Second-Class Citizens? Restricted Freedom of Movement for *Spätaussiedler* is Constitutional

By Amanda Klekowski von Koppenfels[*]

A. Introduction

The right to the freedom of movement for all Germans is one of the nineteen so-called *Grundrechte* (Fundamental Rights) and is enshrined in Article 11(1) of the German *Grundgesetz* (Basic Law): "All Germans enjoy freedom of movement throughout the Federal territory." On 17 March 2004, however, the *Bundesverfassungsgericht* (Federal Constitutional Court) handed down a decision[1] in which it concluded that the restriction of freedom of movement for one clearly defined group of German citizens is constitutional. Pursuant to the *Wohnortzuweisungsgesetz*,[2] or Residence Assignment Act, as amended in 1996, *Spätaussiedler* (ethnic German migrants from the former Soviet Union who are eligible for full citizenship status), may have their freedom of movement restricted during the first three years of their residency in Germany. The restriction on their freedom of movement is triggered if they seek to avail themselves of any of a range of social benefits, including: welfare, some forms of unemployment assistance (*Arbeitslosenhilfe*), or integration assistance directed at *Spätaussiedler*, such as a six-month language course. Confronted with the loss of these social benefits, *Spätaussiedler* who nonetheless choose to exercise their freedom of movement are eligible to receive only a subsistence level of support.[3] This restriction applies, nearly without exception, to all *Spätaussiedler* for the first three years of their residence in Germany due to the high rate of

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[1] BVerfG, 1 BvR 1266/00 (17 March 2004)

[2] *Gesetz über die Festlegung eines vorläufigen Wohnortes für Aussiedler und Übersiedler*, v. 6.7.1989 (BGBl I S. 1378). *Zweites Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler*, v. 28.2.1996 (BGBl I S. 223).

[3] §31(1)

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reliance among *Spätaussiedler* in their initial years in Germany upon these forms of public assistance.[4]

Aussiedler (literally translated as "out-settlers") are persons who, drawing upon German ancestry and coming from the former Soviet Union or, until 1992, Central and Eastern Europe, may fulfill certain conditions, including passing a German language test, and qualify to come to Germany with the status of *Aussiedler*. After 1992, the term used was *Spätaussiedler*, or "late out-settlers." This status entitles them to German citizenship as well as to various integration assistance packages, including the payment of pensions, unemployment and welfare.[5]

Restrictions of the freedom of movement are foreseen in the Basic Law, under the conditions set out in Article 11(2).[6] However, according to scholarly commentary on Article 11, this is the first time that a restriction of the freedom of movement has been applied to a group not defined by a professional duty, such as that of soldiers.[7] Otherwise, it has been applied only in individual cases.[8]

The law in question, the *Wohnortzuweisungsgesetz*, draws upon the provision in Article 11(2) *Grundgesetz* which states that the freedom of movement "…may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community." In its decision of the *Spätaussiedler* case, the *Bundesverfassungsgericht* gave priority to the right of the federal states and municipalities to be free of a "particular burden" over the right of *Spätaussiedler* to enjoy the right of freedom of movement. Because this is a right otherwise enjoyed by all other German citizens, the Court's decision raises some troubling questions about the equal treatment of *Spätaussiedler*: are there now second-class German citizens?

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[4] *Integrationsbericht*, Märkischer Kreis, 2004, p. 14

[5] For an extended discussion of *Aussiedler*, see Amanda Klekowski von Koppenfels, *The Devolution of Privilege: The Legal Background of the Migration of Ethnic Germans*, *in* COMING HOME TO GERMANY? THE INTEGRATION OF ETHNIC GERMANS FROM CENTRAL AND EASTERN EUROPE IN THE FEDERAL REPUBLIC, 118 (David Rock/Stefan Wolff eds., 2002)

[6] GG Article 11(2): This right may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free democratic basic order of the Federation or of a Land, to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime.

[7] Hartmut Krüger, *Artikel 11*, *in* GRUNDGESETZ KOMMENTAR, para 28 (Michael Sachs, ed., 1999).

[8] *Id.*

This article will discuss the legal background and the development of *Aussiedler* migration. It will go into more detail on the law restricting the freedom of movement, and the background behind the passage of the law. Finally, this article will discuss and comment on the *Bundesverfassungsgericht* decision itself.

B. Evolution of *Aussiedler* Migration

Article 116(1) *Grundgesetz* laid the groundwork for the admission and equality of *Vertriebene* (expellees) and *Aussiedler*. In the wake of the 1945-1949 expulsions, in which twelve million Germans were expelled from former German territories ceded to Poland and parts of the Soviet Union as well as from Czechoslovakia. The citizenship status of the eight million expellees who had settled in West Germany had no single legal basis. Three distinct groups of Germans made up the membership of the expellees: *Reichsdeutsche*, or those who had been German citizens in the territories since ceded to Poland; *Sudetendeutsche*, those Germans from the Sudetenland in Czechoslovakia and who had become German citizens by the annexation of the Sudetenland in 1938; and so-called *Volksdeutsche*, ethnic Germans, but not German citizens, who had been expelled from their Central and Eastern European homes.[9] While the citizenship status of the 4.4 million *Reichsdeutsche* was clear – they were indubitably German citizens – the legal status of the 2 million *Sudetendeutsche* and 1.6 million ethnic Germans had to be resolved.

Article 116(1) included expellees, from all the above-mentioned groups, as full members in the German polity, making expellees the equal of indigenous Germans with no legal differentiation between indigenous Germans and expellees.[10] Furthermore, in order to ensure the legal equality of the expellees, the phrase *deutsche Volkszugehörigkeit*, roughly translated as "(German) ethnicity," but literally meaning "belonging to a people," was explicitly introduced into the text of Article 116.[11] The addition of this phrase to the constitutional provisions, clearly intended to ensure the inclusion of all expellees, is a direct result of the Allies' use of German ethnicity as the determining factor for deportation and expulsion. In the face of this strong textual commitment to the equality of expellees, the decision by the *Bundesverfassungsgericht* permitting the restriction of one fundamental right for *Spätaussiedler* is particularly worrying.

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[9] HANS W. SCHOENBERG, GERMANS FROM THE EAST: A STUDY OF THEIR MIGRATION, RESETTLEMENT AND SUBSEQUENT GROUP HISTORY SINCE 1945, 36, (1970).

[10] GG Article 116 (1) Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of December 31, 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person.

[11] Parlamentarischer Rat, Hauptausschuß, 19 Jan. 1949, 596 (45th Sess.).

The growing ideological conflict of the Cold War also played a key role in Germany's policy toward ethnic Germans in the East Bloc, as reflected in these legal texts, as will be seen below. Some three to four million ethnic Germans were estimated to remain in Eastern and Central Europe after the expulsions.[12] An additional 16 million ethnic Germans also resided in the Communist Bloc, in East Germany. West German parliamentarians felt that both these groups of Germans were owed a special debt, particularly as they continued to suffer ethnically based discrimination within the East Bloc.[13] Consequently, West Germany provided a safe welcome to all of these ethnic Germans as a means of registering political protest against the East Bloc. The status of ethnic Germans in the East Bloc is codified in Article 116(1) as well as in the second, more extensive legal text relevant for postwar citizenship developments, the *Bundesvertriebenengesetz*, or Federal Expellees Act.[14]

In addition to Article 116(1), which laid the groundwork for the admission and equality of expellees and *Aussiedler*, the *Bundesvertriebenengesetz* regulated the finer details of the admission of *Aussiedler* to Germany. This Act established a legal basis for the integration and equality of the expellees in all spheres – economic, professional, social, educational and residential. Their integration was to be aided where necessary, even if it appeared that expellees were privileged over native Germans.[15] One of the means of aiding the expellees was to distribute them more evenly throughout Germany. This distribution would be fully voluntary[16] and was intended to help them find housing and jobs in the destroyed Federal Republic. The question of burden upon certain *Länder*, or federal states,[17] was also expressly addressed, giving the federal government the right to determine in which states and from which states persons should be re-settled. Expellees – and, later, *Aussiedler* – were explicitly provided a status equal to native Germans in all *Sozialversicherung* (social insurance) issues. Pensions, unemployment, and health insurance were to be

[12] DANIEL LEVY, DAVID ROCK AND STEFAN WOLFF COMING HOME TO GERMANY? THE INTEGRATION OF ETHNIC GERMANS FROM CENTRAL AND EASTERN EUROPE IN THE FEDERAL REPUBLIC, 20 (2002).

