 of Basic Constitutional Law, § 30a para 1 sentence 1 of the Property Act clearly presents a **limitation of content and scope** as defined by Article 14 para 1 sentence 2 of Basic Constitutional Law.*

Instead of determining the content of the rights, § 30a para 1 sentence 1 of the Property Act states that there are no rights, there is no content left. And the limitation barrier? Indeed, you have a right, but there is no way to overcome the barrier.

Claims under the Property Act are restitution claims. If Nazi legislation is regarded as null and void, or has been repealed by the Allied Powers and through subsequent legislation, the original owners have not lost the legal rights that have been passed on to their heirs. These property claims are clearly subject to Article 14 of Basic Constitutional Law.

This [limitation of content and scope] is admissible because the deadline for property claims is justified by substantial reasons of public interest and also complies with the constitutional principle of proportionality.

Substantial reasons of public interest? Is the expropriation of Jewish heirs in the public interest? Is this not contradictory to Germany's obligation to provide restitution? Even if expropriation was necessary for some reason, according to Art.14 of Basic Constitutional Law, suitable compensation must be awarded. Where is it?

⁷ <http://www.claimscon.org/about/successor/goodwill-fund/>

The ... loss of the right to a return [of property] or compensation is still commensurate with the ... purposes of legal certainty and legal clarity, as well as with the removal of investment barriers.

This does not require expropriation. The effect of expropriation results from the interplay with § 2 para 1 sentence 3 of the Property Act. Legal certainty and clarity are also achieved when the JCC is only treated as a trustee for the entitled heir.⁸

It further states that the legislature is entitled to *introduce deadlines, even if these inevitably result in hardships*.

These hardships are by no means inevitable. If the JCC was relegated to the role of a trustee, there would be no more hardships for entitled heirs who have missed the deadline.

The hardships associated with the introduction of the deadline are in any case suitably justified by the purpose of § 30a para 1 sentence 1 of the Property Act.

This is in no way justified vis-à-vis Nazi victims and has been demonstrated as unnecessary.

2. Legal succession of the Jewish Claims Conference pursuant to § 2 para 1 sentence 3 of the Property Act

The complaint also states that there is a basic need to clarify whether the restitution precept for severe Nazi-related injustices as well as Article 14 of Basic Constitutional Law are compatible with the JCC being regarded as the legal successor pursuant to § 2 para 1 sentence 3 of the Property Act, ... without creating a legal framework that gives the heirs of Jewish victim a legal claim against the JCC in cases where the heirs have missed the deadlines set by the JCC.

Is the JCC making the laws? True, the JCC asked for this deadline, but it was actually set by the German Parliament.

⁸ Fritz Enderlein: „Still Waiting for Restitution” ZOV 2012 [4] 9

Purportedly, laws should be passed to ensure that the JCC serves only as a trustee authorized to apply on behalf of the legal heirs or simply act on their behalf in court proceedings. This question does not lead to permission for an appeal because it can be answered on the basis of the Act and in the context of case law.

So what is the answer? Do the Jewish heirs already have a legal claim against the JCC?

When the entitled Jewish claimant or legal successor fails to submit a claim before the specified deadline, the claim expires.

The claim against the federal government expires, but it should not expire against the trustee.

The legal heir's right to property is not violated by the fiction of the JCC as legal successor.

Very nice. According to the Property Act, this applies to the property ownership rights of all entitled heirs. In contrast, the JCC clearly limited those eligible for the Goodwill Fund.⁹

But, what can the entitled heir do with these property ownership rights?

The restitution claim of the claimant regulated in § 1 para 6 Property Act is a determination of the content and limits of the property owner, which cannot be constitutionally challenged.

Has anyone ever tried to object to the restitution rights specified in § 1 para 6 of the Property Act? What does this have to do with the limitation of content and scope for the property owner? Which limitations apply? Perhaps this doesn't pertain to the entitled property owners but to the party with disposal rights who is facing the property restitution claim of the entitled heir. As it pertains to the party with disposal rights, there was no objection to this limitation of content and scope in the appeal against denial of leave to appeal.

⁹ Fritz Enderlein: „What the guidelines and deadlines of the JCC Goodwill Program are all about” Jüdische Zeitung, August 2008, p. 2 and „The Claims Conference and German inheritance law” Jüdische Zeitung, September 2011, p. 20

The JCC is tasked with asserting restitution claims on behalf of Jewish victims who have not filed claims themselves, and is required to use the proceeds for collective restitution to the Jewish people.

Up until now, this has been communicated in all official statements. This is also how the Bundestag Legal Affairs Committee and Federal Ministries see things. Of course, the Jewish people have a right to restitution. But the individuals who have been persecuted and injured are also entitled to restitution.

§ 2 para 1 sentences 3 and 4 of the Property Act are also intended to ensure restitution for Jews persecuted by the Nazi regime. However, since the JCC was neither persecuted nor does it assume the function or tasks of those actually persecuted, the JCC is not entitled to freely dispose of the assets assigned to the organization on the basis of its eligibility pursuant to § 2 para 1 sentences 3 and 4 of the Property Act.

This is exactly how my clients see it. But Germany's Federal Ministries see things differently!

