

Migration and Asylum Law and Policy in the European Union

FIDE 2004 National Reports

Editor

IMELDA HIGGINS

General Rapporteur

KAY HAILBRONNER

CAMBRIDGE

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FIDE (the International Federation for European Law) brings together National Associations for European Law and their members and serves as a forum for the study, development, critical appraisal and renewal of European law.

Written for the XXI FIDE Congress taking place in Dublin in June 2004, this book explores EU policy on migration and asylum, and the manner in which this policy is being implemented at a national level. With national reports from 20 EU, EEA and EFTA Member States, it is the most wide ranging and comprehensive international survey of this issue to date. Each report was prepared by a national expert and focuses on: the national implementation of existing EU legislation in the field of migration and asylum law; the compatibility of national migration and asylum law and policies with pending EC legislation on asylum procedure, legal status of third country nationals, and definition of refugees; national attitudes to European Commission proposals on the future development of European migration and asylum law; and long term perspectives for EU legislation in the field of migration and asylum law and policy.

IMELDA HIGGINS is a practising barrister at the Bar of Ireland. She is also a part-time lecturer in European law at the Faculty of Law, Trinity College Dublin and at the Faculty of Law, University College Dublin. Before coming to the bar, Ms Higgins worked as a Legal Secretary to Judge D.A.O. Edward at the Court of Justice of the European Communities, and prior to that was engaged as a Lecturer by the European Institute of Public Administration, where her central role was the training of judges and lawyers in the accession countries, mainly in the context of Community training programmes. Ms Higgins has published numerous articles in the field of European Law.

PROFESSOR DR. KAY HAILBRONNER, LL.M. is Professor of public law, international law and European law at the University of Konstanz. He obtained his Master of Laws from McGill University in Montreal, and, in 1971, his Doctorate in law from the University of Heidelberg. From 1988 to 1992, Professor Hailbronner was Judge at the Administrative Appeal Court of Baden-Württemberg. Since 1990, he has been Legal Counsel for the Federal Government in asylum and immigration law, and European law. He is Director of the Centre for International and European Law on Immigration and Asylum at the University of Konstanz, which was established in 1994. He is widely published in the area of Immigration and Asylum Law, and is co-editor of the leading journal in aliens law in Germany.

WELCOME TO XXI FIDE CONGRESS

FIDE PRESIDENT

The Hon. Mr Justice Nial Fennelly

It has been a great honour for Ireland to be asked to host the XXI Congress of FIDE. It has equally been a great honour for me personally to have been asked to act as President of FIDE during this very important year for the European Union.

The topics for the Congress were chosen after much debate and wide consultation. The choice was not easy. There are several other topics worthy of debate. The Congress debates will cover both old and new ground.

There are two special features of this year's Congress.

First, on the virtual eve of our meetings in Dublin, ten new Member States will join the European Union. Words are not adequate to express the great happiness which I share with my colleagues at the Irish Society for European Law at being able to welcome the delegates from these States to Dublin and to the Union at the same time.

Second, even as I write, the Constitution for Europe remains under discussion, though the outcome is shrouded in uncertainty. I express the hope that, whatever the state of political discussions, delegates to the Congress will grasp the opportunity for a lively exchange of views.

Finally, I offer a hearty welcome to all delegates, rapporteurs, spouses and others. I hope that you enjoy your stay in Dublin.

FOREWORD

PATRICK MCCANN
FIDE Secretary General

The XXI FIDE Congress takes place in Dublin, Ireland between the 2nd and 5th of June, 2004. The Congress is the biennial meeting of *Fédération Internationale de Droit Européene* (FIDE – the International Federation for European Law).

FIDE brings together National Associations for European Law and their members and serves as a forum for the study, development, critical appraisal and renewal of European law.

The FIDE Congress has a special place among the many conferences and seminars on European law. First, it is a not for profit venture organised on behalf of FIDE by different National Associations in rotation as a matter of professional solidarity between lawyers interested in European law. Secondly, the Congress brings together the full range of lawyers – Judges, Practitioners and Academic Lawyers – across the breadth of Europe.

The Irish Presidency of FIDE is particularly pleased to have been able to develop relationships with lawyers in the new Member States of the Union. Also, the Irish Presidency of FIDE is very pleased to have delegates and Rapporteurs from potential or future Member States as well as the continued participation and representation by Rapporteurs and Delegates of Lawyers from EU EFTA and EEA Member States.