[13] Parlamentarischer Rat, Hauptausschuß, 19 Nov. 1948, 578 (6th sitting).

[14] Gesetz *über die Angelegenheiten der Vertriebenen und Flüchtlinge (Bundesvertriebenengesetz – BVFG* -), v. 22.5.1953 (BGBl I, S. 201).

[15] Among the *Bundestag* members, great concern was exhibited that the expellees not be treated as second-class citizens in any way. *See, e.g.* Stenographische Berichte, 12TH SESS., 285 (20 Oct. 1949); 250TH SESS., 11971 (25 Feb. 1953).

[16] §27 BVFG

[17] §31 BVFG

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paid as if the expellees had been born and had worked in the Federal Republic.[18] Explicit means of integration, such as language courses or job retraining programs, were not at issue. Rather, emphasis was placed on equal representation of expellees in all spheres of German society.[19] The *Bundesvertriebenengesetz* provided a legal framework that enabled the expellees to take control of their own future and it ultimately succeeded in promoting integration.[20] As will be shown below, however, the amendments in the *Bundesvertriebenengesetz* and related laws[21] have shifted from an attitude which emphasized the needs of the expellees and was based upon the inclusion of the expellees in decision-making to one in which *Spätaussiedler* are the mute objects of legislation and their needs are often clearly not the top priority of legislation which affects them.

The *Bundesvertriebenengesetz* served many purposes. Perhaps most significantly, it provided for the integration of the expellees – an important task, as one in five Germans in post-war Germany was an expellee – as well as the continued acceptance of (including the granting of West German citizenship to) ethnic Germans remaining in Central and Eastern Europe and refugees from East Germany. Among other elements, the *Bundesvertriebenengesetz* included a list of countries from which Germans could migrate and be recognized as having the status of *Aussiedler*.[22] The list, included countries with few Germans such as Albania and, as amended in 1957,[23] China. It excluded others with considerably more Germans, such as Brazil and Argentina. Thus, as pointed out above, alongside the important domestic role the law played, it also clearly was meant to serve the ideological agenda of providing Germans with a safe haven from persecution under Communist regimes.[24]

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[18] §69 BVFG

[19] §90 BVFG

[20] DANIEL LEVY, *supra* note 12, at 23; Silke Delfs, *Heimatvertriebene, Aussiedler, Spätaussiedler: Rechtliche und politische Aspekte der Aufnahme von Deutschstämmigen aus Osteuropa in der Bundesrepublik Deutschland*, AUS POLITIK UND ZEITGESCHICHTE (1993, nr. 48) at 4.

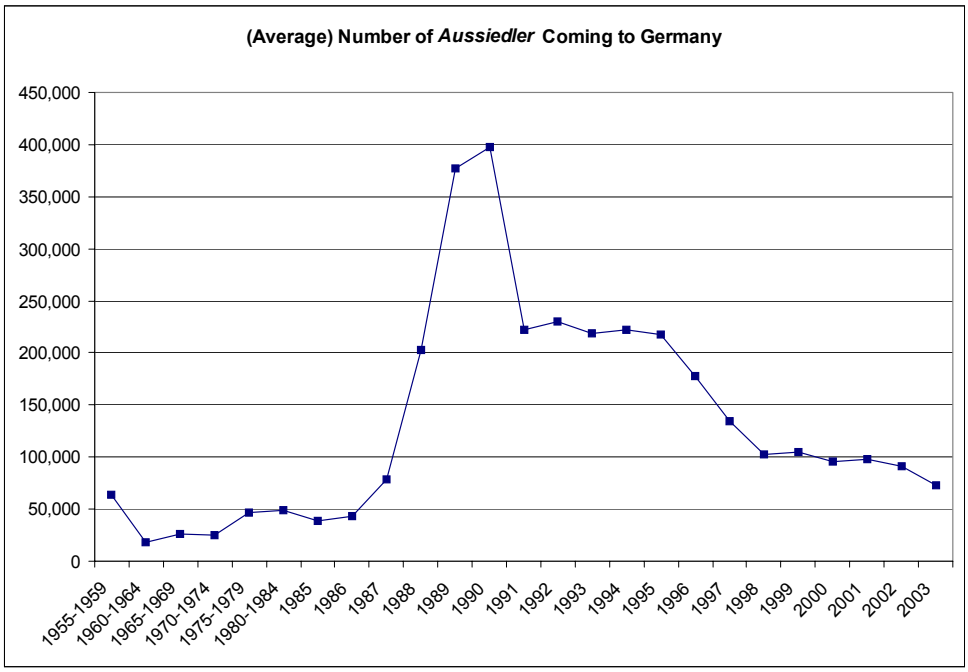
[21] Including the Gesetz zur Regelung des Aufnahmeverfahrens für Aussiedler (Aussiedleraufnahmegestz – AAG) v. 28.6.1990 (BGBl I S. 1247), and Gesetz über die Festlegung eines vorläufigen Wohnortes für Aussiedler und Übersiedler v. 6.6.1989 (BGBl I S. 1378).

[22] § 1(2) BVFG

[23] Zweites Gesetz zur Änderung und Ergänzung des Bundesvertriebenengesetzes (2. Änd G BVFG) v. 20.8.1957 (BGBl I S. 1207).

[24] Amanda Klekowski von Koppenfels, *Politically Minded: The Case of Aussiedler as an Ideologically Defined Category*, in MIGRATION IN ERKLÄRTEN UND UNERKLÄRTEN EINWANDERUNGSLÄNDERN: EIN GESCHENK VON SCHÜLERN UND STUDENTEN ZUM 60.GEBURTSTAG VON DIETRICH THRÄNHARDT, (Uwe Hunger, Karin Meendermann, Bernhard Santel and WichardWoyke, eds., 2001).

The *Bundesvertriebenengesetz* fulfilled this role and was in force until 1993, when it was substantially amended by the *Kriegsfolgenbereinigungsgesetz*, or Act Dealing with the



Consequences of the War.[25] In broad overview, laws were passed during the Cold War, which enabled *Aussiedler* – originally those who were left in Eastern Europe after the post-war expulsions, but including other Germans living under Communist regimes – as well as the East Germans – to come into the Federal Republic of Germany and claim a passport, as outlined below.[26] Essentially, it was feared that Communist regimes would harm Germans because of their implied, although sel-

[25] Gesetz zur Bereinigung von Kriegsfolgengesetzen (Kriegsfolgenbereinigungsgesetz – KfbG) v. 24.12.1992 (BGBl I S. 2094).

[26] Rainer Münz and Rainer Ohliger, *Deutsche Minderheiten in Ostmittel- und Osteuropa, Aussiedler in Deutschland. Eine Analyse ethnisch priviligierter Migration*. DEMOGRAPHIE AKTUELL, no. 9, 6-7 (1997), *available at*: http://www.demographie.de/demographieaktuell/index.htm

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dom actual, link to Hitler and Fascism. Thus, these laws enabled Germans, in theory, to come to Germany and benefit from a variety of integration assistance, including language training and certain subsidies. The immediate post-war *Aussiedler* migration flow, averaging about 36,000 per year from 1950 to 1986, was clearly, from a quantitative perspective, secondary to the eight million expellees who settled in West Germany within the four immediate post-war years. The legal framework accepting and incorporating *Aussiedler* into Germany was seen as an important tool in regulating treatment of ethnic German minorities in Central and Eastern Europe. The laws were also a means of placing pressure upon Central and Eastern European governments, and shifted according to changes in politics in Eastern and Central Europe over the decades since World War II, as will be discussed below.[27]

Contrary to popular opinion, the basis for acceptance as an *Aussiedler* in Germany is not German ethnicity *per se*, but is rather *Vertreibungsdruck* (literally: expulsion pressure) arising as a result of German ethnicity.[28] Thus, the potential *Aussiedler* must have seen himself or herself as a German, represented himself or herself as a German to others and, as a direct result, have suffered ethnically-based discrimination. This distinction is the legal basis for the requirement that *Aussiedler* show that they have maintained the German language or cultural and/or social customs.

