



The Temporary Protection Directive: Central Themes,  
Problem Issues and Implementation in Selected Member States

Directive 2001/55/EC on temporary protection was adopted on 20 July 2001 as the first instrument of the Common European Asylum System (CEAS). It introduces an EU wide applicable mechanism to respond to mass arrivals of refugees whereby the need to examine individual applications for protection is waived while those falling under its regime enjoy a harmonised set of rights across EU states. The directive was activated for the first time on 4 March 2022 by a unanimous decision of the European Council after the Russian invasion of Ukraine on 24 February 2022 led to millions of persons fleeing Ukraine to neighbouring EU countries.

The contributions to this book are based on lectures presented at a seminar organised on 20 January 2023 by the Centre for Migration Law of the Radboud University, in the Netherlands. The seminar aimed to take stock of the application of the Temporary Protection Directive (TPD) in selected EU states almost a year after its activation. The book examines how selected EU states apply the provisions of the directive, what problem issues are relevant in practice and how protection needs are met in EU states bound by the directive and in one non-EU state, the United Kingdom which applies its own national laws. The final chapter addresses the future of Ukrainians in the EU after the system of temporary protection introduced by the directive will come to an end.

Sandra Mantu, Karin Zwaan and Tineke Strik (eds.)

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## THE TEMPORARY PROTECTION DIRECTIVE



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# Table of Contents

<i>Introduction</i> Sandra Mantu and Karin Zwaan	1
<i>The Temporary Protection Directive: an Overview</i> Karina Franssen	9
<i>The Czech Republic: Current Issues in the Application of Temporary Protection</i> Veronika Víchová	19
<i>The Implementation of Temporary Protection for People Fleeing the War in Ukraine in Germany</i> Wiebke Judith	33
<i>The Implementation of the Temporary Protection Regime in Belgium</i> Christine Flamand	43
<i>Implementation and Practice of the Temporary Protection Directive in the Netherlands</i> Karen Geertsema	57
<i>The implementation of the Temporary Protection Directive in 2022 in Portugal to Persons Fleeing the War in Ukraine</i> Ana Rita Gil	71
<i>(Temporary) Protection of Ukrainians in the UK</i> Anna Kirby and Erin Brown	89
<i>Temporary Protection and the Future of Ukrainians in the EU</i> Elspeth Guild and Kees Groenendijk	105

<b>ANNEXES</b>	117
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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

Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.



# Introduction

*Sandra Mantu and Karin Zwaan\**

This book is the result of a seminar organised on 20 January 2023 by the Centre for Migration Law of the Radboud University in the Netherlands. The seminar aimed to take stock of the application of the Temporary Protection Directive (TPD) in selected EU states almost a year after its activation following the Russian invasion of Ukraine on 24 February 2022. The seminar took place when it was clear that the system of temporary protection would be prolonged until 4 March 2024 seeing the ongoing war in Ukraine. It seemed a good moment to examine how selected EU states applied the provisions of the TPD, what problem issues were relevant in practice and how protection needs were met. The book builds on the seminar but also includes a chapter examining how temporary protection has been organised in the United Kingdom (UK), to give a fuller account of how protection needs can be met.

Directive 2001/55/EC on temporary protection (TPD) was adopted on 20 July 2001 as the first instrument of the Common European Asylum System (CEAS).<sup>1</sup> The adoption of the directive is linked to the Yugoslav and Kosovo wars during the 1990s that led to millions of displaced persons seeking refuge in EU states, pushing their protection systems to the limit. The response of the EU states varied as did their national systems for granting temporary protection. This resulted in a push for the harmonisation of temporary protection standards at the EU level building also on the then newly acquired competences of the EU under the Amsterdam Treaty to adopt harmonized measures in respect of immigration, asylum, visas, and external borders. Developing EU temporary protection standards was seen as one of the building blocks of a common asylum system and the TPD introduces a Union wide applicable mechanism to respond to mass arrivals of refugees whereby the need to examine individual applications for protection is waived while those falling under the regime of the TPD enjoy a harmonised set of rights across EU states. Therefore, temporary protection is an exceptional measure to provide immediate and temporary protection to displaced persons from non-EU countries unable to return to their country of origin. It applies when there is a risk that the standard asylum system will struggle to cope with demands stemming from a mass inflow, risking a negative impact on the processing of claims.

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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 [2001] OJ L 212.



The TPD was adopted relatively quickly, especially when compared to the other CEAS measures, but when it came to its transposition by 31 December 2002, half of the EU states failed to transpose it (Belgium, Greece, Netherlands, Luxembourg, France, the United Kingdom and Ireland; Denmark was not bound by the directive). Unlike the other CEAS instruments, the TPD was never recast<sup>2</sup> neither activated despite the EU facing several refugee crises. Moreover, the 2020 EU Pact on Migration and Asylum contained proposals for the repeal of the directive by a new regulation addressing situations of crisis and force majeure<sup>3</sup> suggesting that neither the EU states nor the Commission saw the TPD as a particularly useful legal instrument. There have been wide discussions as to why the TPD was never activated in the case of mass displacements following the Arab Spring<sup>4</sup> and even an acknowledgment by the European Commissioner for Home Affairs Ylva Johansson that the failure to activate the TPD in the context of the so-called refugee crisis of 2015 was a wrong decision.<sup>5</sup>

The unanimous decision of the European Council<sup>6</sup> to activate the Temporary Protection Directive on 4 March 2022 following the Russian invasion of Ukraine came as a surprise considering past difficulties with its activation. The lack of any previous experience with the directive and the system it introduces brought questions about how fit a legal instrument adopted in 2001 can be in dealing with a mass influx of Ukrainians in the EU in 2022. Questions around coordination between EU states and financing were equally important since the directive does not address them at length.<sup>7</sup> This meant that EU states and the Commission had to adopt new measures and instruments. The Commission has launched a dedicated solidarity platform<sup>8</sup> where information can be found by persons coming from Ukraine as well as persons helping Ukrainians. The EU Commission has also produced operational and other guidelines and provided financial support from the EU budget amounting to €11.6

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2 Guild, E. and Groenendijk, K. (2023) The impact of war in Ukraine on EU migration. *Frontiers in Human Dynamics* 5: 1189625.

3 Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final, Brussels, 23.9.2020.

