

‘Foreigner Policy’ and Applied Law in Germany

- Attempts to prevent the naturalisation of an Indian -

A case study

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1. Introduction

Die zwischenstaatlichen Beziehungen können in besonderer Weise belastet werden, wenn Staatsangehörige der Entwicklungsländer eingebürgert werden. Diese Länder ermöglichen ihren Staatsangehörigen zur Aus- oder Weiterbildung den Aufenthalt im Bundesgebiet, um sie zu Fach- oder Führungskräften heranbilden zu lassen. Hier werden ihnen Schul-, Studien- und Forschungsplätze sowie Lehr- und Praktikantenstellen bereitgestellt. Mit dieser personellen Entwicklungshilfe leistet die Bundesrepublik Deutschland einen Beitrag zu den weltweiten Maßnahmen der Entwicklungspolitik. Dies gilt auch dann, wenn dem Aus- oder Weiterzubildenden darüber hinaus finanzielle Ausbildungshilfen (Stipendien, Zuschüsse, Darlehen) nicht gewährt werden.

Der damit angestrebte Erfolg wird nur erreicht, wenn diese Personen nach Beendigung der Aus- oder Weiterbildung in ihre Heimat zurückkehren und dort am Aufbau mitwirken. Die Einbürgerung von Angehörigen der Entwicklungsländer, die im Bundesgebiet oder in anderen Industriestaaten im Rahmen der personellen Entwicklungshilfe eine Aus- oder Weiterbildung erfahren haben, soll deshalb unterbleiben. (5.2.1. EinbürgRiLi)¹

Despite the presence of more than 7 million ‘foreigners’ in Germany, the German state and thus also its population adhere still to the idea of a homogenous white Germany which is no *Einwanderungsland* (land of immigration - see 2.3. EinbürgRiLi). §1 Abs.2 AuslG defines anybody who has not got the German citizenship as *Ausländer* (foreigner) thus using a term which literally stands in contrast to *Inländer* (resident in a country) to refer not only to those resident outside Germany but also to most of the ethnic minorities living in the country. The law, accordingly, suggests both to ‘Germans’ and ‘foreigners’ that the latter do not really belong to the country and thus need a special treatment. This distinction is further strengthened by the German concept of citizenship which is based on *ius sanguinis* (§4 RuStAG), i.e. the idea that one can belong to the German *Volk* (people) only if one descends from Germans. The law of the country has, accordingly, always made the process of naturalisation for people of other ancestry very difficult and tedious. As the above quote from the *Einbürgerungsrichtlinien* (rules for naturalisation) illustrates this is particularly the case for migrants from the developing world.

While there is, thus, in Germany a general dislike for immigration, the extent to which it is allowed and accepted by the state and the population depends very much on the current economic situation. During the ‘economic miracle’ in the 50s and 60s there was such a lack of qualified labourers that Germany was happy to receive many people from abroad. It not only recruited the mostly unskilled *Gastarbeiter* from the Mediterranean countries, but also welcomed many young men (and a few women) from all around the world at German

¹ „International relations can be strained in a particular manner when citizens of developing countries are naturalised. These countries make a stay in the federal territory possible for their citizens for education and training purposes in order to get them trained to be specialists and managers. Here they are provided with school, university and research places as well as apprenticeships and places for practical training. With this personal development aid the Federal Republic of Germany contributes to the world wide measures of development politics. This is true also when the trainee does not receive financial education aids (scholarships, grants, loans) beyond this.

The intended success can only be achieved if this person returns after finishing the education or training to its home country and participates there at its development. The naturalisation of members of developing countries who have experienced in the federal territory or another industrial country an education or training in the bounds of personal development aid should thus be omitted.“ (own translation)

This part of the rules has been unchanged since 1971.

universities and provided many of these with scholarships and grants. The opportunity to get further education in Germany was seized by many South Asians, who came to get away from a tense labour market situation on the sub-continent and to get to know the world. Both for the migrants and the German state the belief was that the former come for some time to study and work and then return to their country of origin. In fact, any other plan would have been in opposition to the German imagination of not being an *Einwanderungsland*. If anybody at that time, however, had thought about the dynamics of migration, it would have been clear that neither all the *Gastarbeiter* nor all the students would leave the country again after they had spent a considerable part of their formative years there. Given that university studies in Germany last several years without there being a definite time of ending, it is not surprising that many of the South Asian students became increasingly adjusted to living abroad and started to form families at their place of residence. As many of the wives were German, the longing for a return to South Asia lost in urgency and the roots for South Asian communities in Germany were laid.

In the 70s when the South Asian students had completed their studies, were in their first employments in Germany, when their first children had been born and the state got more restrictive in its application of the laws made for ‘foreigners’, many of the migrants thought about applying for the German citizenship. The latter was particularly appealing to all the physicians as the employment situation for non-German physicians became increasingly tense. Applications for naturalisation, however, were generally countered by the German administration by reference to the state’s interest in development politics and its obligation to prevent a brain drain from the developing world. It was argued that given this hurdle the only way to become German was to pay back all scholarships and grants received from German bodies during the studies, as they had been given as a part of development policy. Although a clause to that effect had not been part of most of the contracts entered in by the South Asian students, most who wanted to become Germans and were faced by this demand of the German authorities did not see any alternative, gave in and paid back. There were, however, a few student migrants (not only South Asians) who questioned the validity of the claim and went to court. Despite the fierce resistance of the German administration and government, some did not give in after the first defeats, battled for years using all possibilities of the appeal system, going up and down the court hierarchy.

One of them was an initially young Indian who had applied for the German citizenship in 1970 and finally got it in 1987 without being anymore required to pay back the money he had received in the course of his studies. Together with another case which was decided by the *Bundesverwaltungsgericht* (the highest court for administrative law) on the same day², his case thus set a precedent forcing the German administration to change its approach concerning applications for naturalisation by former students from developing countries. This case³ will in this essay be taken to illustrate the kind of arguments and methods used to prevent the naturalisation of (South Asian) student migrants and to investigate how the applied law has been used in Germany for the purpose of *Ausländerpolitik* (foreigner politics). In order to do this first of all a brief description of the history of the case will be given, before then the case’s arguments and methods are analysed and finally major features of this case and the implicit agenda of the administration will be discussed.

