

Hailbronner (Editor)

EU Immigration
and Asylum Law
- Commentary -

C. H. Beck · Hart · Nomos

EU Immigration and Asylum Law

Commentary on EU Regulations
and Directives

edited by

Kay Hailbronner



C. H. Beck · Hart · Nomos

Published by

Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
eMail: bestellung@beck.de

Co-published by

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,
online at: www.hartpub.co.uk

Published in North America (US and Canada) by Hart Publishing, c/o International
Specialized Book Services, 930 NE 58th Avenue, Suite 300, Portland, OR 97213-3786,
USA, eMail: orders@isbs.com

ISBN 978-3-406-60017-3 (Beck)
ISBN 978-1-84946-075-2 (Hart Publishing)

© 2010 Verlag C. H. Beck oHG
Wilhelmstraße 9, 80801 München

Printed in Germany by
Druckerei C. H. Beck Nördlingen
(Address see above)

Typeset by
ottomedien, 64295 Darmstadt

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Preface

EU directives and regulations determine increasingly the legislation and practice of EU Member States in immigration and asylum law. The European Union has fulfilled – almost according to plan – its promise to elaborate a set of European rules destined as the first cornerstones for a Common European Asylum System (CEAS) and a slightly more modest Common European Immigration Scheme. The directives and regulations, commented upon in this book, have been conceived as but a first step on the way to the Lisbon Treaty's ambitious aims for a common immigration and asylum policy of the European Union. The European Commission has already presented a number of recast proposals in the area of European asylum law, replacing the present scheme of minimum standards, options and discretions of Member States by a full-fledged harmonization shaping a common European asylum and immigration policy. It remains to be seen whether and in what time frame this aim can be achieved in a different legislative setting of majority voting and the European Parliament as co-legislator.

It is the purpose of this commentary to provide assistance to courts, administrative authorities and the civil society involved in the interpretation of the existing European immigration and asylum rules, primarily to apply properly such rules and, if necessary, to improve the existing rules in a second stage of legislation. Various national courts and the European Court of Justice have already passed a number of leading decisions in the interpretation of immigration and asylum law which have clearly indicated a variety of further issues of interpretation.

The common method employed in this book is the German type of commentary, article by article, in order to explain the content of each provision, always keeping in mind that the existing rules provide a large scope for different interpretations and a substantial margin for implementation of such rules in national law.

It is not the purpose of the commentary to give exhaustive information on the implementation of directives in 27 different EU Member States. The primary aim is a more modest one to describe the content of the existing European legislation, identify potential interpretation issues and provide arguments for applying such rules.

Different authors with different backgrounds participated in this book. Some are experienced practitioners with a high academic expertise in immigration and asylum law. Some have for decades contributed to the academic analysis of European immigration and asylum law, and some have been working intensively with the directives and regulations in writing their academic masterpieces.

Not every author contributing to this book shares exactly the same opinion on the way how the directives and regulations included in this book should be properly interpreted. Therefore, different views on overlapping issues cannot be excluded. There have also been different views on methodological issues, such as the importance of the drafting history for the interpretation of directives and regulations in immigration and asylum law. Every author is exclusively responsible for the content of her/his commentary. Nonetheless, contributions are based on a common concept. It is hoped that the method of commentary will be useful for the academic as well as for the practice of European immigration and asylum law. There may be gaps and omissions. The editor and the

Preface

authors appreciate any suggestions as to the improvement of subsequent editions of this book. They should be directed to

Prof. Dr. Dr. h.c. Kay Hailbronner
University of Konstanz
Centre for International and European Law on Immigration and Asylum
Universitätsstraße 10
78457 Konstanz/Germany

Acknowledgments

The editor would like to express his thanks to the members of the staff of the Center for International and European Law on Immigration and Asylum at the University of Konstanz. Special thanks go to the research fellows Simone Alt, Cordelia Carlitz, Marcel Kau, Julia Schieber and Julia Margarethe Schmidt for their dedicated assistance in editing this commentary.

The editor owes great debt to Sabine Appt who has done an excellent coordination work and skillfully typed the manuscripts. The editor also thanks her for her endurance during this time-consuming project.