4 Küçük, E. (2023). Temporary Protection Directive: Testing New Frontiers?, *European Journal of Migration and Law* 25(1): 1-30. doi: <https://doi.org/10.1163/15718166-12340142>; Ineli-Ciğer, M. (2022) *Reasons for the Activation of the Temporary Protection Directive in 2022: A Tale of Double Standards*, ASILE, 6 October 2022; Koo, J. (2018). Mass Influxes and Protection in Europe: A Reflection on a Temporary Episode of an Enduring Problem, *European Journal of Migration and Law* 20(2): 157-181. doi: <https://doi.org/10.1163/15718166-12340027>.

5 EURACTIV, 'EU should have used Temporary Protection Directive before Ukraine, says Johansson', 6 February 2023.

6 Council implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2011/55/EC and having the effect of introducing temporary protection [2022] OJ L 71.

7 See Article 27 TPD on administrative cooperation.

8 [https://eu-solidarity-ukraine.ec.europa.eu/index\\_en](https://eu-solidarity-ukraine.ec.europa.eu/index_en).

billion in 2022, and up to €18 billion in 2023.<sup>9</sup> As an instrument from the first generation of asylum legislation, the TPD is a minimum harmonization instrument which can be seen in its flexible provisions that give the Member States a wide margin of appreciation and in the fact that it allows national temporary protection schemes to co-exist with the directive provided that they do not offer less rights. This flexibility has been considered useful by the Commission and the EU states, but it has been equally criticised by scholars as a reason for the limited personal scope of temporary protection and the possibility for EU states to exclude categories of TCNs from protection.<sup>10</sup>

By April 2023, Eurostat data<sup>11</sup> shows that almost 4 million persons are registered with EU temporary protection status, the majority of them in Germany (1 090 235 persons; 28% of all registrations), Poland (995 035 persons, 25% of all registrations) and Czech Republic (331 850 persons; 8% of registrations). Ukrainian citizens represented 98% of all registrations and they are mainly adult women (47%) and children (35%), while adult men count for 18% of registrations. The profile of Ukrainian displaced persons, that is mainly women and children, has been offered as an explanation for the decision to trigger the activation of the TPD as opposed to the mixed flows that characterised previous displacements in the context of the Arab Spring. The fact that Ukrainians enjoyed visa free travel for 3 months in the Schengen area played an important role in the distribution of displaced persons across the EU, illustrated by the fact that Ukrainians self-distributed and did not necessarily remain in the first line states bordering Ukraine,<sup>12</sup> without this causing similar discussions linked to secondary movements as with other asylum seekers. Hopes have been expressed that the overall positive experience with self-distribution will inform future EU legislation and policy on CEAS more generally since the Ukraine example shows it to be positive for both states and asylum seekers.<sup>13</sup>

While the implementation of the TPD is generally presented as successful, problem issues persist. They relate to the personal scope of protection which excludes certain categories of displaced TCNs, to eliminating barriers to accessing the rights awarded to displaced persons under the TPD, the early and systematic

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9 Factsheet EU Solidarity with Ukraine. June 2023.

[https://ec.europa.eu/commission/presscorner/detail/en/FS\\_22\\_3862](https://ec.europa.eu/commission/presscorner/detail/en/FS_22_3862)

10 Carerra, S. and Ineli-Ciğer, M. (2023) The Activation of the Temporary protection Directive in 2022: A Turning Point in EU Asylum Law and Policy, in Carrera, S. and Ineli-Ciğer, M. (eds) *EU Responses to the Large-Scale Refugee Displacement*. European University Institute (pp. i-vi).

11 Eurostat, Temporary protection for persons fleeing Ukraine – monthly statistics. [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary\\_protection\\_for\\_persons\\_fleeing\\_Ukraine\\_-\\_monthly\\_statistics#Who\\_are\\_the\\_people\\_fleeing\\_Ukraine\\_and\\_receiving\\_temporary\\_protection.3F](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary_protection_for_persons_fleeing_Ukraine_-_monthly_statistics#Who_are_the_people_fleeing_Ukraine_and_receiving_temporary_protection.3F).

12 Ukraine shares borders with the following EU states: Poland, Slovakia, Hungary, and Romania. Except for Poland, the other EU neighboring countries do not host the largest numbers of displaced persons from Ukraine.

13 Woollard, C. (2022) *Editorial: Asylum reforms: Ukraine Stimulates a Rethink at the Restart*. 9 September 2022. <https://ecre.org/editorial-asylum-reforms-ukraine-stimulates-a-rethink-at-the-restart/>.

identification of persons with special needs and the situation of children. Housing appears as a stumbling block in several EU states and is linked to the lack of harmonised social and economic rights across the EU. The flexibility that is in-built in the TPD has led to divergent practices because of different interpretations of the directive's provisions relating to scope, eligibility, reception support, access to rights and circular/pendular movements to and from Ukraine.<sup>14</sup> The latter issue is intrinsically linked with uncertainty that reigns over the duration of the war and the situation of displaced persons once the TPD protection ends. The question of 'what happens after' the end of temporary protection remains highly unclear<sup>15</sup>, and constitutes a source of insecurity in the daily lives of people enjoying temporary protection. For the EU institutions and EU states the question of how to deal long-term with large numbers of displaced persons is equally relevant since it requires the deployment of long-term funding and deciding on whether TPD beneficiaries would be streamlined into the asylum system or in the regular migration one, for example via work or study.

The chapters in this book attest to the complexities of temporary protection status as well as its legal and practical application. They equally capture the highly relevant role played by civil society in welcoming displaced person from Ukraine in a spirit of solidarity. The chapters also capture shifts in policies and legal measures that lead to a shrinking of protection and the uncertainty over whether persons displaced from Ukraine will (want to) remain in the EU after the conflict ends and on what terms as no EU state seems to have a clear strategy. Another problem concerns the difference in treatment between persons displaced from Ukraine and other asylum seekers who in all the EU states discussed below enjoy a much lower level of rights, including in relation to the right to work. Moreover, several chapters mention the discrimination of non-Ukrainians as an issue that taints the overall positive experiences with the TPD.