² BVerwGE 1 C 29.84 (31.03.1987) See, for example, DVBl 01.08.1987, pp.793-798.

³ The applicant gave me the opportunity to study in detail all the case documents he had collected in the course of the years.

2. Description of the case

The Indian Mr. Agarwal⁴ came to Germany in 1960 in order to continue his studies in physics. Due to the rules about admission to German universities, which do not consider an Indian bachelor sufficient for postgraduate studies, he contrary to his plans had to join undergraduate courses and thus was forced to face a longer period of studies in Germany than he had intended. As his family in India was only able to finance his journey abroad but not his living expenses, Mr. Agarwal worked in his holidays and applied for scholarships. He got the latter for a short period from the DAAD (German Academic Exchange Service) and for a longer period from his university receiving in total the amount of 13,330 DM. According to his own accounts he did not apply for any scholarship directly linked to development policies as he did not wish to be bound in his planning for the future by such a contract. After Mr. Agarwal graduated he began a Ph.D. financed by paid work at the university. During all this time his applications for permit to stay and to work had been granted without problems. When he, however, returned from a half year research trip to Oxford he was forced to sign a declaration that he will leave Germany once he has completed his Ph.D., as otherwise he would not have got the extension of his permit to stay which he needed to finish his research. Before he, however, submitted his thesis he had married a German in 1969 and thus had a right of residence as the spouse of a citizen of the country. In 1970, the year in which he also started to work for a research institute and his first child was born, Dr. Agarwal then applied on the 6th of August for naturalisation. The time which passed from then onwards until his becoming a German citizen can be divided into five periods which I will now briefly describe.

Two months after he had submitted his application Dr. Agarwal was informed by his home town Karlsruhe that in general the development politics interests of the German state prevent a naturalisation of applicants from developing countries. As, however, the conference of ministers of the interior had earlier that year decided that the rules for applicants with German spouses should be further discussed in the process of rewriting the *Einbürgerungsrichtlinien* and that until this has been completed such applications should not be decided on, Dr. Agarwal was told that if he did not object his application would be suspended for the time being.

About two years later he was informed that the minister of the interior of Baden-Württemberg had agreed to his naturalisation, since his home country India did not object to it. The only condition was that for reasons of development politics he had to pay back all the money he had received as scholarship from German bodies. As Dr. Agarwal could not remember to have entered any obligation to pay back, he sought to collect material to this effect. He contacted the DAAD, the foreign office and the education ministry responsible for the university he had gone to, asking them about the legal validity for claiming back the money he had received. The ministries as well as the town administration in the next few years kept on referring in their letters, sometimes in contrast to what they had said orally, to interests of development politics and the discretion of the public authority in deciding the case. Dr. Agarwal's request to name him the justification for linking repayment and naturalisation was not further met, the town however, both in letters and especially in the many personal meetings which were characteristic for this period, started to pressurise him to either declare that he will repay or instead withdraw his application.

⁴ Name changed.

Instead of doing either in 1976 Dr. Agarwal asked his friend and lawyer Dr. Herzog⁵ to be officially, and not only behind the scenes as before, his legal advisor. This changed the path of conduct on both sides, within two weeks the application was rejected, a measure which formerly had been carefully avoided, and thus the way was open to go to the courts. Dr. Herzog used all possible means, first submitting a *Widerspruch* (protest) against the dismissal of the application and then, after the town had issued a *Widerspruchsbescheid* reacting to the protest, filed a suit at the *Verwaltungsgericht* (administrative court) Karlsruhe. As the judgement⁶ in 1977 confirmed the town's position Dr. Agarwal and Dr. Herzog appealed (*Berufung*) against it. In order to save time they suggested to the town administration to immediately head for an appeal (*Revision*) at the BVerwG rather than to first wait for a decision of the *Verwaltungsgerichtshof* (second stage in the appeal hierarchy). This path does not seem to have been pursued further and thus the next judgement was held by the VGH.⁷ It was again in favour of the official position and adding to this held that a further appeal would not be possible. Dr. Herzog thus directed a *Nichtzulassungsbeschwerde* (objection to the non-admission of an appeal) first to the VGH and as the latter rejected it the objection was passed on to the BVerwG. This led to the first success in Dr. Agarwal's case as the BVerwG⁸ in 1979 accepted the objection and thus cleared the way for a further appeal (*Revision*).- During all this time Dr. Agarwal and Dr. Herzog were collecting more material relevant for the case and doing so also came across similar court cases.

It then took again some more years till anything happened. In 1983 Dr. Agarwal was informed that there had been a procedural mistake in not including the federal home office in the case. This meant that in case the BVerwG decided in his favour it would not be binding on the authority, but that in the reverse case he would finally have lost. In the end the BVerwG⁹ decided in favour of Dr. Agarwal's case and it was referred back to the VGH for a renewed consideration. The latter then asked both parties to the case whether they would be willing to agree to a settlement out of court. While Dr. Herzog was ready to do so, the town administration, however, refused as they considered the matter of too much importance. Accordingly the case went on and the home ministry was included as a party in it. Since the case was to be decided newly, it was also necessary to collect more material for it. On the basis of the new facts and the former ruling of the BVerwG the VGH¹⁰ decided that Dr. Agarwal had to be naturalised, but it left the town administration and the home office the possibility of appealing against this. The latter used the opportunity and so the BVerwG was to be involved a further time.

In 1987 there was finally the last judgement of the BVerwG¹¹ which ordered that Dr. Agarwal had to be given the German citizenship. On the 7th September 1987, more than 17 years after he had applied for it, Dr. Agarwal then became a German by law. Except for the regulation of some financial matters the battle with the administration was over.

⁵ Name changed.

