

# DESCENDANTS OF HOLOCAUST REFUGEES FACE MAZE OF DISCRIMINATORY AND ARBITRARY REQUIREMENTS IN RECLAIMING GERMAN CITIZENSHIP

CAMERON B. WOLFE\*

Reports of anti-Semitic incidents in the United States and the United Kingdom have dramatically increased in recent years. According to data released by the Anti-Defamation League, more anti-Semitic incidents were reported in the United States last year than in any year since the Anti-Defamation League began tracking such incidents.<sup>1</sup> In New York City, home to one of America's largest Jewish populations, more than half of the hate crimes last year were attacks on Jewish people.<sup>2</sup> The spread of COVID-19 and the strict lockdowns that have followed in much of the western world have led to an even greater surge of religious bigotry.<sup>3</sup> According to an annual report on global anti-Semitism by the Kantor Center for the Study of Contemporary European Jewry at Tel Aviv University, in the months since March 2020, there has been a dramatic increase of accusations against Jews, Zionists, and Israelis, as individuals and as a collective, "for causing and spreading the coronavirus."<sup>4</sup>

The U.K.-based Community Security Trust reported that from January to June 2020, the United Kingdom experienced an "explosion" of online anti-Semitic hate incidents.<sup>5</sup> These incidents largely involved the promotion of conspiracy theories accusing Jews of developing the COVID-19 virus and purposely spreading it to non-Jews.<sup>6</sup> Meanwhile, in the United States, the FBI reported that, since March 2020, neo-Nazi and white supremacist organizations have devoted considerable online resources to promoting a similar

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\* Cameron Wolfe, J.D. Candidate, 2022, Georgetown University Law Center; B.A. Politics, 2016, Brandeis University. © 2021, Cameron Wolfe.

1. Johnny Diaz, *Anti-Semitic Incidents Surged in 2019, Report Says*, NEW YORK TIMES (May. 12, 2020), <https://www.nytimes.com/2020/05/12/us/antisemitic-report-incidents.html>.

2. Liam Stack, *Most Visible Jews Fear Being Targets as Anti-Semitism Rises*, N.Y. TIMES (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/nyregion/hasidic-jewish-attacks.html>.

3. Amy Woodyatt, *Coronavirus Lockdowns are Fueling an 'Explosion' of Anti-Semitism Online*, CNN (Jul. 30, 2020), <https://www.cnn.com/2020/07/30/uk/online-anti-semitism-intl-scli-gbr/index.html>.

4. Daniel Estrin, *New Report Notes Rise In Coronavirus-Linked Anti-Semitic Hate Speech*, NPR (Apr. 21, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/839748857/new-report-notes-rise-in-coronavirus-linked-anti-semitic-hate-speech>.

5. Woodyatt, *supra* note 3.

6. *Id.*

range of anti-Semitic COVID-19 related conspiracy theories.<sup>7</sup> These social media campaigns have claimed that Jews created COVID-19 in order to sell vaccines, and have also encouraged fellow neo-Nazis to spread the illness to Jews and members of law enforcement.<sup>8</sup> In addition, there have been widespread reports of U.S. Jewish institutions and synagogues having their virtual services hacked by hate groups and other anti-Semitic hackers.<sup>9</sup>

The U.S. and the U.K. are homes to two of the largest Jewish diaspora communities outside of Israel.<sup>10</sup> Accordingly, the surge in anti-Semitic activity that COVID-19 has left in its wake has crystalized the importance of a decades-old German law allowing Holocaust refugees and their descendants to reinstate their German citizenship. The increased danger felt by Jews in the U.S. and the U.K. has motivated many former German-Jews to reestablish their ancestral German citizenship not only to reclaim a stolen piece of their heritage but also to seek refuge.<sup>11</sup>

The constitution of the Federal Republic of Germany, referred to as the Basic Law, includes a provision that permits citizenship to be granted to former German citizens who were stripped of their citizenship by the Nazi regime for political, racial, or religious reasons.<sup>12</sup> This provision applies equally to the descendants of those persons whose citizenship was revoked, as the “injustices perpetrated against their forebears prevented them from becoming German citizens by descent.”<sup>13</sup> Specifically, Article 116 (2) of the Basic Law (Grundgesetz) states: “Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial or religious grounds and their descendants shall, on application, have their citizenship restored.”<sup>14</sup> While the large German-Jewish diaspora has mainly utilized this provision, it is by no means exclusive to Jewish victims of the Nazis.