The first chapter by Karina Franssen gives a short overview of the history and content of the directive in terms of its scope, procedure, substantive rights, links with the asylum procedure, and the question of return following the end of temporary protection. Franssen argues that the added value of the directive lies in its personal scope, the lack of lengthy procedures and a uniform status with a relatively high level of rights as well as the possibility to apply for asylum at the end of temporary protection.

Chapter 2 by Veronika Víchová examines the application of temporary protection in the Czech Republic where new laws had to be adopted to supplement the original transposition of the TPD into national law. The main issues in the Czech Republic are linked to the exclusion of TCNs without

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14 ECRE (2023) *Movement to and from Ukraine under the Temporary protection Directive*. Policy Note # 43. <https://ecre.org/wp-content/uploads/2023/01/Policy-Note-43-movement-to-and-from-Ukraine-January-2023.pdf>

15 Carrera et al. (2023) criticise the wide discretion left to EU states when deciding if someone cannot return in safe and durable conditions to their country or region of origin, see Carrera et al. (2023) *The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy*, in Carrera, S. and Ineli-Cigir, M. (eds) *EU Responses to the Large-Scale Refugee Displacement*. European University Institute, p. 74.

permanent residence in Ukraine from the scope of protection, the lack of appeal against inadmissible applications, denial of TP status to persons who have protection in another EU state and the situation of dual Ukrainian and Russian nationals asking for protection. Housing, recognition of qualifications, labor exploitation and ensuring access to education raise specific issues that require long-term policies.

In chapter 3 Wiebke Judith argues that the German experience with the TPD has been overall positive, while the problems that exist are in fact structural and include the lack of social housing, teachers, and few childcare options. These issues have consequences for Ukrainians' incorporation into the labour market. The high level of rights enjoyed by Ukrainian refugees, which is seen as being tremendously positive in terms of their integration, has nonetheless led to discussions about a two-class refugee system. The biggest challenge is linked to how German authorities will approach the issue of return once temporary protection ends. The possibility of steering more than 1 million persons into the asylum system is not appealing, while Germany has in the past tried to send people back too early to their state of origin.

Chapter 4 by Christine Flamand equally stresses the efforts that have been made in Belgium to protect persons fleeing from Ukraine, such as easy registration and access to substantive rights. Housing remains a problematic aspect, with the majority of TPD beneficiaries resident in Flanders. Similar to Germany, the majority found housing on their own or with the help of friends, family and the Ukrainian diaspora. Like in other EU states, problems arise because of the exclusion of TCNs from the scope of protection which has led to rather incoherent case law. Future challenges concern the difference in treatment between Ukrainian and other refugees and the legal solution to be adopted once TP status ends. The possibility to transition to a work-based status is not excluded but would require a regularisation request.

Chapter 5 by Karen Geertsema discusses the application of the TPD in the Netherlands, a country that has transposed the directive in a particular fashion. Namely, the application for temporary protection qualifies as an asylum application, which is put on hold for the duration of the temporary protection. This is expected to have consequences since at the end of the temporary protection Ukrainians would be dealt with within the asylum system, a prospect that is not appealing considering the shortcomings of the Dutch asylum system. Geertsema argues that the approach of the Dutch authorities has been positive in terms of facilitating the creation of reception centres, giving leeway to municipalities to create housing and cooperate with employment agencies to find employment. The latter aspect is considered a success considering the very limited labor participation of other refugees. However, the generous transposition of the TPD's personal scope of application that initially included TCNs is now being reversed linked to claims of abuse, an issue that has created insecurity for a group of displaced people who were initially classed as TP beneficiaries. Long-term solutions for housing are equally problematic in light of a general housing crisis in the Netherlands.

Chapter 6 by Ana Rita Gil describes the Portuguese experiences with temporary protection. Portugal has maintained its own national temporary protection scheme and has put to good use its previous experiences with

protecting displaced persons fleeing the civil wars in Guinea Bissau and Kosovo. Like the situation in the Netherlands, Portugal started with a wide interpretation of the personal scope of the TPD but changed tracks in December 2022 and is now excluding some categories of persons that were initially eligible to receive temporary protection. Moreover, Portugal has extended the validity of protection for another 6 months as opposed to 1 year as in the Council decision. Despite efforts to welcome displaced persons and award them access to the rights pertaining to TP status, finding long-term housing remains a challenge, while access to social rights must be understood within a generally declining situation. Portugal has put a lot of effort into integrating children in schools, such as the creation of multidisciplinary teams to help their integration as well as adopted extraordinary measures to create extra day care centres to stimulate women's labour market participation.

Chapter 7 by Anna Kirby and Erin Brown details the protection given to displaced persons from Ukraine in the United Kingdom (UK), a country that is no longer bound by the TPD. This chapter offers a different perspective on how to legally organise the temporary protection of persons fleeing the war in Ukraine as well as highlights similar practical problems as in EU states bound by the TPD. The UK adopted a distinct approach outside its ordinary asylum system in response to persons fleeing the conflict in Ukraine. In doing so, the UK introduced three new visa schemes, allowing for entry, residence and access to a number of other rights. While the UK's approach towards the people of Ukraine is more liberal than that offered to other groups of refugees, it is more restrictive than the TPD. The main differences are the eligibility criteria which dictates that a Ukrainian individual or family must have UK family connections or sponsorship and they must apply for a visa in advance. The latter requirement has led to a bureaucratised system, characterised by long wait times and inconsistent decision making. TCNs living in Ukraine are excluded from the visa schemes and they must follow the regular asylum system. Like in EU countries, problem areas include long-term housing with private support for the scheme beginning to decline, followed by access to the labour market which is hampered by lack of acceptance of Ukrainian qualifications, language barriers and access to childcare. Similar questions exist concerning the position of displaced persons at the end of the conflict in Ukraine since none of the UK visa schemes provide for a route into permanent settlement.

The final chapter by Elspeth Guild and Kees Groenendijk examines a growing concern for EU institutions, Member States and, as the other chapters in the book have detailed, the beneficiaries of TP protection in Europe, namely their future after the end of the TPD scheme. The authors identify five possible solutions: amending the TPD to allow further exceptions; assimilation into existing EU law on TCNs; incorporation into CEAS; the 'reconstruction permit' advised by L. Asscher, the EU's special adviser for Ukraine, and finally, modified free movement of persons. These five options are examined against five benchmarks durability of residence rights; is the status limited to persons registered in the TP programme before its end; entitlement to socio-economic rights, including family life; mobility rights within the EU, and mobility rights to return to the EU after a stay in Ukraine or elsewhere. The authors highlight the pros and cons of each of

these options while stressing the need that all TP beneficiaries should transition automatically to another status, otherwise chaos will prevail in Member states' immigration departments, the very reason why the TPD was activated.