Until the late 1970s, ethnically based discrimination was generally taken for granted by the German authorities. Thus, during the height of the Cold War, ethnicity and ethnically based discrimination, despite the legal distinction, were, in practice, synonymous; any ethnic German from the East Bloc was virtually guaranteed admission as an *Aussiedler*. In general, documents showing German descent were regarded as sufficient and knowledge of the German language was not required.[29] The courts and other relevant authorities saw the situation in the following light: one of the distinguishing characteristics of ethnically-based discrimination in Central and Eastern Europe was that Germans, as part of the forced assimilation policy of the Central and Eastern European governments, were not permitted to speak German.[30] Consequently, therefore, it was not reasonable (*zumutbar*) to ask that they be conversant in German.[31]

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[27] *Id*.

[28] The legal basis for acceptance as *Aussiedler* is explained in full detail in: ULRIKE RUHRMANN, REFORMEN ZUM RECHT DES AUSSIEDLERZUZUGS, 106-114 (1994), Thomas Sandvoß, *Vertriebene, Aussiedler, Spätaussiedler: Arbeitshandbuch für Behörden, Verbände und Aussiedlerbetreuer*, VERTREIBUNGSDRUCK (1995).

[29] BVerwGE 55, 40

[30]Ruhrmann, *supra* note 28, at 107.

[31] Ruhrmann, *supra* note 28, at 108

Starting in the late 1970s, however, the situation shifted somewhat, not owing to any change in the laws, but rather to court decisions altering the interpretation of the relevant laws in reaction to changes in the political landscape.[32] Rather than *Vertreibungsdruck* being taken for granted in all situations, certain factors were now regarded as a refutation of *Vertreibungsdruck*. These included an active turning away from German *Volkstum* (ethnicity), a high-level political or professional employment which implied supporting the (Communist) political system, and an application for asylum in Germany that would imply a reason for migrating to Germany, such as economic, other than ethnically-based discrimination.[33] In other words, as the war and its consequences, such as discrimination against Germans in Eastern and Central Europe declined in importance, the policy became more stringent as well.

When Mikhail Gorbachev came to power in the Soviet Union in 1985, the political landscape of Eastern and Central Europe began to change even more. In recognition of this shift in the poles of the Cold War, the *Bundesverwaltungsgericht* (Federal Administrative Court) decided in 1986 that there could be exceptions to the rule, and not every German leaving these areas was automatically an *Aussiedler*. [34] This decision states clearly: "Whoever emigrates for purely personal reasons, and not because of the consequences of expulsion, is not an *Aussiedler*."[35] However, in practice, the policy was the following: if the investigating authorities could not explicitly disprove the assumed *Vertreibungsdruck*, then the potential *Aussiedler* had to be accepted into Germany. Thus, the burden of proof lay on the side of the German government, and the *Aussiedler* policy continued to be relatively generous until the passage of the *Kriegsfolgenbereinigungsgesetz*, or Act Dealing with the Consequences of the War, in 1992, which substantially revised the *Bundesvertriebenengesetz*.[36]

C. Devolution of *Spätaussiedler* Migration

As emigration restrictions were eased in Central and Eastern Europe in the late 1980s, the *Aussiedler* migration flow rose correspondingly (see figure above). On a purely practical level, West Germany was simply not equipped to accept the nearly 380,000 *Aussiedler* who arrived in 1989 and the 400,000 *Aussiedler* who arrived in

[32] See, e.g. BVerwGE 55, 336

[33] Ruhrmann, *supra* note 28, at 111

[34] BVerwGE 55, 336

[35] *Id*.

[36] Gesetz zur Bereinigung von Kriegsfolgengesetzen (Kriegsfolgenbereinigungsgesetz – KfbG) v. 21.12.1992 (BGBl I S. 2094).

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1990 (together making up about 2% of the then ca. 62 million strong West German population).[37] In addition, as Eastern and Central Europe opened up, the situation for ethnic minorities improved and the burden ethnic Germans had to endure while remaining in these countries eased. Furthermore, the German government was doing much to advance the interests of these same ethnic Germans from afar. Germany and the Soviet Union signed a bilateral agreement, which also provided for the protection of ethnic minorities in 1990, Germany and Poland signed a similar agreement in 1991, and Germany and Romania, Hungary and the Czech and Slovak Republics did so in 1992.[38] However, *Aussiedler* policy could not be abolished completely. Now domestic considerations played a role in maintaining the *Aussiedler* regulations: not only did conservative factions still believe in the concept of protecting co-ethnics, but the post-war expellees, who supported the maintenance of the *Aussiedler* policy, continued to exercise a certain amount of power or, perhaps, better stated, influence within Germany well into the post-war era. This point is perhaps best illustrated by then-Chancellor Kohl's reluctance to acknowledge the Oder-Neisse line as the final border of Germany until after the first all-German elections in 1991, fearing that he would lose expellee votes. [39]

Thus, starting in 1989, a series of laws were passed which began to control and restrict the acceptance and integration of *Aussiedler* without wholly abolishing the practice. These had an almost immediate impact upon *Aussiedler* migration (see figure). Discussed in the following section are the laws which affect actual entry to Germany as well as immediate acceptance. The restrictions in benefits, which are also considerable, are not discussed here.[40]

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[37] INFO-DIENST *Deutsche Aussiedler* 4-5 (Sep. 1998); *Datenreport* 43-45 (1998), *Datenreport* 49, 51 (2002).

[38] JÜRGEN HABERLAND, EINGLIEDERUNG VON AUSSIEDLERN: SAMMLUNG VON TEXTEN, DIE FÜR DIE EINGLIEDERUNG VON AUSSIEDLERN AUS DEN OSTEUROPÄISCHEN STAATEN VON BEDEUTUNG SIND, 21 (1994).

[39] BARBARA MARSHALL, EUROPE IN CHANGE: THE NEW GERMANY AND MIGRATION IN EUROPE, 8 (2000).

[40] Pensions, for instance, were to be paid as if the *Aussiedler* had worked in Germany during the time he or she had been in the labor force. Now, restrictions are placed upon the maximum income an individual or a married couple may receive in pensions. Other integration assistance packages have been severely reduced as well. *See, e.g.*

Table 1: Laws Affecting Acceptance and Distribution:

1989	Wohnortzuweisungsgesetz (WoZuG): §1 "In the interests of achieving a sufficient standard of living for *Aussiedler* ...," §2 "*Aussiedler* and *Übersiedler* ... can be assigned to a temporary residence." Intended to remain in effect for three years.
1990	Aussiedleraufnahmegesetz: Requires potential *Aussiedler* to apply for admission from their countries of origin. In conjunction with WoZuG, *Aussiedler* are assigned to a particular *Land*. This *Land* must also agree that potential *Aussiedler* fulfill all admission requirements.
1992	Kriegsfolgenbereinigungsgesetz (KFbG): §4: Creates new legal category: "Spätaussiedler" (late *Aussiedler*); not all spouses or children are included in this category. §5: Lists grounds for exclusion from *Spätaussiedler* category. §6: Creates new "definition" of German ethnicity: "(2) Anyone born after 31 December 1923 is an ethnic German if: 1. he is descended from a German citizen or an ethnic German, 2. his parents, one parent or other relatives have passed confirming characteristics, such as language, upbringing on to him, **and** [emphasis added] 3. he declared himself, up until he left the area of German settlement, to be of German nationality, or recognized himself as German in some other manner or belonged to the German nationality according to the law of his country of origin. The requirements according to Number 2 are deemed to be fulfilled if the passing on of such confirming characteristics was not possible, or cannot be seen as reasonable because of the conditions in the country of origin. The requirements of Number 3 are seen as fulfilled if the recognition as a German would have endangered life and limb, or would have been connected with grave professional or economic disadvantages..." §27: Sets limit at an average of the numbers of *Spätaussiedler* migration of 1991 and 1992 ± ten percent

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1992	WoZuG extended for another three years, to 1995
1995	WoZuG extended for another five years, to 2000
1996	WoZuG extended to 2007; Non-residence in assigned *Land* for the first two years of residence in Germany now results in non-payment of all benefits from Work Promotion Act, Federal Welfare Act for that time.
1996	Language test introduced as fully institutionalized method of checking "objective characteristics"; nearly one-third of applicants fail.
1997	WoZuG: two-year limitation on freedom of movement removed; freedom of movement restricted indefinitely (in practice, given the new law that was passed, this amounted to a maximum four and one-half years for some *Spätaussiedler*). All *Spätaussiedler* who came to Germany after 29 Feb 1996 are now restricted to the community of assignment indefinitely, unless they have a job, etc. elsewhere. Still in effect to 2007.
2000	WoZuG: three-year limitation on freedom of movement established. New, more differentiated guidelines established, permitting time to search for a job in other *Länder*. Not applicable to *Spätaussiedler* who came to Germany before 1 March 1996. In effect until 31 December 2009.