For years, Germany received relatively few applications. In 2015, for example, Germany received only 43 applications under Article 116 (2).<sup>15</sup>

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7. Josh Margolin, *White supremacists encouraging their members to spread coronavirus to cops, Jews, FBI says*, ABC NEWS (Mar. 23, 2020), <https://abcnews.go.com/US/white-supremacists-encouraging-members-spread-coronavirus-cops-jews/story?id=69737522>.

8. *Id.*

9. Estrin, *supra* note 4.

10. See Emily Guskin, *How many Jews live in the U.S.? That depends on how you define “Jewish”*, WASH. POST (Feb. 23, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/02/23/measuring-the-size-of-the-u-s-jewish-population-comes-down-to-identity>.

11. Shannon Dooling, *Fearing Anti-Semitism, Some American Jews Are Reclaiming German Citizenship*, NPR (May 9, 2017), <https://www.npr.org/2017/05/09/526706661/fearing-anti-semitism-some-american-jews-are-reclaiming-german-citizenship>.

12. Grundgesetz [GG] [Basic Law], Article 116 II, translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0728](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0728).

13. See Press Release, Horst Seehofer, Fed. Minister of the Interior, *Easier Path to German Citizenship for Descendants of Victims of Nazi Persecution* (Aug. 30, 2019), <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/EN/2019/08/wiedergutmachung-ns-verbrehen-en.html>.

14. Grundgesetz [GG] [Basic Law], Article 116 II, translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0728](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0728).

15. Luke Hanrahan, *Jewish Refugee Descendants Challenge Germany Over Citizenship*, BBC NEWS (Aug. 13, 2019), <https://www.bbc.com/news/uk-england-49322110>.

The first wave of increased application activity began shortly after the Brexit vote in 2016. That year, Germany received more than 600 applications from British descendants of Jews seeking to reinstate their German citizenship.<sup>16</sup> As anti-Semitism continues to increase in the U.S. and the U.K., the number of applications has ballooned. In 2017 and 2018 alone, Germany received almost 10,000 applications under Article 116 (2), and that figure has continued to increase in the wake of COVID-19.<sup>17</sup>

The dramatic rise in applications that Germany receives under Article 116 (2) has generated newfound scrutiny and calls for reform. Germany faces increasing scrutiny, both from within the country and from the Jewish diaspora, for reviewing applications under Article 116 (2) in an unreasonably restrictive manner and applying the letter rather than the spirit of the law.<sup>18</sup> Of the 10,000 applications filed in 2017 and 2018, Germany only approved 3,900.<sup>19</sup> The German government rejected many of these applications on the basis of unfair and discriminatory technicalities.<sup>20</sup> These technicalities excluded Holocaust refugees and their descendants who were: “(1) Born in wedlock to a formerly German mother and foreign father before 31 March 1953; (2) Born out of wedlock to a formerly German father and foreign mother before 1993; (3) Adopted by formerly German parents before 1977; (4) Born to a female ancestor who fled Germany and married a foreign man before being forcibly denaturalized; (5) Born to an ancestor who fled Germany and applied for the removal of their German citizenship before being forcibly denaturalized.”<sup>21</sup> The most striking, and seemingly unfair, technicality, however, relates to the narrow way in which Germany has construed the term “deprived of citizenship” in Article 116 (2).

By its text, Article 116 (2) applies to “former German citizens, who between January 30, 1933, and May 8, 1945, were *deprived* of their citizenship on political, racial, or religious grounds, and their descendants.”<sup>22</sup> Rather than applying to any minority citizen who fled Germany during the Nazi terror, Article 116 (2) currently applies only to those Germans who were specifically deprived of citizenship by German law. These include those who lost their German citizenship “(1) under §2 of the 11th Decree Implementing the Reich Citizens Act (this affected all German citizens of the Jewish faith who had their permanent residence abroad when the regulation

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16. *Id.*

17. Charlotte Potts & Kate Brady, *Descendants of Nazi Victims Continue Fight for German Citizenship*, DW NEWS (Dec. 02, 2020), <https://www.dw.com/en/descendants-of-nazi-victims-continue-fight-for-german-citizenship/a-52295031>.

