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Case Foxes – Grawi Heirs v. City of Düsseldorf

Grawi Heirs – City of Düsseldorf – Kurt Grawi – Artwork/oeuvre d'art – Nazi-looted art/spoliations nazies – Institutional facilitator/facilitateur institutionnel – Mediation/médiation – Negotiation/négociation – Settlement agreement/accord transactionnel – Ownership/propriété – Unconditional restitution/restitution sans condition

Kurt Grawi, a Jewish businessman, was persecuted by the Nazi regime. Before fleeing Germany, he managed to transport the painting "Foxes" to the USA, where he sold it in 1940 to secure a living for himself and his family in exile. In view of the close connection between the persecution and the sale of the painting, the German Advisory Commission recommended the restitution of the "Foxes" to the Grawi heirs. The painting was returned in January 2022.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

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I. Chronology

Nazi-looted art

- **1928:** Kurt Grawi acquired the painting “Foxes” from Max Leon Flemming¹.
- **From 1933 onwards:** Grawi and his family suffered increasing persecution by the Nazi authorities. At the end of 1938, Grawi was interned for several weeks in the Sachsenhausen concentration camp.
- **April 1939:** Owing to the persecution, Grawi emigrated via Belgium to Santiago de Chile, where he arrived on 4 June 1939. His wife Else Grawi and their two sons initially remained in Germany, until they emigrated and joined Grawi in December 1939.
- **30 April 1939:** Grawi wrote a letter to Ernst Simon informing him that “Foxes” had been given to Paul Weill, who was in Paris at the time, for further shipment to New York. There, Simon was to sell the painting on Grawi's behalf, whereby, according to Grawi, the proceeds from the sale were to form the basis for the emigration of him and his family.
- **9 August 1939:** Simon offered “Foxes” in New York to the Museum of Modern Art (MoMA).
- **2 January 1940:** The MoMA offered a purchase price of 800 US dollars for “Foxes”.
- **9 February 1940:** In a telegram addressed to Simon, Grawi stated a limit of “1250”. This was interpreted by the parties as a rejection of MoMA’s offer and the establishment of a minimum selling price by Grawi.
- **Between 19 February/27 September 1940:** “Foxes” was sold to William and Charlotte Dieterle by the art dealer Karl Nierendorf, who had received the painting from Simon for sale.² The price and specific circumstances of the sale are unknown.
- **5 September 1944:** Grawi died of cancer in exile.
- **June 1961:** “Foxes” was consigned to an auction held by Galerie Klipstein & Kornfeld in Berne by William and Charlotte Dieterle. There it was purchased by Helmut Horten.
- **1962:** Horten donated “Foxes” to the “Municipal Art Collection Düsseldorf” (*Städtische Kunstsammlung Düsseldorf*). It was later displayed at “Foundation Museum Kunstpalast” (*Stiftung Museum Kunstpalast*) of the City of Düsseldorf.
- **5 February 2015:** Grawi heirs petitioned the City of Düsseldorf for restitution of “Foxes”.³
- **Autumn 2018:** The parties agreed to submit the case to the “Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property” (hereinafter Advisory Commission).
- **10 February 2021:** The Advisory Commission decided to recommend the restitution of “Foxes” to the Grawi heirs.

¹ Unless otherwise stated, the facts are taken from Beratende Kommission NS-Raubgut, *Recommendation of the Advisory Commission in the case of the Heirs of Kurt and Else Grawi v. Landeshauptstadt Düsseldorf*, 18 March 2021, 1-3.

² Landeshauptstadt Düsseldorf, *Stellungnahme der Landeshauptstadt Düsseldorf zum Herausgabegesuch der Erbgemeinschaft nach Kurt Grawi für das Gemälde Fuchse (1913) von Franz Marc*, 20 December 2019, 5.

³ Landeshauptstadt Düsseldorf, *Stellungnahme*, 20.