⁶ VerwGE Karlsruhe II 196/77 (04.10.1977)

⁷ VGHE Baden-Württemberg I 3038/77 (13.06.1978)

⁸ BVerwGE 1 B 300.78 (26.02.1979)

⁹ BVerwGE 1 C 56.79 (13.06.1983)

¹⁰ VGHE 1 S 1931/83 (14.05.1984)

¹¹ BVerwGE 1 C 30.84 (31.03.1987)

The brief account of the events illustrates the degree of persistence needed on the side of the Indian applicant. For 17 years he not only was in a constant process of correspondence with several institutions, especially in the initial stage he also frequently was summoned to personal interviews, he had to learn all the details of the German naturalisation law and was constantly collecting material linked to his case. All this he could only do as he had a secure employment and the backing of family and friends as well as the support of a lawyer who worked all this years without any financial recompense.

3. Arguments and Methods

3.1. Phase I: application and delay (1970)

durch langjährigen Aufenthalt fühle ich mich mit Deutschland verbunden und möchte dieses Land auch aus Rücksicht auf meine Frau und deren Familie nicht verlassen ¹²

reason given in the application form by Dr. Agarwal

As reasons for his application for the German citizenship Dr. Agarwal emphasised his strong link to Germany which had been formed through ten years of residence in the country and his marriage to a German. He, furthermore, argued that he did not want to take his wife out of her familiar surroundings and intended to stay close to his parents-in-law in Eastern Germany. Not satisfied with the impact this might have on the authorities he also referred to the gain Germany experienced through his employment as a scientist and mentioned that neither he nor his wife would be able to find a suitable occupation in India given the tense labour market situation there. He then concluded with stressing the fact that he never had received a scholarship linked to development politics. The reasoning clearly indicates that Dr. Agarwal anticipated some objection from the German authorities and thus tried to present as many points in favour of his application as possible. Accordingly he not only argued by emphasising his own integration into the German community, but also referred to the interests of his German wife, which he imagined would be protected by the German state, and economic and inner-German advantages for the country arising from his presence. He was careful to mention also that India would not experience any disadvantage from his not returning there. Dr. Agarwal's application, thus, not only attempted to prove that all legal requirements are fulfilled but that in fact Germany would benefit from the naturalisation. His whole approach was, thus, directed to please the authorities.

It did, however, not have the intended effect. The German authorities reacted by focusing on the interests of German development politics in general and their opposition to any naturalisation of applicants from developing countries. The particular circumstances of Dr. Agarwal's case were dealt with only in so far as he was informed that his personal professional interests were secondary to the country's interest and that his wife by marrying a foreigner had had to expect to leave her country of origin with him. Dr. Agarwal was, thus, faced with a purely exclusionary reaction, displaying no intention of accommodating him.

3.2. Phase II: repetition and intimidation (1972-6)

The new *Einbürgerungsrichtlinien* of 1971 introduced formal rules according to which applicants from developing countries could in exceptional cases, such as being married to a German spouse, be naturalised if they repaid all scholarships they had received earlier. The

¹² „through long-standing residence I feel attached to Germany and do, also in consideration of my wife and her family, not wish to leave this country“ (own translation)

administration was thus somewhat more limited in the application of its discretion than before and in the case of Dr. Agarwal no further objections to the naturalisation were made as long as he was willing to fulfil the condition. The German state, in doing so, to some degree faced the reality of former students having settled in the country and now wanting to obtain also citizen's rights. It was now willing to accept a financial compensation for no longer adhering to what it called its principles of development politics. At this stage there, thus, seemed to be introduced some wish to accommodate the applicant.

Dr. Agarwal, however, whose sense of justice was put under pressure continually, by for example the administration questioning his wife's right of residence in her home country or by not informing him about his right to obtain an unlimited permit to stay, was not to be easily accommodated in this manner. Given that he did not perceive himself as having entered any obligation for repayment, he set out to prove the illegitimacy of its linkage to his naturalisation. His unwillingness to part with so much money was certainly also a motive for his not accepting the offer, but as the administration was ready to make generous rules for the manner of repayment, this on its own would not have induced him to fight against it.

Acquiring proof for his scholarships never having been openly linked to development politics, however, presented itself more difficult than expected. Dr. Agarwal soon learned that his questions were answered differently depending on whether the reply was oral or written. In person most people he got in contact with agreed with his line of reasoning, but he did not receive written documentation of these agreements. In all letters the official bodies, such as the university, the ministries and the DAAD, carefully kept covered and did not contradict official reasoning. Behind the scenes, however, the points of view were not that unanimous as is illustrated by an internal paper of the DAAD¹³ of which Dr. Agarwal got possession. In it the DAAD not only complains about not having been consulted in forming the rule about repayment, but also argues in some detail why it is neither politically credible nor legally clear nor practically feasible. Despite these arguments, however, the official position towards the applicant remained unchanged, referring to the discretion of the administration, the supreme importance of development politics, the special status naturalisation confers to a migrant, the unnecessariness of their being a formal obligation for repayment and the need to prevent discrimination of German students. Dr. Agarwal's attempts to obtain arguments specifically linked to his case, to enter into a discussion of the unclear advantages gained by developing countries through the German rules and debates about the legality of the latter remained futile, all resulting in a repetition of the abstract state interest and the absence of a need to consider individual rights in this case.

Interessen der Entwicklungshilfepolitik, die bei der Einbürgerung auf Wunsch des Ausbildungshilfeempfängers zurückgestellt werden, würden doppelt belastet, wenn mit dem Vorteil der Nichtrückkehr noch der Vorteil einer besonderen Ausbildungshilfe aus öffentlichen Mitteln kumuliert würde.¹⁴

from a letter by the ministry of education of Hessen to Dr. Agarwal, dated 25.07.1973

The underlying tenor of these kind of arguments was that the applicant from South Asia should be happy to be in the country of milk and honey at all, that this already was a big advantage to him and that he could not expect more than that. Solely the perceived state's

¹³ Letter from the DAAD to the Bundesminister für wirtschaftliche Zusammenarbeit dated 17.05.1973.