18. *Id.*; see also Caroline Henckels & Markus Wagner, *Descendants of Jewish families who fled Nazi Germany still being denied citizenship*, LENS BY MONASH UNIV. (Sep. 3, 2019), <https://lens.monash.edu/@politics-society/2019/09/03/1376442/some-descendants-of-jewish-families-who-fled-nazi-germany-still-being-denied-citizenship>.

19. Charlotte Potts & Kate Brady, *supra* note 15.

20. *See id.*

21. Hanrahan, *supra* note 15.

22. *See Grundgesetz, supra* note 12.

entered into force on 27 November 1941 or later) or (2) on an individual basis under the Act on Revocation of Naturalisations and Deprivation of German Citizenship of July 14, 1933.”<sup>23</sup> Former German citizens who fled Nazi Germany and acquired other citizenship prior to 1941 are thereby ineligible under Article 116 (2).<sup>24</sup> However, even a cursory review of the historical record makes clear that the Jews who fled Nazi Germany in the years prior to their citizenship being officially revoked did not do so voluntarily but because they legitimately and justifiably feared for their lives.<sup>25</sup> Until October 1941, German policy went so far as to “officially encourage[e] Jewish emigration.”<sup>26</sup> Jews who fled Germany prior to 1941, not because they wanted to, but because they feared for their lives, should be eligible to reclaim their former German citizenship under Article 116(2).

Germany’s discriminatory and inflexible restrictions stand in stark contrast to the citizenship restoration programs adopted by other EU countries.<sup>27</sup> In 2019, for example, the Austrian Parliament unanimously ratified a law that greatly liberalized the process for the descendants of Nazi victims who fled the Third Reich to obtain citizenship.<sup>28</sup> Going further back still, Spain and Portugal facilitated the naturalization of the descendants of those who had to flee their homes at the end of the 15th century due to the terror of the Spanish Inquisition.<sup>29</sup> Some commentators have argued that Germany’s technical restrictions are “inconsistent with the right to equality under the German constitution” and with “Germany’s obligations of non-discrimination and the right to private and family life under the European Convention on Human Rights, to which Germany is a party.”<sup>30</sup>

The basic intent of Article 116 (2) is to provide a pathway for the victims of the Nazi terror and their descendants to reclaim their birthright of German citizenship. The scale of the historical injustice caused by the Holocaust has created a clear moral imperative to compensate the Nazi’s many victims. That moral imperative, combined with the rise of anti-Semitism around the world, has created new political pressure in Germany to reform Article 116 (2) so it is applied in a more generous and equitable fashion.<sup>31</sup>

In August 2019, in response to this growing pressure, the German Federal Ministry of the Interior, Building and Community (BMI) issued two Decrees to facilitate the acquisition of German citizenship by a broader swath of those who, while descendants of Germans persecuted under the Nazi regime, were

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23. *Restoration of German citizenship (Article 116 II Basic Law)*, GERMAN MISSIONS IN THE UNITED KINGDOM, <https://uk.diplo.de/uk-en/02/citizenship/restoration-of-citizenship> (last visited Jan. 4, 2020).

24. See Henckels & Wagner, *supra* note 18.

25. *German Jewish Refugees, 1933-1939*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/german-jewish-refugees-1933-1939> (last visited Jan. 23, 2021).