This will be the second time the FIDE Congress has taken place in Dublin. The 10th FIDE Congress took place in Dublin in June 1982. The late Mr. Justice Brian Walsh, formerly of the Irish Supreme Court and the European Court of Human Rights, was the President of FIDE on that occasion. Mr. Finbarr Murphy B.L. was the chairman of the host National Association, the Irish Society for European Law, and Mr. Eoghan P. Clear Solicitor was Honorary Secretary. As with the present Congress, it is worth noting that there were delegates from Finland, Spain, and Sweden, then prospective Member States, as well as delegates from the then Member States.

The President of FIDE for the present Congress is the Honourable Mr. Justice Nial Fennelly, a member of the Irish Supreme Court and a former Advocate General at the European Court of Justice.

For the XXI Congress, the Presidency of FIDE has selected, in consultation with FIDE's National Associations, three topics for the Congress. The three topics which will be discussed are: –

Topic 1: “Criminal Law in the European Union: a giant leap or a small step?”

Topic 2: “European Union Competition Law and Policy: The Reform of Competition Law Enforcement will it work?”

Topic 3: “European Union and Member State Migration and Asylum Law and Policy.”

The Irish Presidency is delighted that Professor Mario Chiavario of the University of Turin has agreed to act as General Rapporteur for Topic 1; that Judge John Cooke of the European Court of First Instance has agreed to act as General Rapporteur for Topic 2; and that Professor Kay Hailbronner of the University of Konstanz has agreed to act as General Rapporteur for Topic 3.

The working method of the Congress began with the preparation by the General Rapporteurs of detailed Questionnaires on each of the Topics. The Questionnaires are addressed to Rapporteurs in the existing and future Member States of the European Union and other affected States with a view to exploring the transposition and reception of European Law into the domestic legal systems, its effectiveness and the problems the domestic legal systems might have to face in dealing with Community law.

The Questionnaires from the General Rapporteurs were then translated and disseminated among the existing National Associations and the embryonic National Associations in the new Member States and potential future Member States.

The Irish Presidency of FIDE is particularly pleased that Rapporteurs have been designated by each of the existing and new Member States, as well as Rapporteurs from EFTA and EEA States. We are also very pleased that lawyers in Albania and Croatia also nominated Rapporteurs for participation in the FIDE process. As a result, some twenty-nine States have nominated approximately one hundred and six National and Assistant National Rapporteurs. Also, we are delighted to have Institutional Rapporteurs from the Council, the Commission and the Université Libre de Bruxelles.

The National Reports were prepared by the National Rapporteurs or teams of National Rapporteurs and delivered to the General Rapporteurs, their Dublin based National Report Co-Ordinators and to the Institutional Rapporteurs. The General Rapporteurs wrote the General Reports, which offer a synthesis on the development of European Law in their chosen Topic, and an assessment of the dynamic relationship between European Law and the National legal systems. The Institutional Reports offer a thematic response to the Questionnaire from a European Union perspective.

The Congress itself does not take the format of a conference. Apart from the opening address by the President of the Court of Justice there will be no formal set piece presentations. Rather, the General Rapporteurs, in conjunction with various chairpersons of working sessions, will moderate a debate and discussion. Each delegate, having been informed by the publication of this volume and the Reports' earlier appearance on the FIDE website (www.fide2004.org), will be able to participate and discuss different aspects of each Topic. The tradition of FIDE has been participation by all Delegates.

As well as the formal Congress Topics, the Irish Presidency intends to host a debate and discussion on the Constitution for Europe on the morning of Saturday the 5th of June, 2004.

The Presidency of FIDE is again pleased to welcome the Presidents of the European Court of Justice and the Court of First Instance to Dublin for the FIDE Congress. Their participation and that of their colleague Judges from the Courts as well as Référéndaires and the permanent staff of the Court, contributes to the unique quality of the Congress.

The FIDE Congress also offers an opportunity for Delegates to meet up with old friends and to make new ones. The accession of the new Member States is a very particular opportunity to make new friends and to re-orientate our conception of Europe.

The Presidency has arranged an extensive and varied social programme with the assistance of the Congress' sponsors, and it is hoped that these social gatherings will facilitate the continuation of the Congress' debates in informal settings and allow for the development of friendships and professional ties.

The Irish Presidency of FIDE is very appreciative of the work and professionalism of Finola O' Sullivan and Jane O'Regan of Cambridge University Press in preparing and printing these volumes. The Irish Presidency would also like to express its appreciation to the three Dublin Co-Ordinators who looked after the considerable task of collating the National Reports and

doing verification and pre-publication editing on each of the volumes. This immense and invaluable work was carried out by Mr Anthony Moore B.L. (Criminal Law), Mr Dermot Cahill (University College Dublin) (Competition Law) and Ms Imelda Higgins B.L. (Immigration and Asylum Law).

The Irish Presidency would like to thank its predecessor National Associations, the United Kingdom National Association, the Finnish National Association and the Swedish National Association in particular, for all their help and assistance in organising this Congress.