¹⁴ „Interests of development aid politics, which would in the case of a naturalisation be deferred according to the wish of the recipient of education aid, would be doubly strained if together with the advantage of non-return the advantage of a special education aid from public sources would be cumulated.“ (own translation)

interest in development policy and implicitly also the idea of Germany not being an *Einwanderungsland* was taken into account and there seems to be no indication that the applicant was considered a human being endowed not only with obligations but also with rights. The letters from town officials are the clearest proof of these discriminating attitudes. They persistently repeated the original arguments of the abstract interest of development politics and their own discretion in deciding about it. Dr. Agarwal's arguments were not taken into consideration at all, instead another court judgement confirming their views was used as the basis for setting him an intimidating deadline to either accept the repayment or withdraw his application.

Wir möchten Sie höflichst bitten, uns bis spätestens 20.7.76 mitzuteilen, ob Sie unter den dargelegten Voraussetzungen eingebürgert werden wollen oder Ihren Antrag aus Kostengründen zurücknehmen. Falls wir bis zum genannten Zeitpunkt keine Mitteilung erhalten, werden wir davon ausgehen, daß Sie Ihren Einbürgerungsantrag zurückgenommen haben. Für die Bearbeitung Ihres Antrages müssen wir in diesem Fall 20% der im Genehmigungsfalle zu erhebenden Verwaltungsgebühren in Ansatz bringen.¹⁵

from a letter by the town to Dr. Agarwal, dated 25.05.1976

This early stage of Dr. Agarwal's attempt to get the German citizenship was thus characterised by much arrogance on the official side which sought to use its power of authority to discourage the applicant by letting time pass, not reacting to his arguments, refusing to issue a decision which could be challenged in court and finally setting deadlines and threatening with costs. However, while the administration, thus, kept true to its original arguments and gradually changed in its approach from indifferent in its rejection to hostile, Dr. Agarwal was not intimidated but rather strengthened in his sense of injustice and will to fight for his right, putting in his arguments an emphasis on the administration's responsibility to act within the realm of the law. An agreement, accordingly, became increasingly unlikely and the need arose to find a legal solution.

3.3. Phase III: litigation I (1976-9)

In order to get the case out of the arbitrary, impenetrable world of the administration and to be able to bring it to the courts Dr. Agarwal at this stage of hardened positions decided to let his friend and legal advisor Dr. Herzog appear also officially, thus indicating to the administration that it had to use legal means to win its case. The young lawyer after studying the relevant material was quite optimistic that they could soon be successful and based all his arguments on the legal issues, in particular the infringements on rights, relevant in the specific case. The town administration, thus being put under pressure themselves, reacted to the arguments by repeating its concerns about development politics and the discrimination of Germans, constructing a reasoning why scholarships were meant for development politics even if this had not been mentioned openly and how this formed a sufficient obligation to repay it, and finally by discussing the faults of Dr. Agarwal's former actions. In particular, the town now referred to the declaration about his intention to return to India he had signed under force on returning from Oxford in 1969 and which so far had not posed any problem. Instead

¹⁵ „We want to ask you most politely to inform us latest by the 20.7.76 whether you want to be naturalised under the given conditions or whether you want to withdraw your application for financial reasons. If we do not receive a communication by the indicated date we will assume that you have withdrawn your application for naturalisation. In this case we have to charge you for the handling of your application 20% of the administration fee payable in the case of approval.“ (own translation)

of discussing in terms of legal concepts, the town thus tried to assemble as much anecdotal evidence, independent of its applicability to the particular case, against the applicant as possible and doing so illustrated quite clearly its xenophobic point of view according to which foreigners should be grateful for all that had been done for them rather than dare to claim their rights.

... Diese staatl. Hilfe beginnt für solche Personen bereits mit der Erlaubnis, sich hier vorübergehend zum Studium oder zur Berufsausbildung aufzuhalten. Sie setzt sich fort mit der sehr kostspieligen Bereitstellung von Studien- u. Ausbildungsplätzen und evt. mit der Vergabe von Studienhilfen sowie in den wiederkehrenden Genehmigungen zum Ausbildungsaufenthalt. Daraus resultiert die weitere Forderung, daß die so Begünstigten ohne besondere vertragliche Regelungen diese großzügigen Hilfen ihres Gastlandes dadurch würdigen, daß sie durch besondere Leistungen und auf dem schnellsten Wege ihr Berufsziel anstreben und vor allem nach Beendigung ihrer Ausbildung in ihre Heimat zurückkehren.

... Erhebliche Belange sind bei ihm deshalb gegeben, weil er für sein Studium 6 Jahre lang und für seine Weiterbildung 2 Jahre lang Ausbildungsplätze blockiert hat, ohne seine „ausdrücklich und verbindlich gegebenes Versprechen“ zur Rückkehr in die Heimat eingelöst zu haben.¹⁶

from the *Widerspruchsbescheid* of the town, dated 05.04.1977

Although the lawyer set out to disprove the town's arguments, showing that in the specific case development politics was not impaired and that the town administration in any case was not competent to decide on this issue, that the applicant faced many hardships by not getting the German citizenship without this helping development issues, that the refusal of naturalisation was also disadvantageous to the German state and that most importantly of all the administration's arguments were not in line with the existing laws, in this first stage of litigation the lower court followed the official line of reasoning by focusing on the abstract interest of the state.

By now the main issues of the debate were clearly the following:

- i) Is it necessary to take into account the facts of the specific case, in particular the restrictions of the rights of the applicant, or is it sufficient to refer to the general interest of the state?
- ii) In how far can the naturalisation be considered as a proof of the failure of the intended development aid?

For the town administration and the courts the answer to these questions were still clear. They considered the state's abstract interest as unquestioningly supreme and thus considered it superfluous to consider any specific facts.

¹⁶ „... This state aid begins for such persons already with the permit to stay here temporarily for education or training purposes. It is continued with the very cost intensive provision of university and training places and potentially with the allocation of education aid as well as the repeated permits to stay for education purposes. From this results the further demand that the thus benefited appreciate this generous aid of their guest country without any further contractual regulation by aiming for their professional goal through exceptional achievements in the fastest possible way and in particular by returning after their finishing their education to their home country.