The trajectory of the TPD is in many ways extraordinary: from a shelved directive ready to be axed under the 2020 EU Pact on Asylum and Migration, it has become a showcase of EU solidarity with persons fleeing the war in Ukraine. The experiences with its application show that, where political will exists, European states can deal with a mass influx of persons in need of protection in a humane manner. Moreover, awarding migrants rights turns out to be beneficial for their integration and for host states. It remains to be seen if the positive lessons learnt from the activation of the TPD will be incorporated in future EU migration policy and laws.



# The Temporary Protection Directive: an Overview

Karina Franssen\*

## 1. INTRODUCTION

During my PhD research on the Temporary Protection Directive<sup>1</sup>, I was often asked why I was dealing with a 'virtual directive' that would never be used anyway.<sup>2</sup> When defending the thesis, I argued that the Directive would probably only be used if there was a conflict close to the EU, for example in Belarus. Exactly ten years and ten months later, on 4 March 2022, the Council of Ministers activated the Temporary Protection Directive for displaced persons fleeing Ukraine because of the war there. That gives me mixed feelings: my dissertation is back in the spotlight after all this time, but it is sad that a war is the cause of this.

In this chapter, I will first briefly consider the history and content of the directive (2). Why has this directive ever been introduced and what is the directive about? I will also try to answer the question why the directive has not been activated until March 2022 (3). I will conclude with what I think can be considered the added value of the directive (4).

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- 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 (OJ L 212, 7.8.2001, p. 12).
- 2 Karina Franssen, *Tijdelijke bescherming van asielzoekers in de EU. Recht en praktijk in Duitsland, Nederland en het Verenigd Koninkrijk en richtlijn 2001/55/EG*, Den Haag: Boom Juridische Uitgevers 2011. In my dissertation I describe and analyse how three EU Member States, namely the Netherlands, Germany and the United Kingdom (at that time the United Kingdom was still a Member State of the EU) dealt with temporary protection before the Temporary Protection Directive came into force, what their role was during the negotiations that led to the adoption of the Directive and how these three Member States implemented the Directive.



## 2. BACKGROUND AND CONTENT

### 2.1. *Background*

The Temporary Protection Directive entered into force in 2001. The immediate reason for the directive were the two civil wars in the former Yugoslavia in the 1990s. These two wars, close to the EU's external border, resulted in large numbers of asylum seekers seeking protection in the EU. In particular, Germany had to deal with a large influx. This led not only to the disruption of asylum systems in certain Member States, but also to major differences in forms of (temporary) protection. While Yugoslav asylum seekers were granted refugee status in some Member States, they were merely tolerated in other Member States. Moreover, there was no joint approach across EU states to toleration and the reasons for tolerating asylum seekers differed. For example, while in Germany asylum seekers were mainly tolerated after the asylum procedure, Dutch and British authorities also tolerated asylum seekers during the asylum procedure. Also, the (final) status and related rights varied from country to country. While in the Netherlands tolerance often resulted in regularization of stay by providing a better status, many persons in Germany stayed with a 'Duldung' for years.<sup>3</sup> In the UK, many persons finally received exceptional leave to remain status (ELR) which could, after some years, lead to a permanent status.<sup>4</sup>

These differences in approach were the main reason for the European Commission to come up with a proposal for a Temporary Protection Directive in May 2000.<sup>5</sup> The main aim of the directive is harmonisation, which was seen as beneficial to temporarily protected persons themselves (to guarantee them certain minimum standards) and to the Member States (to avoid disproportionate distribution and secondary movements). In addition to harmonisation, the directive also aimed to create a solidarity mechanism for those Member States dealing with the most asylum seekers. The Member States reached agreement on this directive remarkably quickly. It was adopted by the Council of Ministers in July 2001 after relatively short negotiations. This was remarkable because earlier attempts of Member States to lay down common criteria for temporary protection failed and did not lead to binding legal rules. Negotiations within the Council stranded mainly on issues such as burden-sharing between Member States, the relationship between temporary protection and access to the asylum procedure and the duration of temporary protection.

### 2.2. *Content*

In this paragraph I will briefly touch upon the most important aspects of the directive. I will successively discuss the scope of application, the procedure, the substantive rights, access to the asylum procedure, return and solidarity.

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3 A 'Duldung' is not a residence permit, but a document stating that expulsion will be postponed.

4 Franssen (2015) p. 391.

5 COM(2000) 303 final, 24 May 2000.

The Directive consists of two important components. On the one hand it formulates minimum standards (meaning substantial rights) for giving temporary protection in case of a mass influx of displaced persons who cannot return to their country of origin and on the other hand it creates some kind of solidarity between Member States with regard to the reception of these people. As regards the first component, the standards are relatively high (right to housing, education, employment, family reunification). Although Member States have tried to weaken the Commission's proposal, the standards are fairly acceptable. The second part of the Directive, consisting of measures to promote solidarity, mainly contains optional provisions. The interests of the different Member States were too far apart to create a more binding solidarity system.

### 2.3. *Scope of application*

As stated, the directive is primarily intended to bring about a form of harmonisation of temporary protection, but what exactly is temporary protection? The Directive summarizes it in Article 2(a) as follows: temporary protection is *an exceptional procedure* which, in the event of a(n) (imminent) *mass influx of displaced persons* from third countries who cannot return to their country of origin, offers these people immediate and temporary protection. This exceptional procedure may be initiated in particular where there is a risk that the asylum system will not be able to cope with the influx without this leading to consequences that are contrary to its proper functioning.

I will highlight the words in italics.

The directive refers to an *exceptional procedure*. This means that, in principle, the regular asylum procedure, during which national authorities assess whether someone is eligible for refugee or subsidiary protection, is preferred. If this is not possible (for example due to the large number of requests), the procedure of temporary protection can offer a solution. The directive expressly states in Article 3(1) that temporary protection is without prejudice to the recognition of refugee status under the Refugee Convention and that it is not intended to derogate from or circumvent the international obligations of Member States.