I. Aussiedleraufnahmegesetz, 1990

The *Aussiedleraufnahmegesetz*, or *Aussiedler* Acceptance Act, of 1990 shifted part of the burden of determining *Aussiedler* status outside the borders of Germany.[41] As of 1990, potential *Aussiedler* were required to fill out a form establishing information about both the applicant and his or her family. Information was collected on family members' birthdates, places of birth, place of residence later in life, "nationality," including the nationality entered in the domestic Soviet passport, and maintenance of German language and customs.

The AAG also introduced a test of language ability in a brief oral exam consisting of a simple conversation upon arrival in Germany. If it appeared that the potential *Aussiedler* had misrepresented his or her German abilities in the application form, denial of entry and return to the country of origin could result. The introduction of

[41] Gesetz zur Regelung des Aufnahmeverfahrens für Aussiedler (Aussiedleraufnahmegestz – AAG) v. 28.6.1990 (BGBl I S. 1247).

the *Aussiedleraufnahmegesetz* and the required application proved effective immediately; the numbers of *Aussiedler* dropped from nearly 400,000 in 1990 to around 222,000 in 1991 (see figure above). From 1990 on, ethnic Germans who migrated to Germany on tourist visas, rather than follow the prescribed path, forfeited their *Aussiedler* status.

II. Kriegsfolgenbereinigungsgesetz,1992

The passage of the *Kriegsfolgenbereinigungsgesetz* in 1992,[42] as part of the so-called asylum compromise, substantially amended the *Bundesvertriebenengesetz* [43] and marks the end of the era of loose regulations on *Aussiedler* admission. The "asylum compromise" of 1992 refers to the concession of the political left to restrict the right to asylum (amendment of Article 16 *Grundgesetz*) and the concession of the political right to restrict *Aussiedler* migration (passage of *Kriegsfolgenbereinigungsgesetz*). With the passage of this act, only ethnic Germans from the former Soviet Union, as a general rule, may now take advantage of *Spätaussiedler* status. They are the only ones said to still be suffering under *Vertreibungsdruck*; all others must prove explicitly that they still suffer ethnically-based discrimination or the after-effects of earlier such discrimination (in 2002, only 829 of the 91,416 *Spätaussiedler* did not come from the former Soviet Union).[44] Ethnically-based discrimination is no longer taken for granted, and is certainly no longer synonymous with ethnicity; after the change of law in 1992, not all ethnic Germans from the former Soviet Union are eligible for *Spätaussiedler* status. In a significant procedural change, the *Bundesvertriebenengesetz* now specifically lists grounds for exclusion from *Spätaussiedler* status,[45] such as having abused a high position, having supported Nazism or worked in a job which was of significance to upholding the Communist system, or have shared a household for more than three years with someone who had done so. The amended *Bundesvertriebenengesetz* also sets an end to *Spätaussiedler* migration, stating that those who were born after 1992 may not enter as *Spätaussiedler* after 2010, although they may enter as family members.

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[42] Gesetz zur Bereinigung von Kriegsfolgengesetzen (Kriegsfolgenbereinigungsgesetz – KfbG) v. 21.12.1992 (BGBl I S. 2094).

[43] Bekanntmachung der Neufassung des Bundesvertriebenengesetzes v. 2.6.1993 (BGBl I S. 829).

[44] Bundesministerium des Innern.

[45] §5 BVFG

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III. Language Tests, 1996

In June 1996, language tests, administered in the country of origin before the submission of the application, were formally introduced as a means of testing German abilities, thus shifting one aspect of the application process outside Germany. The language tests do not derive from laws, but rather court decisions, in particular a decision of the Federal Administrative Court from November 1996, in which the Court held that, "Whosoever speaks only inadequate German and speaks Russian as a native tongue or as the preferred daily language, belongs, as a rule, to the Russian culture."[46] In other words, ethnicity or descent alone does not suffice for claiming *Spätaussiedler* status; some basic grasp of the German language must also persist for acceptance as a *Spätaussiedler*. The language test is administered by a civil servant who starts with a relaxed conversation and then moves to the actual test. According to the *Bundesverwaltungsamt*, or Federal Administrative Office, the applicant must be capable of carrying on a conversation about the simple facts of daily life. The conversation could be about professional life in Kazakhstan or the life of a German in the former Soviet Union and may be either in high German or in dialect. While passing the language test does not guarantee admission as a *Spätaussiedler*, passing the test is required for entry.

Partially explained by the increase in mixed German-Russian marriages, the German language competence of the post-Cold War *Spätaussiedler* is at a much lower level than that of their predecessors. Thus, these tests are a means of ensuring that ethnic Germans have the linguistic tools to ease their integration into contemporary German society. The institution of language tests can be interpreted as testing for integration capacity, as illustrated by a recent quote from the Commission for Aussiedler Affairs (*Aussiedlerbeauftragter*), Jochen Welt: "Those who want to come to Germany as a *Spätaussiedler* with their families have recognized that successful integration is only possible with sufficient knowledge of German."[47] As seen in this quote, the emphasis once placed on language as a carrier of identity has shifted to an emphasis on the significance of language for integration and communication; the percentage of those passing the tests has decreased from a high of 69.3% in 1996, when the test was not yet fully obligatory, to 44.0% in 2002.[48] In May 2004, compromise on a revised immigration law in Germany appeared near, with one of the agreed-upon elements being a language test for family members, which would greatly improve their chances for integration.

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[46] BVerwG 9 C 8.96

[47] *Aussiedlerzahlen werden mittelfristig weiter sinken,* BMI PRESSEMITTEILUNG, (Mdb Welt, Pressemitteilung Nr. 147) 17 Jun 2004, *available at*: www.bmi.bund.de.

[48] Data available from the *Bundesverwaltungsamt* upon request *at* www.bundesverwaltungsamt.de

IV. Wohnortzuweisungsgesetz (Residence Assignment Act), 1989

The *Wohnortzuweisungsgesetz*, or Residence Assignment Act, of 1989 calls for the even distribution of *Spätaussiedler* and East German *Übersiedler* within West Germany according to a quota system based upon area and population.[49] The *Länder* are then responsible for distributing the *Aussiedler* evenly within each state. *Aussiedler* migration had concentrated primarily in Lower Saxony, North Rhine-Westphalia, Baden Württemberg and Bavaria, due to family-determined network migration, and had placed pressures upon certain municipalities in these *Länder*. Unlike the distribution of post-war expellees, this distribution is not voluntary. Again, in a direct contrast to the situation of the expellees, although members of parliament noted that they had spoken with *Spätaussiedler* representatives, none of these representatives was quoted in the *Bundestag* debates on the passage of this law. Initially valid for three years, this law was intended to lessen the impact of *Spätaussiedler* migration on any particular *Land* or municipality and applied to all *Spätaussiedler* reliant upon any form of public assistance (this applies to nearly all *Spätaussiedler* immediately after arrival in Germany, when the law is applied). *Spätaussiedler* were required to stay in the *Land* and district to which they were assigned for a period of two years, unless they could demonstrate they had a job, apprenticeship or were accepted as a student elsewhere.[50]

This law was passed on 6 July 1989, at a time when West Germany was being flooded by *Aussiedler* as well as East German *Übersiedler* (refugees) and asylum-seekers (see Table 2). The *Aussiedler* were not, at the time of the passage of the law, the largest group of migrants coming to Germany, but did constitute a large portion of those entering. Asylum-seekers were (and are)

[49] Gesetz über die Festlegung eines vorläufigen Wohnortes für Aussiedler und Übersiedler v. 6.6.1989 (BGBl I S. 1378).