... Considerable interests are thus given in his case because he has blocked for his studies 6 years and for his further education 2 years education places without meeting his 'explicitly and compulsory given promise' to return to this home country.“ (own translation)

The 'explicit and compulsory promise' was forced from Dr. Agarwal on his return from Oxford.

Ob entwicklungspolitische Belange Indiens beeinträchtigt werden oder nicht, spielt dabei keine Rolle. Auch ist es nicht Aufgabe der Einbürgerungsbehörde, in jedem Einzelfall die „zwischenstaatlichen Beziehung“ konkret zu prüfen und durchzuführen. Hierfür hat diese ihre Richtlinien zu beachten. Was der Kläger fordert, würde zu einem übersteigerten Bürokratismus und Verwaltungserfektionismus führen, wofür der Bürger heute kein Verständnis mehr aufbringt.

... kommt eine Verleihung der deutschen Staatsangehörigkeit in der Regel nur dann in Betracht, wenn ein öffentliches Interesse an der Einbürgerung besteht.

... Letztlich können auch Grundrechte eingeschränkt werden, wenn dies im Interesse des Staates liegt.¹⁷

from the rejection of the appeal by the town to the VGH, dated 21.02.1978

Furthermore, while acknowledging the fact that due to the legally secured protection of the family the applicant had an indeterminate right of residence in the country and that it was, accordingly, not in the power of the state to force him to return to India in order to fulfil the claimed aim of his studying in Germany, the official line of reasoning now made a distinction between this state which in their eyes still carried the possibility of return and that of naturalisation in which case all links to the country of origin were perceived to be torn and thus the interests of the German state violated.

Die Verpflichtung zur Rückzahlung von Ausbildungsbeihilfen besteht erst dann, wenn die Rückkehrerwartung endgültig aufgegeben werden muß. Das wird aber nachweisbar nur offengelegt, wenn die Einbürgerung angestrebt wird. Zwar gilt eine Aufenthaltsberechtigung gemäß § 8 Abs.2 AuslG zeitlich und räumlich unbeschränkt. Gleichwohl hält sich der Inhaber einer Aufenthaltsberechtigung hier als Ausländer auf. Seine Aufenthaltsberechtigung kann mit Auflagen versehen werden. ... Allen diesen Einschränkungen unterliegt er nach seiner Einbürgerung nicht mehr. Erst mit der Einbürgerung, die eine dauernde Hinwendung zu Deutschland manifest werden läßt, steht fest, daß der Antragsteller endgültig nicht mehr in sein Heimatland zurückkehren wird. Dieser unterschiedliche Sachverhalt rechtfertigt eine Differenzierung bei der Rückzahlung von Ausbildungsbeihilfen.¹⁸

from a document by the Federal Chief Attorney to BVerwG, dated 14.03.1980

Adding to this the town seized again the opportunity to emphasise that Germany was no *Einwanderungsland*, that naturalisations could only be an exception and there existed no legal claim for them. While the VGH shared the essence of the official view, the BVerwG

¹⁷ „Whether development politics interests of India are infringed upon or not is of no consequence in this. It is also not the task of the naturalisation authority to check specifically and carry out in each individual case the ‘international relations’. For this it has to observe its regulations. The demands of the plaintiff would lead to an exaggerated red-tapism and administrative perfectionism for which the citizen today has no more sympathy.

... the bestowal of the German citizenship is generally only possible when a public interest in the naturalisation is given.

... Ultimately also basic rights can be restricted if this lies in the interest of the state.“ (own translation)

¹⁸ „The obligation to pay back the education aid arises only then when the expectation of return has to be given up definitively. This, however, is revealed provable only when the naturalisation is aimed for. It is true that an *Aufenthaltsberechtigung* [most secure status of permit to stay, UG] is according to §8 Abs.2 AuslG restricted neither in time nor place. Nonetheless does the bearer of the *Aufenthaltsberechtigung* stay here as a foreigner. His *Aufenthaltsberechtigung* can be equipped with conditions. ... All these conditions are not applicable any more after the naturalisation. Only with the naturalisation, which demonstrates the persistent turn towards Germany, is it clear that the applicant will definitely not return to his home country. These differing circumstances justify a distinction concerning the repayment of education aid.“ (own translation)

allowed an appeal against the former's judgement because it understood the importance of the case also for other potential applicants.

The first phase of litigation was thus characterised by two polarised positions. One arguing that the specific case and its infringements of personal rights needed to be carefully investigated and the other stressing that the state's interest was so supreme that there was no further need for discussion. Accordingly the applicants' party was involved in a debate of specific details, while the official side argued on an abstract level. The town administration added political aspects by referring to issues of foreigner politics and clearly illustrating its readiness to discriminate against foreigners.

3.4. Phase IV: litigation II (1983-4)

In the second phase of litigation there are two major changes to note. These are on the one hand the inclusion of the federal home office in the case and on the other a new approach taken by the courts. The former fact was the effect of and led to a further politicisation of the issue of naturalisation applications by citizens of developing countries. The home office now emphasised the necessity of its agreeing to naturalisations and thus the need for it to be included in all relevant court cases, even though this had not been the standard practice formerly. The contributions made to this specific case by the home office were general treatments about the importance of German development politics, the need to restrain brain drain and to prevent a discrimination of Germans as well as the fiscal impact of a decision in Dr. Agarwal's favour which would prevent future demands for repayment and might challenge the legality of former repayments. Even more so than the line of reasoning taken earlier by the town administration the details of the specific case were largely ignored by the home office.

Es ergibt sich somit abschließend, daß allein der Umstand, daß der Kläger aus einem Entwicklungsland stammt, zur Folge hat, daß das ihm gewährte Stipendium des DAAD unter entwicklungspolitischen Gesichtspunkten geleistet worden ist.¹⁹

from the grounds of appeal by the federal home office to the BVerwG, dated 14.09.1984

The public authorities were not willing to agree to any settlement which did not absolutely confirm their point of view and thus it was now them, and no longer Dr. Agarwal, who stubbornly sought to fight the case through all possibilities of the appeal system.