The venue for the next Congress, the XXII FIDE Congress, will be decided at the Dublin Congress. The Irish National Association hopes that it will relinquish its Presidency with both pride and anticipation; pride at the success of the Congress and anticipation for the future success of the XXII Congress.

GENERAL RAPPORTEUR

Prof. Dr. Kay Hailbronner, LL.M.

Professor Dr. Kay Hailbronner was born in Ulm/Germany in 1943 and has held a professorial chair for public law, international law and European law at the University of Konstanz since 1979. After his education in law at the universities of Tübingen, Freiburg and Heidelberg he received his Master of Laws from McGill University in Montreal pursuant to graduate studies at the Institute of Air and Space Law in Montreal, and, in 1971, his Doctorate in law from the University of Heidelberg. Subsequent to his work as a legal assistant at the Max-Planck-Institute for Comparative Public Law and International Law in Heidelberg, he was appointed senior legal officer at the Ministry of Justice, Rheinland-Pfalz. After two years as assistant to the vice-president of the Federal Constitutional Court, Professor Hailbronner received a call to the University of Konstanz in 1979. From 1988–1992, Professor Hailbronner was Judge at the Administrative Appeal Court of Baden-Württemberg. Since 1990, he has been Legal Counsel for the Federal Government in asylum and immigration law and European law. In 1992, Professor Hailbronner was elected Foreign Member of the Academy of Arts and Sciences, Erfurt/Thüringen. He is Director of the Center for International and European Law on Immigration and Asylum at the University of Konstanz, which was established in 1994. Moreover, Professor Hailbronner was Chairman of the ILA (International Law Association) Committee on Refugee Procedures and has been a member of the German Advisory Council on Science (Wissenschaftsrat) since 1999. From 2000 until 2001, he was a member of the Governmental Commission on Immigration Issues. Since 2000, Professor Hailbronner has been a member of the Advisory Board of the German Federal Office for the Recognition of refugees.

The main emphasis of his scientific activities is on national and international aliens and asylum law, citizenship, university legislation, regulation for awarding contracts as well as on European law.

Among his principal publications, the following should be mentioned; his monograph *Immigration and Asylum Law and Policy of the European Union*; his commentary on aliens law (*Kommentar Ausländerrecht*); and the commentary on citizenship (*Kommentar zum Staatsangehörigkeitsrecht*, together with G. Renner). Moreover, he is co-editor of the leading journal in aliens law in Germany.

VOLUME EDITOR

Imelda Higgins is a practising barrister at the Bar of Ireland. She is also a part-time lecturer in European law at the Faculty of Law, Trinity College Dublin and at the Faculty of Law, University College Dublin. Before coming to the bar, Ms Higgins worked as a Legal Secretary to Judge D.A.O. Edward at the Court of Justice of the European Communities. Prior to working at the Court of Justice, she was engaged as a Lecturer by the European Institute of Public Administration. In this capacity Ms Higgins primarily focused on the training of judges and lawyers from the accession countries in European Community Law, mainly in the context of Community training programmes. Ms Higgins has published numerous articles in the field of European Law and is an editor (Ireland) for the *European Law Reports of cases in the United Kingdom & Ireland*.

EDITOR'S NOTE

Collating the National Reports on the topic of "Migration and Asylum Law & Policy in the European Union" on behalf of the Irish Society for European Law and FIDE was both an honour and a privilege. The Reports contain a wealth of information supplied by eminent practitioners and academics from all over Europe in response to a comprehensive and challenging questionnaire devised by Prof. Hailbronner. Prof. Hailbronner is a renowned expert in the field of EU migration and asylum law and policy, and the questionnaire reflected his expertise in this respect. Fortunately, as can be seen from the high standards of the National Reports, the National Rapporteurs proved themselves both able and willing to meet the challenge set. The result is a fascinating overview of the current state of the law and policy of both Member States and affected countries in this area. The General Rapporteur's Report draws together many of the main developments and perspectives identifiable from the National Reports.

The quality of the National Reports is all the more impressive given the very short time limits within which the National Rapporteurs were required to operate. In this respect, the reader should bear in mind, that the National Reports reflect the position at the time the reports were submitted, namely 26 January 2004. Most of the Reports follow the layout of the General Rapporteur's Questionnaire, although a small number preferred a more thematic approach. In all cases the Reports are very readable and the information contained therein is easily accessible.

I very much look forward to meeting the faces behind the Reports and to a lively discussion on Migration and Asylum Law & Policy in the European Union with my FIDE colleagues.