[50] §2 (4) WoZuG

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Table 2: Migration to (West) Germany

	Aussiedler	Übersiedler[51]	Asylum-seekers
1987	78,523	22,838	57,379
1988	202,673	43,314	103,076
1989	377,055	388,396	121,318
1990	397,073	395,343	193,063
1991	221,995	249,743	256,112
1992	230,565	199,170	438,191
1993	218,888	172,386	322,599
1994	222,591	163,034	127,210
1995	217,898	168,336	127,937
1996	177,751	166,007	116,367
1997	134,419	167,789	104,353
1998	103,080	182,478	98,644
1999	104,916	195,530	95,113
2000	95,615	214,456	78,564
2001	98,484	192,002	88,287
Total	2,881,526	2,920,822	2,328,213

Sources: INFO-DIENST *Deutsche Aussiedler* September 1998, at 4-5; *Datenreport* 1998, at 43-45, *Datenreport* 2002, at 49, 51; Zimmermann 1998, at 522-523.

also subject to mandated and enforced distribution within Germany as of 1982.[52] Thus, all major groups of migrants coming to Germany were subjected to distribution. However, the asylum-seekers' distribution is restricted to the time of claim-processing and that of the refugees from East Germany ceased to be an issue upon German unification. *Spätaussiedler* distribution, however, continued in an intensified form.

D. Wohnortzuweisungsgesetz – with Sanctions

By the mid-1990s, it became apparent that the 1989 *Wohnortzuweisungsgesetz*,[53] which had been expanded to extend to the new *Länder* as well, was not working according to plan; *Aussiedler* would be assigned to a *Land*, but promptly move to,

[51] After 1990, migrants from the former East Germany to West Germany are no longer subject to the WoZuG. These figures are for all in-migration, and do not take out-migration into account.

[52] Gesetz über das Asylverfahren (AsylVfG), v. 16.7.1982 (BGBl I, S. 946).

[53] *Amended by* Gesetz zur Änderung des Bundessozialhilfegesetzes und anderer Gesetze v. 7.7.1992 (BGBl I S. 1226), the validity of the law was extended until 1995.

for instance, Lower Saxony to be near family or friends.[54] In particular, few *Aussiedler* wished to remain in one of the five new German *Länder* – the former East Germany, which is precisely where population is needed.[55] After having been extended in 1995 for a further five years, through 2000,[56] a new version of the *Wohnortzuweisungsgesetz* was passed in 1996.[57] This new version of the law linked receipt of social services to place of residence,[58] and is the Act the *Bundesverfassungsgericht* was called upon to consider. By 1996, 97% of all *Spätaussiedler* coming to Germany were coming from the former Soviet Union, and no longer from Romania or Poland,[59] so this law affects only those *Spätaussiedler* from the former Soviet Union. The law's validity was extended through 2007 in the same amendment law.[60] For two years after entry to Germany,[61] the *Spätaussiedler* must remain in the *Land* of assignment, and, indeed, in the *Landkreis* (district) of assignment, or forfeit all social services such as language courses, welfare, unemployment benefits, job retraining programs, etc.[62] In 1997 (under the center-right government of Helmut Kohl), the *Wohnortzuweisungsgesetz* was amended yet again,[63] removing the two-year limit on the restricted freedom of movement, thus restricting freedom of movement for those on such public assistance indefinitely. In practice, given the new law that was passed, this amounted to a maximum four and one-half years for some *Spätaussiedler*. In 2000 (under Gerhard Schröder's Social Democrat/Greens coalition government), a three-year limitation was put in place and the law was extended to 31 De-

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[54] Bundestagdrucksache 13/3102, 4 (24 Nov 1995).

[55] Rainer Münz and Ralf Ulrich, *Was wird aus den Neuen Bundesländern? Demographische Prognosen für ausgewählte Regionen und für Ostdeutschland* DEMOGRAPHIE AKTUELL Nr. 3 (1994), *available at*: http://www.demographie.de/demographieaktuell/index.htm

[56] *Amended by* the Erstes Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v. 4.7.1995 (BGBl I S. 894).

[57] Zweites Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v. 28.2.1996 (BGBl I S. 223).

[58] All services which were given under the *Arbeitsförderungsgesetz*, now *Drittes Buch Sozialgesetzbuch*.

[59] Data from *Bundesverwaltungsamt*

[60] *Amended by* the Zweites Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v 28.2.1996 (BGBl I S. 223); *Replaced by* the Neufassung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v. 28.2.1996 (BGBl I S. 225).

[61] §3a (2) WoZuG

[62] §3a (1) WoZuG

[63] Drittes Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v. 22.12.1997 (BGBl I S. 3222).

cember 2009.[64] Since the majority of *Spätaussiedler* are, according to the many qualitative sources available, on some form of public assistance during their first two years,[65] this act has been successful in ensuring that *Spätaussiedler* remain in the assigned *Land*, thus evening out the burden on the *Länder*. An additional element is the need for migrants in the new *Länder*, owing to the heavy emigration from that region. The constitutionality of these last two laws was not considered in the *Bundesverfassungsgericht* decision.

I. Constitutionality of the Wohnortzuweisungsgesetz

However well the *Wohnortzuweisungsgesetz* may or may not have worked in terms of maintaining an even distribution of *Spätaussiedler* throughout Germany, this law clearly restricts the freedom of movement of the *Spätaussiedler*; this restriction is acknowledged in the Law itself.[66]

Article 11(1) of the Basic Law states that "all Germans have the right to move freely throughout the federal territory". This right is qualified by Article 11(2) *Grundgesetz*, in which it is stated that the unequivocal right to freedom of movement "…may be restricted only by or pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community." Such a restriction may be legislated if it is necessary to avoid danger to the existence of Germany or a *Land*, or to prevent a natural disaster, epidemic etc. In other words, not every restriction of freedom of movement is a violation of this fundamental right. The *Wohnortzuweisungsgesetz* does draw upon this language, stating that it is intended to achieve a "sufficient livelihood" for *Spätaussiedler* and to avoid placing an undue burden on the *Länder* and municipalities.[67]

However, it remains unclear whether this law has played a role in reducing *Spätaussiedler* unemployment or not. In other words, the question of whether it has fulfilled the objective of securing a "sufficient livelihood" for *Spätaussiedler* has not been satisfactorily answered. Indeed, one of the experts called to testify before the *Bundesverfassungsgericht* in this case, Dr. Barbara Dietz, is cited in the court decision as having said that the residence assignment has no significant influence on

[64] Viertes Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v. 2.6.2000 (BGBl I S. 775).

[65] Marshall, *supra* note 39, at 53.

[66] §2 WoZuG

[67] §1(1) WoZuG

Spätaussiedler labor market integration.[68] Two other experts, the *Deutsche Städtetag* (German Council of Cities) and the *Vorsitzender des Vorstandes der Konferenz für Aussiedlerseelsorge* (Chair of the Board of the Conference for *Aussiedler* Spiritual Welfare of the Protestant Church) contradict each other as to whether *Spätaussiedler* remain at the place of assignment after the end of the restriction. The *Vorstand* says that *Spätaussiedler* just wait until the end of the restriction and move immediately.[69] Any integration that might have taken place during this time, then, is essentially meaningless for the *Spätaussiedler*.

During the *Bundestag* debates concerning the passage of the 1996 law, which first linked residence assignment to sanctions,[70] the primary reason cited for the amendment was the movement of *Spätaussiedler* from the five new German *Länder* to the old West Germany. This westward movement of *Spätaussiedler* had two negative consequences: the disuse and neglect of certain programs, such as language classes, in the new *Länder*; the overcrowding of language courses in the old *Länder*. The preservation of social peace between *Spätaussiedler* and native Germans was likewise cited, while integration of *Spätaussiedler* was also mentioned – but not as a focus.[71] Meanwhile, the question of the restriction of the freedom of movement was raised by the party (CDU/CSU) proposing the law:

"Ladies and gentlemen, of course we must bring into discussion the question of whether we are restricting the right to freedom of movement of *Spätaussiedler* too strongly. We are not doing so, but freedom of movement in Germany does not mean that I can get benefits throughout Germany when a community is involved. We cannot overburden our municipalities, which are, for example, welfare providers, if we have too few *Spätaussiedler* in one part of Germany and too many in another."[72]

The speaker for the Alliance '90/Greens, which did not support the law, made the following comment on the restriction of the freedom of movement:

"In closing, I would like to quote Dr. Fritz Wittmann, the President of the League of Expellees. He warned that we will put so much pressure on *Spätaussiedler* if their

[68] BVerfG, 1 BvR 1266/00, 22 (17 Mar. 2004).

