

Hailbronner / Thym (eds)

EU Immigration and Asylum Law

A Commentary

Second Edition

C.H.BECK · Hart · Nomos

Hailbronner/Thym
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A Commentary

edited by

Kay Hailbronner

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Second edition
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C. H. BECK · Hart · Nomos

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Preface

Immigration and asylum policy have become the object of intense political disputes in many Member States and at supranational level. Their legal dimension is increasingly influenced by EU directives and regulations on various aspects of border controls, visas, immigration and asylum. For that reason, legal and political debates at national and the European level often revolve around the contents of EU legislation which determines the outcome of court cases throughout the continent and guides national parliaments when adopting domestic rules. After 15 years of legislative activities at EU level, it has become difficult to keep an oversight of the diverse instruments adopted on a variety of topics ranging from visa applications in consulates abroad and border controls at sea over rules on the entry and residence of family members, students, seasonal workers or inter-corporate transferees to reception conditions and procedural guarantees for asylum seekers. This commentary pursues the objective of assisting readers to confront the complexity of supranational legislation.

The publication of a new directive or regulation in the Official Journal is the beginning of an occasionally cumbersome process of implementation, enforcement and adjudication at national and supranational level. It is the purpose of this commentary to support all those involved in different functions and at various levels in the interpretation and application of European rules: judges at domestic courts, officials working for administrative authorities or national ministries, members of civil society, practicing lawyers, civil servants with an EU institution and academics. To support all these readers required the authors to pay attention to both the seemingly technical detail of a specific measure and the grand scheme connecting different instruments. The chapters of this commentary are meant to achieve both in parallel through a combination of four thematic introductions and more specialised sections on no less than 20 different instruments.

In order to provide readers with a comprehensive overview of European immigration and asylum law, this book employs the method of a ‘commentary’ in the German tradition explaining the content and legal context of each legislative instrument article by article. Thus, the chapter on a specific directive or regulation will not usually be read from A to Z like a book. Rather, readers will consult the information on a specific article and will then be re-directed, by means of cross-references, to related information elsewhere in the commentary. By way of example, someone interested in the scope and interpretation of the equal treatment provision in Article 11 Long-Term Residents Directive will open the relevant pages on this article and look for the information he/she requires. In addition, the four thematic introductions provide readers with an outline of overarching legal, constitutional and contextual questions relevant for a better understanding of the policy field as a whole.

We have paid attention to bring together a rich collection of different authors with various backgrounds from across Europe. Some are experienced practitioners with a high expertise in the field they are writing on. Others are senior academics or promising young researchers involved in debates about immigration and asylum. Not all authors contributing to this book share exactly the same opinions on underlying themes. Therefore, different views on overlapping issues of interpretation cannot be excluded. But we are united by the ambition to provide our readers with reliable and in-depth materials on a complex area of the law.

Preface

It is a characteristic of immigration and asylum law that its interpretation is the object of legal and political disputes and disagreements. For that reason, reliability and objectivity are meant to be core features of this commentary which intends primarily to present the law as it stands, while always keeping in mind that existing rules may provide a large scope for divergent interpretation. Whenever there is room for disagreement, existing opinions in the literature shall be presented, possibly together with a proposal by the author how the question should be resolved. In doing so, the contributors participate in the doctrinal reconstruction of the law in line with the continental tradition also in areas where no case law exists so far.

As a transnational undertaking, it is not the purpose of this commentary to give detailed information on how different Member States implemented European rules. It aims, rather, to describe the content of existing European legislation, to identify potential interpretation issues and to provide arguments for applying such rules. Given that the EU is a multilingual polity, we have invited authors to include case law by national courts from across Europe and academic writing in different languages into their line of argument.

We hope that the common methodological concept underlying a commentary article-by-article will be useful for both practitioners and academics working on domestic or supranational immigration and asylum law. Of course, there may be gaps and omissions. The editors and authors therefore appreciate any suggestion how to improve the general scheme or individual chapters in subsequent editions of this book. They should be directed to

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List of Abbreviations

ADD	addendum
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AMIF	Asylum, Migration and Integration Fund
Asylum Procedures Directive	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180/60)
Asylum Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337/9)
Asylum Reception Directive	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180/96)
Blue Card Directive	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 (OJ 2009 L 155/17)
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 Union (until 2009; thereafter: General Court)
CFR	Charter of Fundamental Rights of the European Union
Citizenship Directive	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
CJEL	Columbia Journal of European Law
CJEU	Court of Justice of the European Union
CML Rev.	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
CRC	Convention on the Rights of the Child
CUP	Cambridge University Press
doc.	Document
Dublin II Regulation	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 (OJ 2003 L 50/1)
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 (OJ 2013 L 180/31).
e. g.	for example