This change of roles had come about, because the courts now took a course more favourable to the applicant. Reference was made by them to other court cases about the same issue, the judgements of which made it necessary to look more closely into the details of the specific case. The latter, however, had due to the long time period which had passed since the application in 1970 become increasingly favourable for a naturalisation of Dr. Agarwal. By this time he had spend roughly half his life in Germany, his children grew up there, he had bought a house and a return to India was more unlikely then ever. It was, thus, in this specific case almost impossible to consider the naturalisation as the sole cause for the failure of a development aid objective. The courts, accordingly, argued that the German state had to face this reality independently of an abstract state interest. Furthermore, the courts now started to

¹⁹ „It thus concludes that already the fact that the plaintiff comes from a developing country has as a result that the scholarship he got from the DAAD was provided under development politics considerations.“ (own translation)

challenge the legality of the linkage of naturalisation and repayment which formerly had been not questioned.

It seemed now that Dr. Agarwal, due to his persistence rather than through his arguments, could finally become a German citizen. The appeal by the federal home office, however, prevented this for another few years and thus also prevented a necessary change in policy for that time.

3.5. Phase V: litigation III (1987)

Finally, in 1987 the BVerwG decided that the interests of the state against the naturalisation of Dr. Agarwal, the existence of which were not rejected, were not considerable given the details of the case and thus according to the law were not sufficient to prevent the naturalisation. The court held that the specific case had to be considered, that it was not valid to link the question of naturalisation with that of repayment as little as it was justified to link it with the rights of German students or other unrelated matters. It was clearly stated that the administration could only decide within the limits of the law and that this meant in the case of Dr. Agarwal the obligation to give him the German citizenship. The judgement, however, focused so much on the specific details of the case, in particular on the consolidation of his life and family in Germany, that the rights to naturalisation of other former students and the need for the administration to generally take a different approach was not discussed. Accordingly, while the judgement illustrated the importance of court decisions in interfering with administrative practice, it also showed the unwillingness to do this too sharply.

Ich fürchte deshalb, daß andere an einer Einbürgerung interessierte Stipendien-Empfänger nicht allzu viel Allgemeines aus dem Urteil werden herleiten können.²⁰

from a letter by Dr. Herzog to Dr. Agarwal, dated 19.05.1987

4. Features of the Case

4.1. Introduction

Der Senator für Inneres in Berlin fordert von einem Mandanten von mir, der die Einbürgerungsvoraussetzungen erfüllt, daß er sich zur Rückzahlung der empfangenen Stipendien und des Promotionsstipendiums für den Fall verpflichtet, daß u.a. das von Ihnen geführte Verfahren zum Nachteil Ihres Mandanten ausgehen sollte.

Nach Durchsicht der Unterlagen habe ich die Hoffnung, daß Ihr Mandant sich auf einen „faulen Vergleich“ nicht einlassen wird, sondern mit seinem Rechtssteit bereit ist, gleichgelagerte Fälle mitentscheiden zu lassen und der Rechtsfortbildung zu dienen.²¹

from a letter by another lawyer to Dr. Herzog, dated 07.02.1986

²⁰ „I fear thus that other recipients of sholarships who are interested in naturalisation will not be able to deduct much general aspects from the judgement.“ (own translation)

²¹ „The minister of the Interior of Berlin demands of one of my clients, who fulfils all conditions for naturalisation, that he commits himself to the repayment of the scholarships he received for his studies and his Ph.D. in the case that, among other things, the case pursued by you will be decided to the disadvantage of your client.

After looking through the documents I have got the hope that your client will not enter into a ‘dubious settlement’ but rather is ready to participate with his lawsuit in deciding similar cases and serve the development of the law.“ (own translation)

Dr. Agarwal's case was certainly of much importance for the many other actual or potential applicants from South Asia and other developing countries who had also received scholarships for their studies in Germany. It set, together with the other case decided at the same time, a precedent and thus forced the administration to change methods and subsequently many former students were naturalised with little hassle.

For research about ethnic minorities and the law the case carries importance beyond this fact, since it can be used to investigate which agendas determined the course of the case, how the applicant from South Asia was able to attain justice, etc. It has already been shown that the different parties to the case, i.e. the applicant, the administration and the courts, played quite different roles and how these changed with time. The focus of this final discussion will be, in particular, on the agenda of the administration as it decides policy matters and thus sets the framework in which law is applied. It will be analysed what its claimed and its underlying agenda were and how these determined the position of applicants from developing countries.

4.2. Development politics

The main issue in Dr. Agarwal's case brought forward by the official side were the interests of development politics. Politics and administration argued, and still do so, that students from developing countries were welcomed in the country and provided with scholarships as a part of development aid for their countries of origin and that Germany's obligation is to prevent brain drain from the latter by all means. Accordingly, the EinbürgerLi²² have been drafted in a way which prohibits the naturalisation of any citizen from a developing country, independent of the reason for which he or she came to Germany, and requires in the scarce exceptions of this rule the repayment of all received money. This was the intent of the rules in the beginning of the 70s and that has not been changed until today.

Such general statements about development aid which do not take into account the particular circumstances of the case are, however, somewhat questionable. It is thus necessary to investigate whether the actions and rules of the German administration really seem to operate in favour of development politics and doing so several issues have to be looked into.²³

Firstly, it is not quite as obvious as the German state wants to depict it that the South Asian students, as well as their fellows from other developing countries, came to Germany in order to eventually help their country of origin. When they came in the 50s and 60s the German economy, in fact, experienced a severe shortage of labour, both unskilled and skilled, and it was thus in the interest of Germany to get as many employees from abroad as possible. This was certainly one of the reasons why the students were welcomed and is well illustrated by the ease with which they initially got employments after graduation. Furthermore, the students themselves did not necessarily perceive themselves as being part of a development aid project; they had come for private reasons and with individually different future plans which did not necessarily include a return to their home country. They chose their field of study themselves without being obliged to take into account the development needs of their countries of origin. In fact, in the case of India it is somewhat questionable whether, given its good higher education system and its high rate of unemployment among academics, there was

²² See quote at the beginning of the essay.