26. *Id.*

27. See Potts & Brady, *supra* note 17.

28. *Id.*

29. *Id.*

30. See Henckels & Wagner, *supra* note 18.

31. See Press Release, *supra* note 13.

not entitled to restoration of citizenship under the prior application of Article 116 (2).<sup>32</sup> The Federal Minister of the Interior, Horst Seehofer, said at the time of the announcement that: “Germany must live up to its historical responsibility towards descendants of German victims of National Socialist persecution who have been deprived of citizenship rights. This applies particularly to those whose parents or grandparents were forced to flee abroad.”<sup>33</sup> The announcement further stated that the BMI “considers it a sign of great trust that descendants of emigrated victims of National Socialist persecution now wish to acquire German citizenship” and that is why it decided to “create more options, in the form of these decrees, for the benefit of descendants who wish to become German.”<sup>34</sup>

The 2019 Decrees were indented to rectify several of Germany’s more controversial policies. Specifically, they expanded eligibility under Article 116 (2) to: “(1) children born in wedlock before 1 April 1953 to German mothers whose citizenship had been revoked and foreign fathers; (2) children born out of wedlock before 1 July 1993 to German fathers whose citizenship had been revoked and foreign mothers; and (3) children whose German parent had acquired foreign citizenship and lost their German citizenship amid National Socialist persecution.”<sup>35</sup> In addition, the Decrees loosened other requirements so that applicants need only demonstrate “basic” German-language skills, as well as knowledge of Germany’s legal and social order and living conditions in a personal interview with an embassy official.<sup>36</sup> These requirements are not fleshed out with any degree of specificity and leave a great deal of the evaluation up to the personal discretion of embassy officials. As such, opportunities for corruption, abuse, and discrimination abound. Furthermore, the lack of standardization has led to reports of differing application processes, depending on which embassy an applicant applies through.<sup>37</sup> While the substantive reforms of the Decrees address certain of the prior discriminatory policies, they do not go nearly far enough.

For example, the law bars a child from eligibility born out of wedlock to a German mother.<sup>38</sup> However, a similarly situated child who was born out of wedlock to a German father remains eligible.<sup>39</sup> While the German government has claimed that the Decrees will be “implemented generously” and that the suitability interviews will be “conducted in a spirit of goodwill,” applicants deserve far more legal certainty and standardization.<sup>40</sup>

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. See Henckels & Wagner, *supra* note 18.

38. See Press Release, *supra* note 13.

39. *Id.*

40. *Id.*

Dissatisfied with the extent of the 2019 reforms, the Greens Party requested a debate in the Bundestag in January 2020 to consider ratifying further reforms to the Article 116 (2) process.<sup>41</sup> Symbolically, that same week heads of state and houses of parliament in countries around the world commemorated the liberation of the Auschwitz-Birkenau death camp and held Holocaust memorial services. Unfortunately, the conservative Christian Democrats, Christian Social Union, and the Social Democrats blocked further legal reforms.<sup>42</sup> These conservative parties urged that the 2019 Decrees were sufficient safeguards against discriminatory and arbitrary exclusion.<sup>43</sup>

It remains painfully clear, however, that further legal reform is necessary. German legal scholars have pointed out that the difference between a Decree and formal legislation is not “merely symbolic.”<sup>44</sup> The 2019 Decrees represent a discretionary change akin to an executive order in the United States. Therefore, nothing is stopping the German government from simply overturning or amending the 2019 Decrees with a simple “stroke of a pen.”<sup>45</sup> Changing or repealing legislation, by contrast, would necessitate the consent of the German Parliament and is therefore much harder to accomplish.<sup>46</sup>

In addition to increasing the long-term reliability of the Article 116 (2) reforms, the German government should address the need for increased transparency and consistency regarding eligibility requirements. At the same time, the criteria for eligibility should be made more equitable, objective, and standardized to account for the painful historical realities of the Nazi era. The current process forces Holocaust refugees and their descendants to fight tooth and nail for their right to German citizenship and leaves many falling between the cracks of arbitrary and unfair requirements. For those German citizens forced to flee by the Nazis, the German Constitution makes the restoration of lost citizenship a right, not merely a discretionary reward. By liberalizing the immigration process for Jewish descendants of Holocaust refugees threatened by the rise of COVID-19 fueled anti-Semitism, Germany can build a legacy as a safe harbor rather than a quagmire of arcane and discriminatory immigration requirements.

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41. See Potts & Brady, *supra* note 17.

42. *Id.*

43. *Id.*

44. See Henckels & Wagner, *supra* note 18.

45. *Id.*

46. *Id.*