- **29 April 2021:** The City Council of Düsseldorf unanimously decided to follow the recommendation of the Advisory Commission and to restitute "Foxes" to the Grawi heirs.⁴
- **11 January 2022:** The city of Düsseldorf handed over "Foxes" to the Grawi heirs.⁵

II. Dispute Resolution Process

Institutional facilitator – Mediation – Negotiation – Settlement Agreement

- Direct negotiations on the restitution of "Foxes" between the Grawi heirs and the City of Düsseldorf following the original request for restitution of 5 February 2015 were unsuccessful.
- In autumn 2018, the parties eventually agreed to submit the case to the German Advisory Commission. The German Advisory Commission was established in 2003 by an Accord between the Federation, the Federal States and the national associations of local authorities as a way of implementing No. 11 of the Washington Principles on Nazi-Confiscated Art. The Advisory Commission “may be called upon by institutions and private persons in case of disputes concerning the restitution of cultural property seized by the Nazis, if both parties agree to mediation by the Commission. Cases before the Commission are conducted according to its rules of procedure. To resolve differences of opinion, the Commission may make recommendations which are not legally binding. For example, it may recommend restitution of the cultural property or restitution against payment of compensation; it can also recommend that the cultural property remain with the current holder in exchange for compensation payment, or advise against restitution”.⁶

III. Legal Issues

Ownership

- Originally, it was disputed between the parties whether the sale of the painting took place abroad (according to the view of the City of Düsseldorf) or in the German Reich as a result of persecution (according to the view of the Grawi heirs). After documents emerged in spring 2018 proved that the sale took place in the United States, the parties disagreed on whether the transfer of ownership of the "Foxes" to William and Charlotte Dieterle in Los Angeles in 1940 had to be regarded as a confiscation as a result of National Socialist persecution (*NS-verfolgungsbedingter Entzug*) or rather as an effective sale governed by civil law that took place outside the National Socialist sphere of influence.

⁴ Landeshauptstadt Düsseldorf, *Pressemitteilung der Stadt Düsseldorf vom 29. April 2021*, 29 April 2021.

⁵ “Franz-Marc-Gemälde ‚Die Füchse‘ zurück bei den Erben,“ *Süddeutsche Zeitung*, 13 January 2022.

⁶ Beratende Kommission NS-Raubgut, “Commission“, <https://www.beratende-kommission.de/en/commission> (Accessed 2 November 2022).

- The city of Düsseldorf argued in favour of the latter. According to its argumentation, Kurt and Else Grawi were already able to pay the compulsory levies imposed on them by selling other assets, so that the sale of "Foxes" could not be regarded as a forced sale necessary to enable them to leave the country. Additionally, Grawi managed to get the painting to the United States and sell it there. Although the concrete circumstances of the sale were not known, it was to be assumed, in the absence of other indications, that Grawi had achieved an appropriate sales price and had also received the money for his free disposal. There was therefore nothing to suggest that Grawi had been disadvantaged. In particular, the rejection of MoMA's offer showed that Grawi was in a position to determine the terms of the sale himself. Therefore, one could not assume a confiscation due to persecution.⁷
- The claimants, on the other hand, argued that the sale had to be considered a confiscation as a result of Nazi persecution, given that it took place only out of necessity. Grawi had tried to avoid a sale as long as possible and had only been forced to sell due to the persecution-related emigration. The letter to Simon of April 1939 shows that Grawi considered the sale necessary despite the unfavourable timing, as the proceeds from the sale were to form the basis for emigration. It was therefore clear that the sale had only taken place because of the National Socialist persecution. Those involved in the sale had been aware of Grawi's emergency situation, which would have further weakened his sales position. Furthermore, it was not known whether he had in fact achieved an adequate purchase price and whether this money had actually reached him. For these reasons, persecution-related confiscation was to be assumed.⁸
- The Advisory Commission took the view of the claimants. The sale was to be regarded as a persecution-related confiscation, despite the location of the sale and irrespective of the sale price achieved, as it was the direct consequence of Grawi's imprisonment in the concentration camp and his subsequent flight and was therefore closely related to the National Socialist persecution. In the opinion of the Advisory Commission, although it could be assumed that the price paid for the painting was probably appropriate and that the money was transferred to Grawi for his free disposal, this was immaterial for the decision. Rather, it was decisive that the sale was directly related to the forced emigration and that both the decision and the design of the sale were directly caused by the National Socialist persecution. The facts of the case suggested that Grawi had not wanted to sell "Foxes" of his own free will, but had only felt compelled to do so in the course of the emigration in order to be able to enable his family to begin a new life in Chile. If the sale of the painting had not been necessary for this, he could have abandoned it at any time. Therefore, according to the Commission, "there was such a close connection between persecution, escape and sale that the impact of the first continues to have an effect in the last"⁹. In light of this connection, the fact that the sale took place outside the National Socialist sphere of influence becomes secondary. For this reason, the painting was to be restituted to the Grawi heirs.¹⁰

⁷ Beratende Kommission NS-Raubgut, *Recommendation*, 4.