There should also be a *mass influx*. What is a mass influx? According to Article 2(d) a mass influx constitutes of a significant number of displaced persons, but what is significant? Neither the directive itself nor the Explanatory Memorandum to the original Commission proposal provide any clarity, either in an absolute or in a relative sense. It is only stated that this depends on the circumstances of the case. Subsequently, these displaced persons must come from the same country or geographical area and there must be a sudden and not a gradual influx. It does not matter whether the displaced persons entered the EU on their own initiative (i.e., spontaneously) or with help (for example as part of an evacuation programme).

Finally, the target group: *displaced persons*. Displaced persons are defined in Article 2(c) as third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, and whose return in safe and durable conditions is impossible, because of the situation in that country. Two groups are specifically mentioned: 1) persons who have fled areas of armed conflict or endemic violence, and 2) persons who are at serious risk of, or who have been the victims of, systematic or generalised human rights violations. The directive states that

displaced persons may also include refugees within the meaning of the Refugee Convention.

## **2.4. Procedure**

According to Article 5(1) it is up to the Council of Ministers to activate the directive on the basis of a proposal from the European Commission. A qualified (i.e., two-thirds) majority of votes is required for this. The Council's decision must be motivated and has to contain a number of elements, such as a description of the target group (who?), the starting date (when?), information from Member States on their reception capacity (how much?) and available information from relevant (international) organisations. As a principle, temporary protection can be installed for one year which period can be automatically prolonged with periods of six months (with a maximum of one year). If, after those two years, there are still grounds for granting temporary protection, temporary protection may be extended for another year, but then the Council has to decide again by qualified majority on a proposal from the European Commission. Temporary protection therefore ends after a maximum period of three years or earlier, if the Council so decides, because it considers that a safe and durable return of displaced persons is possible.<sup>6</sup>

## **2.5. Substantive rights**

The Temporary Protection Directive grants a number of rights to displaced persons. These rights are of a fairly high level, in particular when compared with the rights granted to asylum seekers according to the Reception Conditions Directive.<sup>7</sup> The reasons given by the European Commission for this high level are that, on the one hand, they must reflect Europe's humanitarian traditions, and, on the other hand, the persons concerned may well include many refugees within the meaning of the Refugee Convention. Secondly, the rights had to be attractive enough to ensure that there is no excess of asylum applications.<sup>8</sup>

Displaced persons are entitled to a temporary residence permit under the directive (Article 8). In addition, Member States should, if necessary, facilitate persons who will be admitted to their territory for temporary protection to obtain the necessary (transit) visas. Displaced persons also have the right to information about their status (Article 9) and they may work under certain conditions (Article 12) and receive education (Article 14). Member States must also provide them with suitable accommodation (or sufficient financial resources to find it) and, if they do not have sufficient resources, the necessary assistance with regard to social welfare and means of subsistence, as well as for medical care (Article 13). Furthermore, the directive contains specific

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<sup>6</sup> See Art. 4 and 6 of the directive.

<sup>7</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18) which was replaced by 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 (recast) (OJ L 180, 29.6.2013, p. 96).

<sup>8</sup> See the Explanatory Memorandum to COM(2000) 303, p. 8 (par. 5.6).

provisions for vulnerable persons, such as unaccompanied minors (Article 16) and the right to a legal remedy (Article 29). Finally, the directive provides the displaced person with a right to family reunification with members of his nuclear family (Article 15). It makes no difference whether these family members enjoy temporary protection in another Member State or are still outside the EU. This is different for members of the wider family (the directive refers in Art. 15(1)(b) to other close relatives): they can be reunited by Member States in case of extreme hardship, but Member States are not obliged to do so.

## **2.6. *Access to the asylum procedure***

According to Article 3(1) of the directive, temporary protection shall not prejudice recognition of refugee status under the Refugee Convention. The directive therefore contains rules on access to the asylum procedure during the temporary protection regime.

Article 17 contains the main rule: persons enjoying temporary protection must be able to submit an asylum application at any time. However, this asylum application does not have to be processed immediately. Examination can be postponed but must be completed after temporary protection has come to an end. In case temporary protection lasts for three years, this means a considerable extension of the decision-making period.

Article 18 stipulates that in such a case the Dublin criteria apply *mutatis mutandis* and Article 19 allows Member States to determine that temporary protection and asylum status cannot be enjoyed concurrently. The latter therefore means that someone can be excluded from temporary protection if he submits an asylum application. This, however, does not seem to be in accordance with the main rule set out above that everyone should always be able to submit an asylum application

## **2.7. *Return***

When temporary protection ends, the directive stipulates that the national law of the Member States will apply again (Article 20). The directive does not include provisions for a coordinated return of displaced persons by Member States, which is a missed opportunity. The Return Directive of 2008 does, however, also apply to former temporarily protected persons who are no longer legally residing in a Member State, unless the Temporary Protection Directive contains more favourable standards.<sup>9</sup> In that context, the minimum standards of Articles 21 to 23 of the Temporary Protection Directive are relevant. During the negotiations these minimum standards raised concerns among Member States. They took the view that these standards regulate subjects that are up to the Member States to decide on. A Member State must be able to determine who returns, when he returns and in what way he returns. In the end, most of the minimum standards, however, were included in the directive.

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<sup>9</sup> Art. 4(2) of 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 L348, 24.12.2008, p. 98).

According to the mandatory provision in Article 21 Member States shall take the measures necessary to make possible the voluntary return of displaced persons or whose temporary protection has ended. Moreover, Member States shall ensure that the provisions governing voluntary return of displaced persons facilitate their return with respect for human dignity. The Member State shall ensure that the decision of those persons to return is taken in full knowledge of the facts. Member States may provide for exploratory visits.

As long as temporary protection has not ended, Member States shall, on the basis of the circumstances prevailing in the country of origin, give favourable consideration to requests for return to the host Member State from persons who have enjoyed temporary protection and exercised their right to a voluntary return. At the end of the temporary protection, the Member States may provide for the substantive rights to be extended individually to persons who have been covered by temporary protection and are benefiting from a voluntary return programme. The extension shall have effect until the date of return.