²³ A similar discussion can be found in the letter by the DAAD to the Bundesminister für wirtschaftliche Zusammenarbeit referred to in footnote 13.

at all a need for Indians to obtain university degrees abroad, especially if they were not tailor made for development purposes.

This leads to the second major inconsistency in the development politics as expressed in the case. It seems hardly credible that development aid can be given without a consideration of the particular circumstances and needs of the country which is supposed to receive it. The persistence with which Dr. Agarwal's attempts to refer to the interests of his home country in the specific case, like those of applicants in other cases²⁴, are ignored illustrates how little the administration seems to be really interested in that country. This shows also, in the general statement that no citizen of a developing country should be naturalised at all, independent of his or her personal situation and ability to be of benefit to the country of origin. The focus of the law is clearly on the exclusion of the students from Germany and not on their inclusion in the developing country.

The line of reasoning, thirdly, does not take into account at all that the migrant's return to his or her country of origin might not be necessary for efficient development aid. As Punnamparambil (1981) clearly illustrates, it can be the transfers of income to the family back home which are the source for further development by enabling family members to get a better education in the home country or setting up a business there. The developing country might, thus, be much more interested in establishing a diaspora of well educated and situated men and women in an industrial country who can send back resources and act as a bridge for trade and investment, and not have to face the trouble of integrating Western educated academics in an already tense labour market.

Even if the return to the country of origin was an end in itself its likelihood, fourthly, does not closely relate to the citizenship of the migrant. Most of the South Asians and other applicants from developing countries who want to become German citizens have already stayed in the country for a considerable amount of time and have established themselves well within it. In fact, it is this circumstance which makes many want to change their citizenship in order to have all citizens's rights in their country of residence. Most of the student migrants of this category have an indeterminate permit to stay in Germany and the state, accordingly, has hardly any possibility to force them to return to their country of origin. Thus the aim of development aid, if it was the return, has already been failed to achieve and it does not really matter whether the migrants will be naturalised or not. One might even argue that development aid through these former students is more likely if they become German citizens. In that case, they can return to their country of origin and work there for a period without worrying about their permit to stay in Germany. They are thus much more flexible and able to benefit the developing country once they are German.

Finally, it has to be asked what intention lies behind the demand for repayment of scholarships. If those are paid back this certainly does not give back to the state all the investment into the human capital of the foreign students and accordingly falls far short of the money supposedly earmarked for development aid. The feasible repayments, while being of considerable height for the migrants, can at the most be a trickle with little impact on the state's development budget, if it ever reaches that at all. In none of the documents it actually states who will be the recipient of the repayments and it is thus far from clear that it will actually be used to the benefit of developing countries. In fact, it seems much more likely that the administrative costs of demanding the scholarships back and facing court trials will cause so much government spending that any positive budget effect is improbable. Accordingly, the

²⁴ See for example VGHE Baden-Württemberg I 657/75 (13.10.1975) or BVerwGE 1 C 230.79 (16.05.1983)

financial effect of this rule lies solely on the applicant's side and its major effect will not be to benefit development politics but to deter applications for naturalisation. It is thus again an exclusionary and not a constructive regulation.

This discussion shows that if the rules were made at all for development politics issues they have not been thought through well enough. Their aim might be to give some pretence of caring for developing countries on the side of the German state, more likely, however, they are in line with another agenda, with wanting to preserve the idea of Germany being no *Einwanderungsland*. This use of the citizenship law for aims of foreigner policy will be discussed further in a later section, after some other features of Dr. Agarwal's case have been investigated.

4.3. State interests vs. personal interests

The second major issue of the case was the degree to which the facts of the special case had to be taken into consideration when assessing the impact the naturalisation has on the state's interests. Here there were clearly two polar positions with the administration arguing that the country's interests were so superior that the specific case had not to be taken into account at all, and the applicant emphasising the importance of considering his particular situation and not some abstract principles. If one looks somewhat closer into the issue one, however, soon recognises that it is not so much personal or state interests which are at stake but a dispute between *Rechtsstaat* (constitutional state) and politics. The administration, and thus the governments, want to protect their political agendas concerning both development and foreigner policies and thus argue on the basis of abstract, general ideas. The laws include vague phrases which leave much room for discretion and can thus be used by the administration arbitrarily, leaving much possibility also for discrimination. The later is particularly likely, as policies in general reflect the majority view and not that of minorities, ethnic or other. Members of ethnic minorities, like Dr. Agarwal, who suffer under the policies made to please the majority cannot, thus, rely on politics in order to be protected in their rights. In a *Rechtsstaat* like Germany which in its *Grundgesetz* (basic law) has for this reason many safeguards for the protection of minority interests, the law is supposed to take care of this, in particular as Western law very much focuses on the protection of personal rights. Accordingly, Dr. Agarwal and his lawyer most of the time argue on the basis of legally guaranteed rights which are broken by the rules for naturalisation. While doing so they clearly pursue the personal interest of the applicant, it can, however, also be argued that this is in the state's interest as the state's foundation is the *Grundgesetz* and the idea of being a *Rechtsstaat*. Furthermore, it has to be emphasised that there is no objective interest of the state, that it is always politically determined and that, accordingly, this concept can be easily misused to the disadvantage of ethnic minorities.

The courts who, as has been seen, shift their focus with the passing of time away from the abstract state interest to an assessment of the specific case, do so because they perceive the infringement on the *Rechtsstaat*. They are, however, not harsh in their critique of former decisions and do not address the issue of the politicisation of the case. Accordingly, the final judgement has little to offer in general for improving the treatment of ethnic minorities by officials.