List of Abbreviations

EASO	European Asylum Support Office
EBGT	European Border Guard Team
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
EEC	European Economic Community
EFTA	European Free Trade Association
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
EL Rev.	European Law Review
ELJ	European Law Journal
Employers Sanctions	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 (OJ 2009 L 168/24)
Directive	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 (OJ 2009 L 168/24)
EP	European Parliament
ESC	Economic and Social Committee
et al.	et alii/and others
et seq	et sequentes/following
et seqq	et sequentes/and the following
etc.	et cetera
EU	European Union
EuConst	European Constitutional Law Review
Eurodac Regulation	Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (2013 L 180/1)
EuroSTAT	Statistical Office of the European Union
Family Reunification	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12)
Directive	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326/13)
former Asylum Procedures	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 (OJ 2004 L 304/12)
Directive	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31/18)
former Asylum Qualification	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
Directive	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
former Asylum Reception	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
Directive	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
Free Movement Directive	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77)
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

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Frontex Regulation	Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2004 L 349/1)
FYROM	Former Yugoslav Republic of Macedonia
GAMM	Global Approach to Migration and Mobility
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Court of the European Union (since 2009)
GC	Grand Chamber
GC	Geneva Convention
Geneva Convention	Geneva Convention relating to the Status of Refugees of 28 July 1951
GLJ	German Law Journal
HR Rev.	Human Rights Review
HRC	Human Rights Committee
Human Trafficking Directive	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 (OJ 2004 L 261/19)
i. e.	id est/that is/means
ibid.	ibidem/in the same place/the same
ICC	International Criminal Court
ICC Statute	(Rome) Statute of the International Criminal Court
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICT	intra-corporate transferee
ICT Directive	Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ 2014 L157/1)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
ICRC	International Committee of the Red Cross
IJRL	International Journal of Refugee Law
ILO	International Labour Organization
IM Rev.	International Migration Review
IMO	International Maritime Organization
IO	International Organization
IOM	International Organization for Migration
ISCED	International Standard Classification of Education
JCMSt.	Journal of Common Market Studies
JRSt.	Journal of Refugee Studies
lit.	litera/letter
Long-Term Residents Directive	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44) with amendments (see the consolidated version of 2011).
MBA	Master of business administration
MN	margin number/note
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
no.	number
OJ	Official Journal of the European Union
OSCE	Organisation for Security and Cooperation in Europe
OUP	Oxford University Press
p./pp.	page/pages
para.	paragraph
paras	paragraphs
Posted Workers Directive	Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18/1)

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Rec.	Recommendation
Researchers Directive	Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ 2005 L 289/15)
REV	revised
Return Directive	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 (OJ 2008 L 348/98)
SAR Convention	International Convention on Maritime Search and Rescue (1979)
Schengen Borders Code Regulation	Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105/1)
Sea Borders Regulation	Regulation (EU) No. 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation co-ordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2014 L 189/93)
Seasonal Workers Directive ...	Directive 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers of 26 February 2014 (OJ 2014 L 94/375).
SEC	Commission Documents which cannot be classified in any of the other series
sent.....	sentence
SIAC	Special Immigration Appeals Commission
Single Permit Directive	Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343/1)
SIS	Schengen Information System
Social Security Coordination Regulation	Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security system
SOLAS Convention	Safety of Life at Sea Convention (1974)
Students Directive	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 (OJ 2004 L 375/12)
TEC	Treaty establishing the European Community
TEC (Nice version)	EC Treaty (as amended by the Treaty of Nice)
TEC (Maastricht version)	EC Treaty (as amended by the Treaty of Maastricht)
TEC (Amsterdam version)	EC Treaty (as amended by the Treaty of Amsterdam)
Temporary Protection Directive	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 (OJ 2001 L 212/12)
TEU	Treaty on European Union
TEU (Nice version)	EU Treaty (as amended by the Treaty of Nice)
TEU (Maastricht version)	EU Treaty (as amended by the Treaty of Maastricht)
TEU (Amsterdam version) ...	EU Treaty (as amended by the Treaty of Amsterdam)
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea (1982)
UNHCR	United Nations High Commissioner for Refugees
Visa Code Regulation	Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ 2009 L 243/1)

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Visa Regulation 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 (OJ 2001 L 81/1)