[69] BVerfG, 1 BvR 1266/00, 20-21 (17 Mar. 2004).

[70] The very basic welfare payments, however, would be made even in the case of an unauthorized move.

[71] DEUTSCHER BUNDESTAG, 13. Wahlperiode, 84. Sitzung, 7413-7412 (2 Feb. 1996).

[72] DEUTSCHER BUNDESTAG, 13. Wahlperiode, 84. Sitzung, 7414 C (2 Feb. 1996) (statement by Hartmut Koschyk (CDU/CSU)).

domestic freedom of movement is so restricted that these people will no longer feel they are an integral part of our society. We therefore reject this proposal."[73]

Integration of *Spätaussiedler* is not mentioned in the governmental justification for the restriction of freedom of movement. Indeed, in the government's explanatory memorandum, the goal of the law is clearly to reduce burdens on certain municipalities; *Spätaussiedler* integration or the preservation of societal peace are not mentioned.[74] Scholarly commentary on the Basic Law, furthermore, notes that the right to freedom of movement would be meaningless "if the exercise of this right were connected with any economic disadvantages,"[75] which appears to be a clear contradiction to the CDU/CSU's statement in the *Bundestag* on this debate. Indeed, there is no such restriction on other German recipients of social assistance; §107 of the *Bundessozialhilfegesetz* – BSHG (Federal Social Assistance Act) states that, in the case that an individual on social assistance moves, the previous office is responsible to continue paying – if it becomes necessary within the first month after the move.[76] Indeed, the *Bundesverfassungsgericht* notes in its decision on the challenge to these restrictions that *Spätaussiedler* are discriminated against with respect to other Germans in need of welfare, whose freedom of movement is not restricted.[77]

With respect to the constitutionality of the *Wohnortzuweisungsgesetz*, Article 3 of the Basic Law also comes into play. Article 3 provides for "Equality before the law." Paragraph 1 states that "all people are equal before the law" while paragraph 3 states that "nobody shall be prejudiced or favored because of their … national or social origin," which in this case could be applicable to *Spätaussiedler*, nearly all of whom have come from the former Soviet Union. Advocates of the *Wohnortzuweisungsgesetz* could point out that not all *Spätaussiedler* are targeted, but only those on some form of social assistance (although, in practice, this applies to nearly all *Spätaussiedler* for their initial period in Germany). It is certainly true that the logistics involved in applying the principle of Section 107 of the BSHG to large numbers of *Spätaussiedler* would be staggering. However, if this were the case, then it would appear that the *Wohnortzuweisungsgesetz* was not put into place to aid the *Spätaussiedler*, but to solve some logistical issues for German bureaucracy.

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[73] DEUTSCHER BUNDESTAG, 13. Wahlperiode, 84. Sitzung, 7414 D (2 Feb. 1996) (statement by Cem Özdemir)

[74] Drs. 13/3102, *Gesetzentwurf der Bundesregierung: Entwurf eines Zweiten Gesetzes zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler,* 1 (24 Nov. 1995).

[75] Hartmut Krüger, *Artikel 11*, in GRUNDGESETZ, KOMMENTAR, 19 (Michael Sachs ed., 1999).

[76] §107, Bundessozialhilfegesetz, v. 30.6.1961 (BGBl I S. 815).

[77] BVerfG, 1 BvR 1266/00, 54 (17 Mar. 2004).

Section 1(1) of the 1996 *Wohnortzuweisungsgesetz*, "Purpose", reads as follows:

The purpose of this Act is to provide to *Spätaussiedler*, in the interest of creating a sufficient basis for livelihood for them in the initial period after their admission to the territory of application of the present Act, the necessary support, including temporary accommodation, whilst at the same time, by means of appropriate distribution, counteracting any overburdening of one or more *Länder*, welfare providers or municipalities.[78]

It must be noted that there are two purposes of this law: one is to provide a sufficient living standard for *Spätaussiedler*; the other is to avoid an overtaxing of German municipalities, welfare providers and *Länder*. The expert testimony that informed the Court's decision as well as the the *Bundestag's* debate on the passage of the next law both indicate that the latter purpose has indeed been fulfilled, while the allegedly primary – but in reality clearly secondary – purpose of the law, that of providing a sufficient basis for livelihood for *Spätaussiedler*, has not.

Indeed, in the *Bundesrats-Drucksache* (printed document) which introduces the new law for consideration, the purpose states: "Municipalities should not be disproportionately taken advantage of in the area of welfare by *Spätaussiedler* who, departing from the distribution decision of the *Bundesvertriebenengesetz*, in the exercise of their freedom of movement, go to a *Land* other than the one required to accept them."[79] The Government's Draft Law,[80] likewise notes that the principle purpose of the law is to take the burden off certain *Länder*. Integration for *Spätaussiedler*, or concerns about their loss of freedom of movement, are not mentioned in the reasoning for the law, either from the side of the Government, or from the comments by the *Bundesrat* about the law.[81]

The law, in the 1996 version, was drafted with the intention of removing the unequal burden from the municipalities, and did not take special steps to address the potential problem of unconstitutionality for reason of unequal treatment (Art. 3) or through an improper restriction of the freedom of movement (Art. 11).

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[78] §1(1), Zweites Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v. 28.2.1996 (BGBl I S. 223).

[79] BR Drs 527/95, *Entwurf einen Zweiten Gesetzes zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler*, 1 (1 Sep. 1995).

[80] Bundestag Drs 13/3102, *Entwurf einen Zweiten Gesetzes zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler* (24 Nov. 1995).

[81] *Id*.

II. Bundesverfassungsgericht decision

The *Bundesverfassungsgericht* judgement regarding the constitutionality of the *Wohnortzuweisungsgesetz* concerns a *Verfassungsbeschwerde* (complaint of unconstitutionality) by two appellants, mother and son, who came to Germany in December 1996, and were assigned to the city of E. in Lower Saxony.[82] They received welfare in E. The mother found a part-time job in the city of H., some 20 km away from E. Her mother also lived in H. and her son went to school there. In May 1998, mother and son moved to H., a city in the same county and covered by the same welfare provider as E. The city of E. paid for the move and paid welfare for several more months. The city of H. refused to pay welfare, referring to the distribution decision to E. The *Verwaltungsgericht* (Administrative Court) required H. to pay welfare payments to November 1998, as six months were deemed to be necessary to find an apartment in E. and to move back.[83] H. made these payments, but did not make payments after this date. The *Verwaltungsgericht* and *Oberverwaltungsgericht* (Appellate Administrative Court) did not find any concerns of unconstitutionality.[84] The appellant requested a change of residence assignment from E. to H.; this was rejected on the grounds that such a move was not foreseen in the law.[85] After having ceased to receive welfare, the appellants had to give up the apartment in H. They are still paying back rent and the costs of the eviction. Altogether, their freedom of movement was restricted for three years and seven months.[86]

The appellants asserted the unconstitutionality of the law on the basis of Article 11, freedom of movement, and Article 3, equality before the law. The *Bundesverfassungsgericht* found that the 1996 *Wohnortzuweisungsgesetz*, in particular Section 3a, Paragraph 1, sentence 2,[87] is neither unconstitutional on the basis of an infringement of the right to freedom of movement, nor on the basis of the Basic Law's equality protections.[88] However, the Court did make a number of comments that place this decision in context and cast the future viability of the law's restrictions on

[82] BVerfG, 1 BvR 1266/00, 9 (17 Mar. 2004).

[83] *Id*.

[84] OVG Lüneburg, 4 L 1576/00 (13 Jun. 2000); VG Hannover, 15 A 2867/99 (4 Apr. 2000).

[85] BVerfG, 1 BvR 1266/00, 10 (17 March 2004).

[86] *Id*., at 11

[87] §3, Para 1, Sentence 2 reads: "As a rule, [Spätaussiedler who leave the place of assignment] receive only the welfare payments irrefutably necessary under the circumstances, according to the BSHG, to be paid by the welfare provider responsible for the actual residence."