Finally, the editor would like to express his thanks to the research assistants Paul Bäder, Tarek Bary, Anna Eckhardt, Hildegard Falter, Carmen Haberland, Danny Lau, Michael Mayer, Nadine Otz and Jenny Stoev for their invaluable help in the editorial work, and to Gregor Schneider, Benjamin Strasser and Marc Wohlfarth for their technical assistance without which the project could not have been realized in comparable fashion.

List of authors

- Simone Alt*, Ass. iur., Research fellow at the Center for International and European Law on Immigration and Asylum, University of Konstanz/Germany.
- Hemme Battjes*, Dr., Professor at the VU University Amsterdam/The Netherlands.
- Cordelia Carlitz*, Ass. iur., Research fellow at the Center for International and European Law on Immigration and Asylum, University of Konstanz/Germany.
- Astrid Epiney*, Dr., Professor at the University of Fribourg/Switzerland, Vice-rectrice of the Institute for European Law.
- Andrea Egbuna-Joss*, MLaw, Ph.D. student at the University of Fribourg/Switzerland.
- Kay Hailbronner*, Dr. h. c., LL.M., Professor at the University of Konstanz/Germany, Director at the Center for International and European Law on Immigration and Asylum, Member of the Odysseus Network for legal studies on immigration and asylum in Europe.
- John Handoll*, Partner, William Fry, Solicitors, Dublin/Ireland; Member of the Odysseus Network for legal studies on immigration and asylum in Europe.
- Mathias Hermann*, Dr., attorney at law, former research fellow at the Center for International and European Law on Immigration and Asylum, University of Konstanz/Germany.
- Marcel Kau*, Dr., LL.M. (Georgetown), Research fellow at the Chair for Public Law, International and European Law, University of Konstanz/Germany.
- Markus Peek*, Dr., Legal officer at the Federal Department of Justice and Police, Federal Office for Migration, Berne/Switzerland.
- Martin Schieffer*, Dr., LL.M. (London), Acting Head of Unit Fight against Terrorism, European Commission, Directorate-General Justice, Freedom and Security, Brussels/Belgium.
- Florian Schierle*, Legal officer at the Federal Ministry of Labour and Social Affairs, Berlin/Germany.
- Julia Schieber*, Mag. iur., Research fellow at the Center for International and European Law on Immigration and Asylum, University of Konstanz/Germany.
- Julia Margarethe Schmidt*, Ass. iur., Maître en droit international, Research fellow at the Center for International and European Law on Immigration and Asylum, University of Konstanz/Germany.
- Achilles Skordas*, Dr., Professor of International Law, University of Bristol/United Kingdom, Member of the Odysseus Network for legal studies on immigration and asylum in Europe.
- Thomas Spijkerboer*, Dr., Professor of Migration Law, head of the Research Programme Migration and Human Rights, VU University Amsterdam/The Netherlands; Member of the Odysseus Network for legal studies on immigration and asylum in Europe.

List of Abbreviations

ADD	addendum
AG	Advocate General
AJIL	American Journal of International Law
AöR	Archiv des öffentlichen Rechts
art.	article
Asyl	Schweizerische Zeitschrift für Asylrecht und -praxis
AuAS	Schnelldienst Ausländer- und Asylrecht
AufenthG	Aufenthaltsgesetz (German Residence Act)
AuslG	Ausländergesetz (German Aliens Act)
AuslR	Ausländerrecht (German aliens law)
BAFöG	Bundesausbildungsförderungsgesetz (German Federal Training Assistance Act)
BGBI	Bundesgesetzblatt (German Federal Law Gazette)
BT-Drs.	Bundestags-Drucksache (Official Document of Germany's Federal Parliament)
BVerfGE	Decision of the German Federal Constitutional Court
BVerwGE	Decision of the German Federal Administrative Court
C	Commission Documents relating to official instruments for which the Commission has sole responsibility
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEPS	Centre for European Policy Studies
cf.	confer
CFI	Court of First Instance of the European Communities
CJEC	Court of Justice of the European Communities
CJEL	Columbia Journal of European Law
CJEU	Court of Justice of the European Union
CMLR	Common Market Law Review
CoE	Council of Europe
COM	Commission Documents for the other institutions (legislative proposals, communications, reports, etc.)
CoR	Committee of the Regions
COREPER	Committee of Permanent Representatives of the Government of the Member States
DVBl	Deutsche Verwaltungsblätter (Journal for Administrative law)
doc.	Document
e.g.	for example
EC	European Community (-ies)
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECR	European Court Reports
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
EEA	European Economic Area
EEAA	European Economic Area Agreement