Article 22 gives some preconditions for enforced return. Member States shall take the measures necessary to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with due respect for human dignity. In cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.

Article 23 contains both a mandatory and an optional provision. According to Article 23(1) Member States shall take the necessary measures concerning the conditions of residence of persons who have enjoyed temporary protection and who cannot, in view of their state of health, reasonably be expected to travel; where for example they would suffer serious negative effects if their treatment was interrupted. They shall not be expelled so long as that situation continues. Article 23(2) indicates that Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period.

## **2.8.     *Solidarity***

In addition to harmonisation, solidarity was also an explicit aim of the directive. During the negotiations, but also in the period of the wars in the Former Yugoslavia, this was a highly controversial theme. Although Germany and the Netherlands (i.e., Member States that had to deal with large numbers of displaced persons in the 1990s) did their best to include a clear and binding solidarity mechanism in the directive, they did not succeed. The provisions in the directive are hardly elaborated. Member States are given a lot of discretion to decide how many displaced people they want to take in. For example, according to Article 25(1) Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity, whatever that may be. They shall further indicate - in figures or in general terms - their capacity to receive such persons, but there is no obligation to receive persons at all. Member States may indicate additional reception capacity. When the number of those who are eligible for temporary protection following a sudden and massive influx exceeds the

reception capacity referred to in Article 25(1), the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected. It is, however, not clear what this entails.

### 3. REASONS FOR (NON) APPLICATION

Until 4 March 2022, the directive has never been activated. Nevertheless, during the twenty years following the adoption of the directive, various crisis situations have occurred that could have led to the activation of the directive. Consider, for example, the civil war in Iraq in 2003, the uprising in Libya in 2011 and most recently the war in Syria in 2015. Each of these situations caused many people to flee to the EU. Although individual Member States, MEPs or (international) organisations, such as UNHCR, asked for activation in these situations, there was never consensus (neither within the European Commission nor within the Council of Ministers) that there was a situation of mass influx. For example, Germany said that a comparison with the situation in the Former Yugoslavia could not be drawn, because at that time hundreds of thousands of people fled. The existence of a mass influx thus seems to be the touchstone of the system.

But how can it then be explained that in the case of the Syrian crisis, when hundreds of thousands of people fled to the EU, the Directive was still not activated? Other (political) reasons must be relevant too. As long as it concerns only a few Member States that experience a mass influx (for example, Malta and Italy during the uprising in Libya), Member States that are not (or less) affected will not like to lose their sovereign position on how to deal with certain situations and groups of people. After all, activating the directive means a relatively high level of rights (which causes high costs for Member States) and a form of solidarity and burden-sharing as a result of which Member States are expected to take over displaced persons from Member States that are 'overburdened'. Moreover, there is a fear that the EU-wide application of temporary protection will be a pull factor for other displaced persons to come to the EU.<sup>10</sup>

Why was this different after the invasion of Ukraine by Russian troops on 24 February 2022? This time, both the European Commission and the Council of Ministers, decided prompt *and* unanimously that there was a mass influx that should lead to the activation of the Temporary Protection Directive. I think a number of elements are important here.<sup>11</sup>

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10 See Study on the Temporary Protection Directive (final report) by ICF Consulting Services Limited on behalf of DG Migration and Home Affairs (European Commission), January 2016; K. Franssen, 'Richtlijn tijdelijke bescherming. Een vergeten richtlijn', *AcMR* 2016, nr. 6/7, p. 322-327.

11 See M. Ineli Ciger, '5 Reasons Why: Understanding the reasons behind the activation of the Temporary Protection Directive in 2022', <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/>, 7 March 2022; G. Cornelisse en M. Stronks, 'Essay: plotselinge en eensgezinde opvang van Oekraïners. Oekraïners en het permanente heden van tijdelijke bescherming', *AcMR* 2022-2, p. 59-62.

The circumstance that Russia launched, without any valid reason, an unprecedented invasion of its neighbouring country, which was in search of rapprochement with the EU and NATO, plays an important role. The Russian military invasion of Ukraine posed a direct threat to security and stability within the EU and at its external borders. The geographic proximity of Ukraine to the EU is of course also relevant. Within a week after the invasion, almost a million displaced persons fled to countries as Poland, Slovakia, Hungary and Romania. This number rapidly increased in the period that followed. About eight million people have now left Ukraine. Around 4,8 million of them are registered for temporary protection or similar schemes within the EU.<sup>12</sup>

Moreover, it is relatively easy for Ukrainians to enter the EU legally. They can travel visa-free in the Schengen area with a biometric passport for a maximum period of 90 days (within a period of 180 days). This is in stark contrast to displaced persons from countries such as Iraq and Syria who have hardly any legal means of reaching the EU. Humanitarian visas are often refused, so the only option left is to leave for the EU with the help of dubious travel agents and in rickety boats, only to be subjected to pushback practices. Moreover, in the case of displaced persons from Ukraine, there is no third country that acts as a buffer state and prevents the arrival of displaced persons. We all remember the EU-Turkey deal of March 2016 which was intended to stop arrivals of Syrian refugees to the EU. In particular, Turkey agreed to take back persons who had ‘irregularly’ travelled to Greece in exchange for 6 billion euros.

Finally, skin colour and religion may also play a role. The impression is that because Ukrainian citizens, unlike Libyans, Iraqis and Syrians from earlier crises, are mostly white Christians, this may have influenced the decision to activate the directive. Obviously, this distinction is both legally and morally unjustified.

#### 4. ADDED VALUE OF THE DIRECTIVE

I would like to conclude this chapter with some closing remarks as to what can be seen as the added value of the directive. I think there are pros and cons on both sides.

Clear advantages for the asylum seeker are: the broad personal scope of the directive; no lengthy asylum procedure, but a uniform status with a relatively high level of rights (such as access to the labour market, health care and a (conditional) right to family reunification and the possibility offered by the directive to combine the regime of temporary protection (by way of a humanitarian measure) with an evacuation mechanism with corresponding visa facilitation. Another advantage is that at the moment temporary protection comes to an end, there is still the possibility to ask for asylum. In the case of the current application of the directive to displaced persons from Ukraine it is also worth mentioning that the displaced person can choose the Member State where the application for temporary protection is submitted. In addition, in line with the Council Implementing Decision of 4 March 2022, Article 11 of the directive restricting the movement to other EU Member States has not been applied, which enables free movement in the EU. Besides facilitated

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<sup>12</sup> UNHCR, 6 December 2022.

intra-EU movement, temporary protection beneficiaries are also able to pay short-term visits to Ukraine.