[88] BVerfG, 1 BvR 1266/00, 14 (17 Mar. 2004).

the freedom of movement in doubt. The Court found that Article 11 had not been violated because the *Spätaussiedler* could move and simply decide to forego welfare assistance – or at best accept receipt of only the subsistence minimum.[89] Furthermore, the Court noted, residence assignment and even distribution improved the motivation to learn German and access to the labor market.[90] Several East German *Länder* report that *Spätaussiedler* moved away as soon as the time of restriction was passed, and Thuringia in particular felt that the residence assignment made integration more difficult rather than less so.[91]

As noted above, the experts called to testify at the oral argument before the Federal Constitutional Court, testimony that was summarized by the Court in its decision, could not reach agreement. Two experts (*Aussiedlerbeauftragter* [Commissioner for *Aussiedler* Affairs] and the *Deutsche Städtetag*) noted that the distribution protects social peace and prevents the native population from feeling threatened.[92] The other two (*Vorsitzender des Vorstandes der Konferenz für Aussiedlerseelsorge* and Dr. Barbara Dietz) noted that the distribution had a negative impact upon *Aussiedler* integration and the former even noted that, "Above all, the older *Aussiedler* are reminded of the era of deportation [in 1941 in the Soviet Union when they were deported from Russia to Kazakhstan or Siberia]."[93] Dr. Dietz stated that the distribution not only had no significant influence upon labor market integration, but also hindered access to the social networks of other *Spätaussiedler* and families. She further stated that these networks simplify integration, the search for work and lodging, but do also heighten segmentation. An over proportional migration in any one region does, however, lead to complaints on the part of the native population.[94] In other words, the stated goal of the law, namely aiding the integration and employment prospects of *Aussiedler*, are not being achieved.

The most significant problem in determining whether this law is or is not necessary for *Aussiedler* integration and has or has not fulfilled its stated purpose of assisting *Aussiedler* integration is that data are scarce. Barbara Dietz is one of the most informed *Aussiedler* scholars in Germany,[95] and her views are perhaps the most accu-

[89] *Id.*, at 14

[90] *Id.*, at 16

[91] *Id.*, at 17.

[92] *Id.*, at 19-20

[93] *Id.*, at 21

[94] *Id.*, at 22

[95] *See* http://www.lrz-muenchen.de/~oeim/dietz.htm

rate. In her estimation, the *Wohnortzuweisungsgesetz* has had a negative impact on *Spätaussiedler*.[96] Three of the four experts who testified, however, agreed that the distribution did, in some way, ease social tensions and ease the burdens placed on municipalities.[97] Thus, the allegedly secondary goal of the Act – although clearly primary, as seen in the analysis of the parliamentary debate on the passage of the Act – is being met.

One of the primary reasons offered by the Court in reaching its conclusion that there is no violation of Article 11 and Article 3 is that the restriction applies only to *Spätaussiedler* on welfare, and not to all *Spätaussiedler*.[98] However, two paragraphs later, the Court stated that the 3 million *Aussiedler* and Spätaussiedler who have migrated to Germany after 1987 "were and are, as a general rule, in need of welfare when they move to Germany."[99] Thus, while the *Wohnortzuweisungsgesetz* does not specifically target all *Spätaussiedler*, in practice, all *Spätaussiedler* are affected. The Court uses this point to indicate the need for such a ruling, in order to ease the burden on municipalities and indeed says that the law is suitable for equalizing the burden on the municipalities.[100]

In terms of the impact of the law upon *Spätaussiedler*, the Court pointed out that, although the opinion of the legislature that this law is a suitable method for promoting integration cannot be questioned from a perspective of constitutionality, those affected are of another, but divided, opinion. The residence assignment makes some things easier (e.g. children learn German more quickly in child-care in areas with fewer *Aussiedler*, but, on the other hand, restricts access to the *Spätaussiedler* social networks).[101] The Court noted that, while the law as such has not been found to be unconstitutional, the legislature is required, in future revisions of the law, "to observe the further development and, in particular, the effects of this law and, if necessary, to correct these for the future."[102]

Furthermore, the Court said that, while the restriction is constitutional, freedom of movement is, at the same time, considerably restricted. Even the flexibility of the

[96] BVerfG, 1 BvR 1266/00, 22 (17 March 2004).

[97] *Id.*, at 19-22

[98] *Id.*, at 37

[99] *Id.*, at 39

[100] *Id.*, at 41

[101] *Id.*, at 42

[102] *Id.*, at 43

2000 revision of the law, permitting *Spätaussiedler* to look for work and accommodation, is limited.[103] In addition, "for understandable reasons, many *Spätaussiedler* cannot come to terms with the limitation on freedom of movement after their migration to a country whose system, through the Basic Law, is a liberal democratic one."[104] However, when the goal of evening out the considerable burden placed upon the municipalities is weighed against the restrictions upon the *Spätaussiedler*, the municipalities' needs are, in essence, judged to be of a higher order.[105] Nonetheless, if future laws do not take exceptions into account, there will be constitutional concerns. In particular, the wish to live with family members or to take up a part-time job – the relevant details for this case – should be taken into account,[106] and a change in assignment should be made possible.[107]

The Court dismissed the question of unconstitutionality on the basis of Article 3 (3) summarily, stating that there is no discrimination on the basis of origin.[108] Again, as in the question that the law only affects those on welfare, by the letter of the law, this is correct, however, in practice, the law does affect those coming from the former Soviet Union nearly completely and exclusively.[109] Article 3(1) *Grundgesetz* was also dismissed, although the Court did point out that *Spätaussiedler* on welfare are discriminated against as compared with other Germans on welfare.[110] The Court went on to explain that this restriction is justified because *Spätaussiedler* are in particular need of integration.[111] However, as discussed with respect to the debates about the passage of the law and with respect to the experts called to testify before the Court, whether this law does in fact ameliorate integration is in no way either established nor, for that matter, refuted.

This Court decision, while perhaps within the letter of the law, is nonetheless a disturbing one. The decision is, however, mitigated by the numerous exhortations

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[103] *Id.*, at 47

[104] *Id.*, at 47

[105] *Id.*, at 48

[106] Family or career reasons are currently supposedly taken into account as far as possible (§2(2)), but a preference must be expressed before residence assignment, and not all wishes can be met.

[107] BVerfG, 1 BvR 1266/00, 51 (17 Mar. 2004).

[108] *Id.*, at 53

[109] *Id.*, at 53

[110] *Id.*, at 54

[111] *Id.*, at 54

to the legislature as to the content of future amendments to the law. The decision places the rights of the municipalities for the equality of financial burden above the rights of the individuals, German citizens, to choose freely where to live. While, indeed, the simple status of *Spätaussiedler* does not result in the restriction of this right, the fact remains that the vast majority of *Spätaussiedler* are in need of public assistance and, therefore, are treated in a different manner than are other German citizens or, indeed, non-citizen permanent residents of Germany, an aspect which does, in practice, amount to an infringement of Article 3(1) *Grundgesetz*. At the same time, the vast majority come from the former Soviet Union, while very few persons migrate from the former Soviet Union who do not migrate as a *Spätaussiedler* or with one. Thus, there is also, in practice, a discrimination against *Spätaussiedler* on the basis of Article 3(3) *Grundgesetz*.

III. Second-Class Citizens?

While the 1996 law was found to be constitutional, at the same time, the Court did find a number of problems with it in its current version, as noted above. These problems, above all, indicate that the treatment of *Spätaussiedler* is not the same as that of native Germans nor, indeed, even at the level of non-citizens on welfare or asylum-seekers: "In so far as non-citizens in need of welfare are in a better position than Spätaussiedler, this is sufficiently justified. Spätaussiedler are, to date, the only single large group of migrants who show general and coinciding characteristics and have a claim to immigration to Germany."[112] The Court goes on to say that, because *Spätaussiedler* are to remain permanently in Germany, their integration problems are different than those of other groups.[113] However, as has been discussed, *Spätaussiedler* integration is clearly not the focus of the *Wohnortzuweisungsgesetz*. Furthermore, if indeed, *Spätaussiedler* do constitute a clearly identifiable group, then the question of potential discrimination against them by this law, as prohibited in Article 3(3) *Grundgesetz*, becomes more significant.