List of Abbreviations

EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EJ Migration & Law	European Journal for Migration and Law
EJML	European Journal of Migration and Law
EL Rev.	European Law Review
EP	European Parliament
ESC	European and Social Committee
EUROSTAT	Statistical Office of the European Union
et al.	et alii/and others
et seq	et sequentes/following
et seqq	et sequentes/and the following
etc.	et cetera
EU	European Union
EuChFR	Charter of Fundamental Rights of the European Union
EuGRZ	Europäische Grundrechte-Zeitschrift (Journal for constitutional rights)
EuR	Zeitschrift für Europarecht (Journal for European law)
FAC	Federal Administrative Court
FamRZ	Zeitschrift für das Gesamte Familienrecht (Journal for Family Law)
FYROM	Former Yugoslav Republic of Macedonia
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC EU	General Court of the European Union
Geneva Convention	Geneva Convention relating to the Status of Refugees of 28 July 1951
GG	Grundgesetz (German Basic Law)
GLJ	German Law Journal
GWP	Gesellschaft-Wirtschaft-Politik
GYIL	German Yearbook of International Law
Hum Rights Rev	Human Rights Review
i.e.	id est/that is/means
ibid.	ibidem/in the same place/the same
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
IJLP	International Journal of Law, Policy and the Family
IJRL	International Journal of Refugee Law
ILO	International Labour Organization
Ind.J.Global Legal Studies ...	Indiana Journal of Global Legal Studies
InfAuslR	Informationsbrief Ausländerrecht
IOM	International Organisation for Migration
ISCED	International Standard Classification of Education
KJ	Kritische Justiz
lit.	litera/letter
marg. no.	marginal number/note
MBA	Master of business administration
Mich. J. Gender & Law	Michigan Journal of Gender & Law
MoU	Memorandum of Understanding
NGO	Non-governmental organisation
NJW	Neue Juristische Wochenschrift

List of Abbreviations

no.	Number
NStZ	Neue Zeitschrift für Strafrecht (New Journal for Criminal Law)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (New Journal for Administrative Law)
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungsreport (New Journal for Administrative Law – Reports of Jurisprudence)
O.J.	Official Journal
OJ	Official Journal of the European Union
OSCE	Organisation for Security and Cooperation in Europe
p.	page/pages
para.	Paragraph
paras.	Paragraphs
RDUE	Revue du Droit de l'Union Européenne
Rec	Recommendation
REEL	Revista Electrónica de Estudios Internacionales
REV	revised
RLOex	Reglamento de Ejecución para la Ley Orgánica sobre Derechos y Libertades de los Extranjeros en España y su Integración Social (Administrative Order concerning the Spanish Residence Act)
SCB	Schengen Border Code
SEC	Commission Documents which cannot be classified in any of the other series
sent.	sentence
SIAC	Special Immigration Appeals Commission
SIS	Schengen Information System
Stan. J. Civil Rights & Civil Liberties	Stanford Journal of Civil Rights and Civil Liberties
subpara.	subparagraph
subparas.	subparagraphs
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union (current consolidated version after the amendment by the Lisbon Treaty)
TEU (Nice version)	Treaty on European Union (Nice version)
TFEU	Treaty on the Functioning of the European Union
TILJ	Texas International Law Journal
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VwVfG	Verwaltungsverfahrensgesetz (German Administrative Procedure Act)
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik (Journal for Aliens Law)
ZEuS	Zeitschrift für europarechtliche Studien
ZfH	Zeitschrift für Hochschulrecht (Journal for university legislation)
ZIS	Zeitschrift für internationale Strafrechtsdogmatik (Journal for international penal law dogmatics)