A clear benefit for Member States is that the 'regular' asylum system will be relieved through 'group recognition' of temporarily protected persons, which saves time, money and manpower. This will also create space for processing asylum applications from individuals from other countries of origin. Moreover, due to the uniform status, it is expected that fewer secondary movements will occur.

However, in addition to these advantages, there are also a number of disadvantages. I will first mention the way in which Member States, such as the Netherlands, have transposed the directive, namely in the form of a long-term decision and departure moratorium. As a result, the temporarily protected person only has the 'procedural' status of an asylum seeker and therefore only has the facilities that belong to this status (with the exception of rights in the field of work and family reunification). This means amongst other things that he only receives an identity document (instead of a residence permit). This lack of a residence permit may have severe legal and practical consequences.<sup>13</sup> In terms of legal certainty, the situation of a temporarily protected person is even worse than the one of a 'regular' asylum seeker. Suppose that temporary protection is established for the maximum duration of three years and during that time the individual processing of the asylum application is suspended. This leaves the temporarily protected person in uncertainty about his future for a long time. Can he focus on a new life in the host Member State or should he consider returning? Moreover, when processing the asylum application is resumed after three years, it is extremely difficult for the Member State to obtain all the information necessary for a careful assessment. Another disadvantage for Member States that receive many displaced persons on their territory is that the solidarity mechanism in the directive is almost entirely voluntary.

Nevertheless, when taking all the pros and cons into account, I think activation of the Temporary Protection Directive to respond to a mass influx of displaced persons from Ukraine was the right (political) decision. As the European Council on Refugees and Exiles (ECRE) accurately put it in a recent joint statement<sup>14</sup>:

*In an immensely challenging context, the use of the TPD has been a success, ensuring immediate access to legal status and associated rights, and allowing collective management of the situation under the EU's auspices, without the usual political conflicts and paralysis.*

Therefore, ECRE and several civil society organisations ask the European Commission and the Council of Ministers to extend the Temporary Protection Directive until March 2025 as a matter of urgency. As well as providing increased security for those displaced from Ukraine, an extension to the full three years allowed by the TPD will buy time for countries to put in place provisions for medium-term

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13 See Meijers Committee 'Commentaar op de gebrekkige uitvoering van de Tijdelijke beschermingsrichtlijn in Nederland', CM2204, juni 2022; Karina Franssen 'De Richtlijn tijdelijke bescherming: van theorie naar praktijk', JNVR 2022/13, oktober 2022, nr. 3, p. 7-12.

14 ECRE, *Joint Statement: Extend the Current Temporary Protection Regime for Displacement from Ukraine until 2025*, 19 May 2023.



support for those displaced by the war, be that voluntary return if circumstances allow or continued protection outside Ukraine if they do not.

# The Czech Republic: Current issues in the application of temporary protection

Veronika Víchová\*

## 1. INTRODUCTION

According to UNHCR statistics, as of 24 February 2022, approximately 8 million people<sup>1</sup> have fled Ukraine to seek protection in Europe. In addition, 7.1 million more people are internally displaced.<sup>2</sup> In response to the sudden large-scale displacement from Ukraine, and in an unprecedented move, the European Commission proposed the activation of the Temporary Protection Directive (TPD)<sup>3</sup>, which was unanimously adopted by the Council on 3 March 2022.<sup>4</sup> The activation of the TPD sends a clear message of a joint EU commitment to implement a coordinated response, avoiding ad hoc and unilateral Member State measures, easing pressures on national asylum systems, and ensuring a common level playing field of rights for potential beneficiaries fleeing the war.<sup>5</sup> EU Member States have shown exceptional support and solidarity towards those fleeing Ukraine. However, the current state of play and the human rights situation in Ukraine suggest that the armed conflict and its devastating effects will continue, leading to further displacement and the inability of many people to return to their homes.

There is a need to address the urgent issues related to the protection of all those fleeing Ukraine and their subsequent integration. Indeed, the activation and implementation of the TPD raise fundamental questions that require careful

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1 Data updated to 7 March 2023. More here: <https://data.unhcr.org/en/situations/ukraine>.

2 Data updated to 7 March 2023. More here: <https://ukraine.iom.int/data-and-resources>.

3 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. Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:32001L0055>.

4 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection. (Council Implementing Decision) Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_2022.071.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A071%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_2022.071.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A071%3ATOC).

5 Carrera, S. et al. (2022) *'The EU grants temporary protection for people fleeing war in Ukraine. Time to rethink unequal solidarity in EU asylum policy'* [online]. CEPS Policy Insights. March 2022. [accessed 19 July 2022], page 1. Available from: <https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/>.

consideration and reflection. In this context, this contribution highlights some problematic aspects of applying the TPD in the Czech context. First, I will examine the main issues affecting those fleeing Ukraine, focusing on the possibility of changing the country of protection, judicial review, and some legal issues concerning the TPD application. Then in more detail, I will focus on practical issues.

## 2. THE LEGAL REGULATION OF TEMPORARY PROTECTION

By the end of January, the Czech Republic had issued 480,000 permits in the form of temporary protection. This makes the Czech Republic the country which has granted the highest number of temporary protection per capita since the war began. However, we are still determining how many people have returned to Ukraine or found protection in another country. We know from research that 43 % of holders of temporary protection are women, 35 % are children, 20 % are adult men, and 4 % are elderly. Women with children continue to be the most frequent arrivals, but their numbers have decreased compared to June 2022.<sup>6</sup> The household structure has also changed; in June 2022, the most common household was a single adult with a child, while in December 2022, it was a single individual.