IV. Wohnortzuweisungsgesetz as amended in 2000: Further Concerns about Constitutionality

In the explanatory memorandum for the 1996 law, it was stated that "The planned regulation is to be seen as a fixed-term special law."[114] However, the Fourth

[112] *Id.*

[113] *Id.*

[114] Drs 13/3102, p.4

Amendment Act to the *Wohnortzuweisungsgesetz*[115] – not considered in the *Bundesverfassungsgericht* decision – extends the validity of the Act through 2009. With this extension, it is clear that the law is no longer short-term, but is intended to be applied to all *Spätaussiedler* and their family members coming to Germany in the foreseeable future. Indeed, in the parliamentary debates about the passage of this law, there was considerably more concern and discussion about the restriction of the right to freedom of movement, as well as whether the Act met any of its stated or implicit goals, namely those of *Aussiedler* integration, easing the burdens upon the municipalities and providing the five new *Länder* with much-needed population.

In terms of the restriction on freedom of movement, the FDP was quite clear in its statement about the 2000 law:

"The residence assignment restricts the fundamental right of Article 11, namely the right to freedom of movement – admittedly only indirectly – but in a substantial way. […] We went along with this emergency measure for a limited time. We hold to the promise made at the time to let the law run out. […] We cannot support the *Wohnortzuweisungsgesetz* because, on balance, this Law represents a serious intrusion into the *Grundgesetz*."[116]

The PDS is likewise vocal about the restriction to the freedom of movement:

Home, for me, is not land, home is language, is faith, is family. That the new arrivals wish to go to places where their relatives already are is obvious. Every one of us would do the same. Furthermore, following experience, this way they have the best chances to find work. But the *Wohnortzuweisungsgesetz* stands in the way. I can thoroughly understand the interest of the Federal Government and the *Länder* in evenly distributing *Aussiedler*. However, this wish can have no higher status than the actual goal. And the actual goal is the fastest possible integration. I am filled with satisfaction that the *Aussiedler* coming to us receive full citizens' rights. To these people belongs the right to the freedom of movement, which is strongly restricted with this law. On this basis alone, the PDS cannot support this bill.[117]

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[115] Viertes Gesetz zur Änderung des Gesetzes über die Festlegung eines vorläufigen Wohnortes für Spätaussiedler v. 2.6.2000 (BGBl I S. 775).

[116] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8834 D (23 Mar. 2000) (statetement by Max Stadler)

[117] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8836D-8837A (23 Mar. 2000) (statement by Heinrich Fink)

The governmental (SPD/Alliance '90/Greens) coalition and the CDU/CSU do not express such concerns, but refer instead to the importance of maintaining social peace in the municipalities[118] and increasing the acceptance of *Aussiedler* among the population[119] while the Alliance '90/Greens point out that the *Wohnortzuweisungsgesetz* improves integration.[120]

However, as in the *Bundesverfassungsgericht* decision, there was disagreement among the parties as to whether the law truly does improve integration and ease burdens upon the *Länder*: Marieluise Beck states clearly that "It cannot be denied that residence assignment, limited in time, does indeed improve integration possibilities for *Spätaussiedler* and their families,"[121] but others express differing opinions. The FDP notes that, while a pro-active integration policy is to be greeted, "By contrast, the Residence Assignment Act has the appearance of a relic from the bureaucratic authoritarian state. Prescribing to a person where he should live does not fit with a liberal democratic society. Integration problems cannot be permanently solved in such a manner."[122] The PDS speaks even more strongly of badly organized and badly carried out language courses in Brandenburg, one of the many elements which mean that the Residence Assignment Act "impedes their integration, impedes their life in Germany."[123] Brandenburg, it should be noted, is one of the five *Länder* to which *Aussiedler* are expressly being assigned in order to lessen the burden on any one state.

In terms of easing burdens upon the *Länder*, figures are cited as to the increase in welfare payments in the district of Cloppenburg in Lower Saxony, where DM 17 million were spent in 1992/93, but 60 million were spent in 1996.[124] However, no

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[118] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8829 D (23 Mar. 2000) (statement by Jochen Welt (SPD)).

[119] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8831 B (23 Mar. 2000) (statement by Hartmut Koschyk (CDU/CSU)).

[120] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8833 B (23 Mar. 2000) (statement by Marieluise Beck (Alliance ,90/Greens)).

[121] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8833 B (23 Mar. 2000) (statement by Marieluise Beck (Alliance ,90/Greens)).

[122] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8834 A (23 Mar. 2000) (statement by Max Stadler)

[123] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8837 C (23 Mar. 2000) (statement by Heinrich Fink)

[124] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8836 C (23 Mar. 2000) (statement by Günter Graf)

figures are given for the current situation; it is merely asserted that the law is needed. Jochen Welt, the Commissioner for *Aussiedler* Affairs, makes a series of assertions that the law is necessary for social peace and notes that "an important part of socially acceptable immigration is a numerical limit … [but also] an equal distribution of *Spätaussiedler* and the connected distribution of tasks among the federal government, the *Länder* and municipalities."[125] In the debates in the upper house of parliament, the *Bundesrat*, Thuringia, in addition to expressing concern about the restriction of freedom of movement, expressed serious doubts about the effectiveness of the law in terms of reducing burdens on the *Länder*, in particular the five new *Länder*: it notes that the distribution of *Aussiedler* is carried out according to a formula which is based upon population shortly after unification in 1990. As population has shrunk dramatically in the new *Länder* – and as the tax base has shrunk – since then, too many *Aussiedler* are being sent to the five new *Länder*,[126] thus disproportionately increasing the burdens upon the *Länder* rather than easing them. In short, however, there are very few available data to support or refute either claim. Thuringia, again, notes this neatly: "A law based solely on assumption does not justify this sort of extensive restriction of a fundamental right."[127]

The *Bundesverfassungsgericht* stated that there would be issues of constitutionality for this law in the future if certain changes were not made[128] and, mindful of the lack of data, required the legislature to observe the development and consequences of the *Wohnortzuweisungsgesetz* and, if necessary, correct these for the future. The government has said it will carry out such an investigation and assessment by 2005.[129]

E. Conclusion: Civil Rights

T.H. Marshall argued in the 1950s that integration in a society had three substantial components: civil, social and political.[130] Today, citizenship is often thought of as encompassing these three elements. Indeed, in the case of non-citizen residents, or

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[125] DEUTSCHER BUNDESTAG, 14. Wahlperiode, 95. Sitzung, 8829 BC (23 Mar. 2000) (statement by Jochen Welt (SPD)).

[126] BR Drucksache, 747. Sitzung, 41C (4 Feb. 2000).

[127] BR Drucksache, 747. Sitzung, 41A (4 Feb. 2000).

[128] BVerfG, 1 BvR 1266/00, 51 (17 Mar. 2004).

[129] BVerfG, 1 BvR 1266/00, 43 (17 Mar. 2004).

[130] T.H. Marshall, *Citizenship and Social Class, in* CITIZENSHIP AND SOCIAL CLASS, (eds. T. H. Marshall and Tom Bottomore, 1992 [1950]).

denizens,[131] it has been argued[132] that the exercise of substantive rights in all three spheres – participating in activities for which citizenship is not required – is more meaningful than the mere possession of the formal citizenship – the passport. In the case of the *Spätaussiedler*, the opposite appears to be true. Despite their formal possession of the passport, their substantive integration appears to be lagging behind. The case of the restriction of their freedom of movement – of one of the nineteen fundamental rights in the Basic Law – is indicative of their low status and lack of integration as full citizens in Germany. The *Bundesverfassungsgericht* decision confirms that there are second-class citizens in Germany. These are not citizens of Turkish, Bosnian, Italian or Afghani origin, but German citizens of German origin, coming from the former Soviet Union.

[131] TOMAS HAMMAR, DEMOCRACY AND THE NATION-STATE (1990).

[132] DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); YASEMIN NUHOGLU SOYSAL, Limits of Citizenship: Migrants and Postnational Membership in Europe (1994); Peter Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship, in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA (W. Rogers Brubaker ed., 1989). Amanda Klekowski von Koppenfels, *Politically Minded: The Case of Aussiedler as an Ideologically Defined Category*, *in* MIGRATION IN ERKLÄRTEN UND UNERKLÄRTEN EINWANDERUNGSLÄNDERN: EIN GESCHENK VON SCHÜLERN UND STUDENTEN ZUM 60.GEBURTSTAG VON DIETRICH THRÄNHARDT, (Uwe Hunger, Karin Meendermann, Bernhard Santel and WichardWoyke, eds., 2001).