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Contents – Summary

Preface	V
Acknowledgments	VII
List of Authors	XIII
List of Abbreviations	XV
General Bibliography	XIX
 Chapter I. Introduction into the EU immigration and asylum law	 1
<i>Kay Hailbronner</i>	
I. General remarks on the nature and structure of EU immigration and asylum law directives and regulations	1
II. International legal framework of European immigration and asylum law	10
III. The Charter of Fundamental Rights	18
IV. Application of EU directives in domestic law	22
V. Interpretation of EU directives and regulations	23
VI. Minimum standards and more favourable treatment clauses	24
 Chapter II. Entry of third-country nationals	 29
1. Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement	29
<i>Astrid Epiney/Andrea Egbuna-Joss</i>	
A) Text of Council Regulation (EC) No 539/2001	29
B) Literature	37
C) Interpretation	37
2. Regulation (EC) No 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)	63
<i>Astrid Epiney/Andrea Egbuna-Joss</i>	
A) Text of Regulation (EC) No 562/2006	63
B) Literature	102
C) Interpretation	102
 Chapter III. Residence of third-country nationals	 149
1. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification	149
<i>Kay Hailbronner/Cordelia Carlitz</i>	
A) Text of Council Directive 2003/86/EC	149
B) Literature	160
C) Interpretation	161

2. Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service	287
<i>Kay Hailbronner/Julia Schießer</i>	
A) Text of Council Directive 2004/114/EC	287
B) Literature	298
C) Interpretation	299
3. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research	365
<i>Kay Hailbronner</i>	
A) Text of Council Directive 2005/71/EC	365
B) Literature	376
C) Interpretation	376
4. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities	429
<i>Marcel Kau</i>	
A) Text of Council Directive 2004/81/EC	429
B) Literature	437
C) Interpretation	438
5. Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals	533
<i>Florian Schierle</i>	
A) Text of Council Directive 2009/52/EC	533
B) Literature	545
C) Interpretation	546
6. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents	589
<i>John Handoll</i>	
A) Text of Council Directive 2003/109/EC	589
B) Literature	605
C) Interpretation	605
7. Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment	683
<i>Kay Hailbronner/Julia Margarethe Schmidt</i>	
A) Text of Council Directive 2009/50/EC	683
B) Literature	703
C) Interpretation	703
Chapter IV. Asylum Law	803
1. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof	803
<i>Achilles Skordas</i>	
A) Text of Council Directive 2001/55/EC	803
B) Literature	818
C) Interpretation	819

2. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers	871
<i>Markus Peek</i>	
A) Text of Council Directive 2003/9/EC	871
B) Literature	884
C) Interpretation	885
D) Recast Proposal: Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers – COM (2008) 815 final/2 of 9/12/2008, 2008/0244 (COD)	963
3. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted	985
Art. 1–10 <i>Kay Hailbronner/Simone Alt</i>	1006
Art. 11–19 <i>Kay Hailbronner</i>	1093
Art. 20–40 <i>Hemme Battjes</i>	1164
A) Text of Council Directive 2004/83/EC	985
B) Literature	1005
C) Interpretation	1006
D) Recast Proposal: Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted – COM (2009) 551 final/2 of 23/10/2009, 2009/0164 (COD)	1201
4. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status	1227
<i>Thomas Spijkerboer/Younous Arbaoui</i>	
A) Text of Council Directive 2005/85/EC	1227
B) Literature	1257
C) Interpretation	1257
D) Recast Proposal: Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection – COM (2009) 554 final of 21/10/2009, 2009/0165 (COD)	1311
5. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national	1351
<i>Mathias Hermann</i>	
A) Text of Council Regulation (EC) No 343/2003	1351
B) Literature	1368
C) Interpretation	1368
D) I. Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention	1422
II. Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national	1438
III. Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention	1449
IV. Recast Proposal: Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person – COM (2008) 820 final/2 of 19/12/2008, 2008/0243 (COD)	1454

Chapter V. Termination of residence	1489
Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third- country nationals	1489
<i>Martin Schieffer</i>	1489
A) Text of Directive 2008/115/EC	1504
B) Literature	1505
C) Interpretation	1505