Imelda Higgins,
Law Library,
Four Courts,
Dublin
8 February 2004

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Judge of the Supreme Court of Ireland	
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Topic 3: Migration and Asylum Law and Policy

QUESTIONNAIRE

Introduction

The aim of the Congress on this topic is to explore EU and Member States' law and policy on migration and asylum. It will consider the policies in the light of international obligations concerning refugees and migrants from third countries. It will explore the scope for improvement, taking account of the labour market requirements of the Member States. In addition, the topic will explore whether the policies of the Member States undermine or maintain EU-policy.

The topic of migration and asylum law and policy embraces a wide range of different subjects, such as: illegal entry; border control; relations with sending countries; integration issues; admission for labour and other purposes; reception of asylum seekers; asylum procedure; exclusive competence to process asylum claims; burden-sharing; re-admission agreements; return policies; etc. National reports should concentrate upon issues which relate to EU-migration and asylum policy as reflected in the directives and proposals for directives. Therefore, national reports may differ in their structures concerning the compatibility or incompatibility of national law with EU law. In some Member States some aspects will raise major problems while in other Member States such problems do not arise. It is quite obvious that the national reports cannot deal with all issues raised in this questionnaire in detail. It is not the intention of the questionnaire to provide the basis for a comprehensive comparative account of Member States' law and policy in migration and asylum issues. National reports may rely on a number of comparative studies which have been made in preparation for the Commission's Proposals on directives, for instance on the reception of asylum seekers, the legal status of third country nationals, the regularization of illegal aliens, Member States' law and policy on expulsion and deportation, the feasibility of single asylum procedures, etc. I suggest that national rapporteurs briefly review the outcome of these studies or refer to more details of these studies – provided they are correct – in answering the questionnaire if they consider it appropriate.

The focus of the general report equally will not consist of a repetition of already existing comparative surveys, but on a critical examination of the state of national law and policies in relation to the EU. Therefore particular emphasis will be laid on the following points:

- Implementation of existing EU legislation in the field of migration and asylum law;
- Compatibility of national migration and asylum law and policies with pending EC directives and regulations, particularly on asylum procedure, legal status of third country nationals and definition of refugees;
- Prospects and conflicts concerning draft directives and communications of the European Commission on the future development of a European migration and asylum law on which no agreement has yet been achieved in council;
- Long term perspective of EU legislation in the field of migration and asylum law and policy.

The Questionnaire is divided into four major subjects:

- 1 Entry, visa regime and border control
- 2 Admission and residence of third country nationals
- 3 Asylum and refugee law
- 4 Termination of illegal residence, return and repatriation.

PART I (ENTRY, VISA REGIME AND BORDER CONTROL)

In this section each national rapporteur should give a brief account of the national law and policy concerning measures undertaken against illegal entry and stay of third country nationals (return and readmission will be dealt with under 4) relating to the EU-visa regime and the Schengen rules on border control and issuance of Schengen visas. It might also be useful to have a brief factual account of visa issuance and illegal entries, respectively arrests in relation to illegal border crossing.

- 1.1 What national authorities are competent to deal with visa applications (Schengen visas and long-term visas)? Are there any procedures to avoid duplication or successive visa applications at different EU-consulates? On what substantive criteria, other than the

Schengen minimum requirements, are visas granted or refused? How many visas have been issued or refused?

- 1.2 Is there a visa tracking procedure in order to identify visa overstayers? What data are collected from visa-applicants (fingerprints)? Admissibility of visa data to alien and police authorities?
- 1.3 Have courts ever decided on the refusal of a Schengen visa based upon Schengen blacklisting by other Member States?
- 1.4 What measures have been undertaken in the implementation of the action programme for administrative cooperation in the field of external borders, visa, asylum and immigration following the Council Decision of 13 June 2002?
- 1.5 What measures have been undertaken to implement the Directive 2001/51 EC supplementing the Schengen rules concerning carrier sanctions? How often have carrier sanctions been used?
- 1.6 In your judgement, does the visa law and policy of your country live up to EU standards or are adjustments needed? Do you consider that there is need for further EU-harmonization of visa policies concerning:
 - common criteria for granting visas aiming at harmonizing visa obligations among states participating in the Budapest Process;
 - establishment of a European visa identification system (VIS and SIS II)?

To what extent will the EU enlargement process present an opportunity or challenge for tackling issues of illegal entry and border control?

PART II (ADMISSION AND RESIDENCE OF THIRD COUNTRY NATIONALS)

In this section national rapporteurs should identify the basic rules of admission and residence of third country nationals as compared with:

- Proposal for a Directive on conditions of entry and residence of third country nationals for the purpose of paid employment and self-employed activities, COM 2001, 386 final
- Proposal for a Directive on the conditions of entry and residence of third country nationals for the purpose of studies, vocational training or voluntary service, COM 2002, 548 final