4.4. Power and justice

While it was never discussed in the case documents, another major feature of it was the seemingly strategic use of the imbalance of power by the official side. In particular in the

initial phases before Dr. Agarwal officially was represented by a lawyer, the administration used its power as an official body with many specialists opposing an individual applicant with little knowledge of the system. Dr. Agarwal was repeatedly summoned to personal interviews where the responsible official gave him an oral report of the state of things and demanded him to make a decision on the spot, i.e. without having time to think it through and consult with experts. Furthermore, the standard reply to his complaints was that it was all within the discretion of the authority and thus could not be challenged. Given that hardly any public authority will openly contradict the statement of another and that the internal information system of the administration secures that information relevant to a case is transferred from one office to another, Dr. Agarwal was faced with an impenetrable collusion of state bodies which all pursued publicly the same strategy and only by mistake released information undermining that. It was thus for him, as it would be for any other individual, very difficult to be informed about his rights and to acquire necessary documentation to prove his case. Instead of providing him with information which could help him, the administration pursued the strategy of letting time pass and not reacting to his arguments as well as trying to pressurise him to comply with its demands. The method of dealing with the irritating applicant was thus a mixture of intimidation and frustration which was adhered to also later when the courts were involved by then simply reiterating former arguments without any effort to engage in a proper debate and thus letting time work for them.

Given this imbalance of power it is, accordingly, very difficult for an individual opposing the administration to get justice and it requires many preconditions. First of all, one must be aware of the fact that one's rights have been infringed on and that one thus has the right to demand justice. Given this one can only proceed on this path if one is not intimidated by the obvious power imbalance. One needs to be endowed with patience and persistence as otherwise the playing with time on the side of the administration will soon be successful. Furthermore, it is hardly possible to fight such a battle individually without both moral and legal support from family and friends. If one is not as lucky as Dr. Agarwal having a friend who is a lawyer and is willing to work without recompense, one also needs sufficient finances to afford legal advice. Adding to this one must be able to argue one's own case, i.e. one must understand the legal system, must be articulate, etc. Finally, one can undertake such a project only if one has a secure legal status and must not fear disadvantages resulting from opposing the official view of the law.

Such a combination of factors is unlikely for any person, even more so for a member of an ethnic minority who has spend many years outside Germany. It is, thus, far from natural for members of ethnic minorities to get justice if the administration makes attempts to prevent it. It, accordingly, needs stubborn and strong characters situated in favourable circumstances to set precedents which can then be used for the benefit of others.

4.5. The underlying issue: foreigner policy

All this indicates that, although the official reasons for refusing the German citizenship to Dr. Agarwal are development politics issues, there is a different agenda underlying this according to which naturalisation should be handled as restrictive as possible in order to keep in line with the tenor of foreigner policy. This exclusionary and also discriminatory approach surfaces once in a while in the documents written by the town and is also part of the federal home office's line of reasoning. Foreigners from developing countries, i.e. those who are visibly different from *the* Germans, are depicted as seeking only their personal advantage, as coming from a place far inferior to Germany. In that country, furthermore, they are perceived to infringe on the rights of the indigenous population, costing much money and blocking its

progress. There is a display of utter disregard for the countries of origin as the only aim is to keep the foreigners away; if not physically because the law prevents this then at least symbolically by not letting them legally become Germans. By refusing naturalisation, or making it very difficult to obtain, the public authorities cannot only preserve their own myth of return but can also illustrate that getting the German citizenship is something very special, having the character of an act of grace rather than basing on a right which can be claimed.

The many discriminatory remarks are commented on a bit by Dr. Agarwal's lawyer, but they never become an issue debated in the case. Either it is not perceived as a problem, as discrimination is still today denied as a problem in official Germany, or it is carefully avoided as a treatment of discrimination by the courts would be causing too much uproar. Accordingly, the underlying agenda of the administration, i.e. the attempt to exclude foreigners from German life as much as possible, is not addressed and no bar is put on the development of other official measures with the same effect as the repayment rule.

Nobody in the case, not even the applicant, challenges the German state's construction of a homogenous white Germany, of a country which is not an *Einwanderungsland*. It stays thus legitimate to devise exclusionary mechanism, particularly against citizens of developing countries, as long as this happens within the realm of the law. Accordingly, still today, ten years after the final judgement in Dr. Agarwal's case, the *EinbürgerLi* have hardly been changed in the relevant passages and the political discussion about a change of the citizenship law shows that Germany still sticks to its image of German *Volk* with common descent in which ethnic minorities have no place.

The institutional racism, i.e. administrative structures which disadvantage members of ethnic minorities by applying law according to a xenophobic agenda, which tried to prevent the naturalisation of Dr. Agarwal, while having been defeated in that special case, is thus still in existence.

4.6. Implications for South Asians

A feature of the established South Asians in Germany, i.e. of those migrants from the sub-continent who are integrated in the German middle class, have a sufficient income to afford the appropriate style of life and to provide a good education for their children, and to which Dr. Agarwal belongs, is that they are always eager to stress how well they are integrated in German society and how they do not face discrimination. They are, thus, emphasising their difference to the 'real' foreigners, especially the Turkish migrants and asylum seekers, who are in their eyes not willing to integrate and thus provoke discrimination. But no matter how much they stress this distinction, as Dr. Agarwal's case illustrates, also the established South Asians in their contact with German administration face institutional discrimination with major impact on their lives.

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Table of Statutes

AuslG	Ausländergesetz (foreigner law from 9.7.1990, last changed on 29.10.1997)
EinbürgRiLi	Einbürgerungsrichtlinien (rules for naturalisation from 15. 12. 1977, changed on on the 20.01.1987 and the version of 1971)
RuStAG	Reichs- und Staatsangehörigkeitsgesetz (citizenship law from 22.7.1913, last changed on 18.6.1997)

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BVerwGE 1 C 30.84 (31.03.1987)

Abbreviations

Abs.	Absatz (section)
BVerwG	Bundesverwaltungsgericht (highest court for administrative law)
BVerwGE	Bundesverwaltungsgerichtsentscheidung (decision of the BVerwG)
DVBl	Deutsche Verwaltungsblätter (journal for administrative law)
VerwG	Verwaltungsgericht (court for administrative law)
VerwGE	Verwaltungsgerichtsentscheidung (decision of VerwG)
VGH	Verwaltungsgerichtshof (intermediary court for administrative law)
VHGHE	Verwaltungsgerichtshofsentscheidung (decision of VGH)