⁸ Beratende Kommission NS-Raubgut, *Recommendation*, 5.

⁹ Beratende Kommission NS-Raubgut, *Recommendation*, 8.

¹⁰ Beratende Kommission NS-Raubgut, *Recommendation*, 6-10.

IV. Adopted Solution

Unconditional restitution

- By a majority of six votes to three, the Advisory Commission recommended the unconditional restitution of "Foxes" to the Grawi heirs on 10 February 2021.¹¹
- The City Council of Düsseldorf unanously decided to follow the recommendation of the Advisory Commission and to resitute the painting to the Grawi heirs on 29 April 2021.¹²
- After prolonged "legal tug-of-war"¹³, the City of Düsseldorf finally handed over the painting to the Grawi heirs on 11 January 2022, thereby complying with the Advisory Commission's recommendation.

V. Comment

- From a legal point of view, the case is interesting as it falls into the category of cases dealing with so-called "flight assets" (*Fluchtgut*). Unlike looted cultural assets (*Raubgut*), which were confiscated, stolen or forcibly sold within the National Socialist sphere of influence, flight assets are cultural objects that were first successfully transferred from Germany or the occupied territories to a safe third country by their rightful owner, who was persecuted by the Nazi regime, and then sold there by the owner on the free market in order to be able to provide for their livelihood.¹⁴ Accordingly, in these cases there is a causal connection between the sale of the object and the National Socialist persecution of the owner.¹⁵
- How such cases should be dealt with and what a just and fair solution of them should look like is controversial. There is no uniform international practice at the European level: while in Austria, following the established practice of the Austrian Art Restitution Advisory Board, restitution is excluded as the territorial scope of application of the Austrian Art Restitution Act (*Kunstrückgabegesetz*) is limited to the former Nazi-controlled area, in the Netherlands the Restitution Committee has recommended restitution in several (but not all) cases concerning flight assets.¹⁶ In Germany, to date, the Advisory Commission had to deal with flight assets in five cases. In three of them (*Freund v. Federal Republic of Germany*,

¹¹ Beratende Kommission NS-Raubgut, *Recommendation*, 1.

¹² See "Düsseldorf to return £13m painting to heirs of Jewish man imprisoned by Nazis," *Jewish News*, 2 May 2021; Rose-Maria Gropp, "Rückgabe von Kulturgut: Franz Marcs „Füchse“ verlassen Düsseldorf," *Frankfurter Allgemeine Zeitung*, 29 April 2021.

¹³ "Franz-Marc-Gemälde ‚Die Füchse‘ zurück bei den Erben," *Süddeutsche Zeitung*, 13 January 2022.

¹⁴ See definition for *Fluchtgut* in Ester Tisa Francini, Anja Heuss and Georg Kreis, *Fluchtgut – Raubgut: Der Transfer von Kulturgütern in und über die Schweiz 1933-1945 und die Frage der Restitution* (Zürich: Chronos, 2001), 25.

¹⁵ Matthias Weller and Anne Dewey, "Warum ein ‚Restatement of Restitution Rules for Nazi-Confiscated Art‘?: Das Beispiel Fluchtgut," *KUR - Kunst und Recht* 21, no. 6 (2019), 173.

¹⁶ See Matthias Weller and Anne Dewey, "Warum ein ‚Restatement of Restitution Rules for Nazi-Confiscated Art‘?," 173-177.