On April 16, 2009 the Federal Ministry of Justice wrote: „You certainly agree that comprehensive authorization of the JCC is indispensable“ ... „The JCC is solely responsible for deciding how the funds are used.“ On November 16, 2009 the same Ministry wrote: „In particular, it does not seem necessary or politically feasible for the legislature of the Federal Republic of Germany to influence the Goodwill program administered by the Jewish Claims Conference.“

Regarding the legal position of the JCC, the Federal Ministry of Finance wrote the following on April 7, 2009: „The use of the funds acquired in this way is up to the discretion of the JCC ... The Federal Ministry of Finance is not authorized to make demands on the JCC in this respect or set guidelines regarding the way the funds are administered.“

Nevertheless, on January 11, 2013, the Head of Division V of the Federal Ministry of Finance, acting on behalf of Federal Minister Dr. Schäuble, wrote: „... Prof. Dr. Enderlein, appealed to both ministries and to the German Bundestag Petitions Committee to establish for Holocaust survivors or their heirs who failed to file restitution claims under the Property Act within the

prescribed time limits a legal claim against the JCC forcing the organization to hand over formerly owned assets or to relinquish sales proceeds from these property assets. He further supported his idea by publishing articles in professional journals. The Federal Ministry of Justice and the Federal Ministry of Finance repeatedly rejected proposals to amend the Property Act.

„In accordance with § 2 para 1 sentence 3 of the Property Act, the JCC has been designated the legal successor to all claims not asserted by entitled Jewish heirs or their legal successors. The JCC has acquired the full rights to the transferred assets and does not merely serve as a trustee. This legal position has been challenged by Prof. Dr. Enderlein in his efforts to retroactively reclaim the assets in question.

„How the JCC uses the funds obtained from the restitution of property assets is entirely their own affair ruled by the organization’s bylaws.“¹⁰ (Please pardon the long quotation.)

My clients are very pleased that the Federal Administrative Court sees things in a completely different light!

Moreover, [the JCC] is only authorized to serve as a trustee for those Jews or their heirs who were persecuted by the Nazi regime and who are either not entitled to compensation, or have failed to meet the time limits requested by the JCC pursuant to § 30a para 1 of the Property Act.

The JCC is therefore not only a trustee for the Jewish people, including those persecuted or murdered who have no natural heirs, but also a trustee for entitled survivors who failed to comply with the deadlines specified in the Property Act.

However, the JCC sees things differently and, at the same time, has the support of the German Government and the German Parliament.

Although, according to the Property Act, people who are ‘genuinely entitled’ are disqualified and unable to assert claims against the JCC.

¹⁰ The JCC bylaws specifically state that the organization is required to support individual victims of Nazi persecution. These bylaws are extensively quoted in ZOVS 2012 [6] 324 pp.

But it must be possible to file a lawsuit against the JCC in a civil court. As a trustee, the JCC is obligated to return the assigned assets.¹¹

By using a fictitious legal succession, the legislature only intended to create temporary authorization for the JCC (this authorization thus expires when the heirs demand a return of the assets) to prevent the German state from becoming the legal heir.

An indirect inheritance by the German state is not prevented when the JCC can freely dispose of the assets and use the money that actually belongs to the heirs to finance assistance programs that should actually be funded by the German government. The less the JCC pays out to the entitled heirs, the more the state saves. If, as recently, the German Federal Ministry of Finance increases relief funds, the JCC can no longer argue that its assistance programs were threatened by the continuation of the Goodwill Fund.

The legal status of the entitled heirs is therefore not affected by § 2 para 1 sentence 3 of the Property Act. These individuals remain the legal successors. Accordingly, in several decisions, the Federal Administrative Court assumed that this is merely a fictitious legal succession in favor of the JCC.

That's right. But so far, no practical conclusions have been drawn from these decisions.

The fact that, according to the Property Act, the excluded „entitled heir“ has no right to assert a legal claim against the JCC...

Although the entitled heir and rightful property owner has no legal claim under the Property Act, he does have rights under civil law. The question remains as to why this could not be clarified in

¹¹ There is no record of a successful lawsuit against the JCC. See Fritz Enderlein: „The Jewish Claims Conference in court?, ZOV 2011 [5] 202

In a decision to reject a case dated September 4, 2012, the District Court of the Southern District of Florida essentially stated that, with respect to the German legislation, the JCC is not required to surrender the assets. The lawsuit is thus directed against the system established in Germany. (Case No. 11-80719-CIV-Marra/Hopkins)

the Property Act. Is it because this is related to administrative law? The priority investment law is also an administrative law, yet it regulates civil claims in § 16.

... is a legal consequence that corresponds to the Allied restitution laws.

This is true, but times were different back then. Yet there was overwhelming agreement that the assets should be returned to the entitled owners by the successor organizations.¹²

In the implementation of the Federal Administrative Court decision discussed here, in contrast to their previous stance, the Federal Government is obligated to take action and demand that Goodwill Fund established by the JCC be continued in its entirety. Since 1998, this fund has only been used to pay compensation in special hardship cases.

¹² Heirless and unclaimed. Unclaimed? ZOV 2012 [6] 324 pp.