Emden v. Federal Republic of Germany, *Grawi v. City of Düsseldorf*), the Advisory Commission recommended restitution, while in two others (*Levy v. Bavarian State Painting Collection*, *Flechtheim v. City of Köln*) it did not. Importantly, in its recommendation published in 2014 in the case *Levy v. Bavarian State Painting Collection*, the Advisory Commission argued that the sale of a painting in a safe third country for economic reasons was not sufficient to justify restitution, as "[i]t is not to be presumed that the Washington Declaration even if it is interpreted in the widest possible sense and thus extended to cover also forced sales or other forms of persecution-related confiscation, aims to reverse sales transactions such as this one (which was effectively concluded under civil law by the rightful owners in New York) and the subsequent re-sales of the painting"¹⁷. The Advisory Commission departs substantially from this finding in its recommendation in favour of the Grawi heirs. Accordingly, it has been heavily criticised by some, arguing that the recommendation represents a tacit change in the decision practice that could lead to a new wave of restitution claims.¹⁸ The president of the Advisory Commission, Hans-Jürgen Papier, countered these accusations in a newspaper article in which he stated that one could not speak of a break with an established practice, as there could not be a uniform solution due to the lack of specifications regarding flight assets, but rather required a weighing of interests in individual cases.¹⁹

- While it might be too much to speak of a change in an established practice, it is undeniable that the practice of the Advisory Commission is somewhat inconsistent, even contradictory, when it comes to cases concerning flight assets. This is problematic as it has the potential to undermine its legitimacy and effectiveness. After all, in order for a case to be taken on, both parties to the dispute must agree to submit it to the Advisory Commission. The Advisory Commission is therefore right when it laments that even today no guidelines have been developed for such cases that go beyond the individual case. The *Guidelines for implementing the Statement by the Federal Government, the Länder and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially Jewish property*, on which the Advisory Commission bases its deliberations, do not contain useful criteria for dealing with such situations. The development of guidelines for cases involving flight assets, whether in the form of a law or not²⁰, should therefore be a priority in order to facilitate the search for just and fair solutions, as called for by the Washington Principles. Moreover, such guidelines should adopt a comparative approach that incorporates the experiences and practices of other jurisdictions, as this would strengthen the

¹⁷ Beratende Kommission NS-Raubgut, *Recommendation of the Advisory Commission in the case of the Heirs of Clara Levy v. Bayerische Staatsgemäldesammlung*, 21 August 2014, 4.

¹⁸ Patrick Bahners, "So wird jetzt fast alles Raubkunst," *Frankfurter Allgemeine Zeitung*, 16 April 2021. See also Friedrich Kiechle, "Aufforderung zum Rechtsbruch," *Frankfurter Allgemeine Zeitung*, 24 April 2021.

¹⁹ Hans-Jürgen Papier, "Ein Verkauf unter dem Druck der Verfolgung," *Frankfurter Allgemeine Zeitung*, 7 May 2021.

²⁰ On the ongoing debate on the necessity of a restitution law for Germany, see Stefanie Pferdenges, "Gerechte und faire Lösungen – ist ein Restitutionsgesetz der beste Weg?," *KUR - Kunst und Recht* 23, no. 2 (2021): 50-59.

coherence and thus the legitimacy of the recommendations.²¹ As Weller and Scheller rightfully point out, “[j]ustice requires reasoning, thereby producing consistency, thereby producing predictability and, based thereon, reconciling competing equities of ownership or other stakes involved, i.e. an adequate balancing of interests”²². The "Restatement of Restitution Rules for Nazi-Confiscated Art", on which the two authors are currently working, could be an important step towards normative improvement in this sense.²³ The present case certainly underlines the necessity of the project.

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²¹ Matthias Weller and Tessa Scheller, “Why a ‘Restatement of Restitution Rules for Nazi-Confiscated Art’?: Observations on the ‘weighing of interests’ in light of the Kohnstamm Report,” *Newsletter of the Network of European Restitution Committees on Nazi-Looted Art* 12 (December 2021): 52.

²² Matthias Weller and Tessa Scheller, “Why a ‘Restatement of Restitution Rules for Nazi-Confiscated Art’?”, 52.

²³ On the project in general, see Matthias Weller and Tessa Scheller, “Why a ‘Restatement of Restitution Rules for Nazi-Confiscated Art’?”, 44-45.

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