For comparison, it is useful to consider the number of arrivals from the war in Yugoslavia. TPD was initially designed in response to the forced displacement following the 1998-99 Yugoslavia War. Migration within the territory of the former Yugoslavia was mainly forced and associated with war and mass human rights violations. People affected by the conflict sought international protection in various European countries. They got temporary protection from many countries, such as Germany, Austria, Sweden, and even the Eastern Bloc countries of Czechoslovakia, Poland, and Hungary. The Czech Republic took in 5,000 citizens from Bosnia and Herzegovina over several years, 1,000 of whom returned home after the war, and 1,000 of whom moved to another country.<sup>7</sup>

The different figures are one of the reasons for the creation of new legislation in the Czech Republic. In 2003, the Czech Republic transposed the TPD into the Act on the Temporary Protection of Foreigners.<sup>8</sup> It regulates, in particular, the procedural rules of the application procedure for temporary protection, the grounds for denial of temporary protection, the withdrawal and termination of temporary protection, the legal status of the applicants, the beneficiary of temporary protection, and family reunification. The Act was applied during the outbreak of the war in Ukraine. However, for the arrival of such a large number of persons, the Act on the Temporary Protection of Foreigners in its existing form needs to be supplemented. Otherwise, the whole procedure would be very lengthy and practically unfeasible for such a large

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6 For example, the research of the Ministry of Interior and the Ministry of Labor and Social Affairs. Available (in Czech) at:

[https://www.mpsv.cz/documents/20142/2786931/Analiza\\_situace\\_uprchliku\\_CENSUS\\_14072022.pdf/1650e3f6-8c1f-a2af-5f3a-b1acdb0bd0ee](https://www.mpsv.cz/documents/20142/2786931/Analiza_situace_uprchliku_CENSUS_14072022.pdf/1650e3f6-8c1f-a2af-5f3a-b1acdb0bd0ee).

7 By comparison, Germany received 320,000 people, and only 22,000 stayed. Germany pursued an active policy of re-migrating. There can be no comparison with today's figures.

8 Act No. 221/2003 Sb., on the Temporary Protection of Foreigners.

number of people; the administrative authority could not grant temporary protection to several persons affected by the conflict in Ukraine simultaneously. For this reason, a new Lex Ukraine came into force.<sup>9</sup> This law simplifies the rules for granting temporary protection and, for this reason, has taken over some institutions from the Act on Residence of Foreigners<sup>10</sup> and some from the Act on Temporary Protection of Foreigners. Lex Ukraine came into force on 21 March 2022.

## **2.1. Personal scope of temporary protection**

Article 1 of the Council Implementing Decision applies to the following categories of persons displaced from Ukraine on or after 24 February 2022 as a result of the military invasion by Russian armed forces that began on that date:

- (a) Ukrainian nationals residing in Ukraine before 24 February 2022;
- (b) stateless persons and nationals of third countries other than Ukraine who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and,
- (c) family members of the persons referred to in points (a) and (b).

Family members are (a) the spouse, (b) minor unmarried children, (c) other close relatives who lived as a family and were wholly or mainly dependent on them, (d) a parent of a foreigner under the age of 18. Czech law does not allow partners to apply for temporary protection. However, they can prove they already had a durable relationship in Ukraine and lived together permanently. In that case, they can ask for temporary protection under the grounds of special consideration.<sup>11</sup>

According to Article 2(2) of the Council Implementing Decision, stateless persons and third-country nationals, who can prove that they were legally resident in Ukraine before 24 February 2022 based on a valid permanent residence permit and who cannot return to their country or region of origin in a safe and durable condition, can get temporary protection. According to this Article, Member States shall apply either this Decision or the equivalent protection under their national law<sup>12</sup>, at the discretion of each Member State. The Council has therefore left the Member States the choice of applying the Directive or offering them protection under their national law. The

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9 Act No 65/2022 Sb., on specific measures in connection with the armed conflict on the territory of Ukraine caused by the invasion of the troops of the Russian Federation.

10 Act No 326/1999 Sb., on the Residence of Foreigners on the Territory of the Czech Republic and Amendments to Certain Acts.

11 See article 52 of Lex Ukraine: "A close relative of a foreigner enjoying temporary protection who is not referred to in Section 51(2) may be granted a residence permit for temporary protection on the grounds of special consideration, provided that they were living together permanently at the time of the events leading to the mass influx of displaced persons into the territory." A close relative is a person who would reasonably perceive the harm suffered by the holder of temporary protection as his or her own. The condition is that he/she resided together with the holder in Ukraine on 24 February 2022.

12 Similarly, according to recital 12 of the Implementing Decision, this protection should consist either in applying this Decision to them or in other adequate protection under national law.

alternative is to give them immediate access to the asylum procedure and to prioritize their cases. It is also in the Member States' interest to grant temporary protection to these persons.

The Czech Republic has decided to follow the path of application of the Directive and to grant temporary protection to permanent residents of Ukraine by including them in the group of eligible persons. This is because, in the current situation, even permanent residents cannot return to Ukraine. These people need immediate protection in the same way as the Ukrainians who fled the country. The procedure would be more straightforward, and the risk of overburdening the asylum system would be further reduced.

In this context, Member States should consider whether the person concerned still has a meaningful link with his or her country of origin, for example, in terms of time spent in Ukraine or with family in the country of origin. Furthermore, for the return to be 'durable,' the person concerned should be able to enjoy in his/her country or region of active origin rights, enabling that person to have prospects for basic needs to be addressed in his/her country/region of origin, and the possibility to reintegrate into the society.<sup>13</sup> Member States should consider the general situation in the country or region of origin when assessing whether a return is 'under conditions of safety and sustainability'.

To complete the picture, I note that Article 3 of the Council Decision, following Article 7 of TPD, provides the possibility for a Member State to apply the Council Decision also to other persons, including stateless persons and nationals of third countries other than Ukraine, who have resided lawfully in Ukraine and who cannot return to their country or region of origin under conditions of safety and dignity. This includes people having worked or studied in Ukraine. Unfortunately, the Czech Republic has not used this possibility.

## **2.2. *Inadmissibility of applications***

Lex Ukraine considers inadmissible an application which (i) is not submitted in person (except for children under 15), (ii) is submitted by a foreigner who is not listed in Article 3 of Lex Ukraine (not covered by the Council decision), (iii) is submitted by a foreigner who has applied for temporary or international protection in another Member State of the European Union or (iv) is submitted by a foreigner who already got temporary or international protection in another Member State.

If the administrative authority believes that an application for temporary protection is inadmissible, then there is no procedure. In such a case, the administrative body returns the application to the applicant with a mark of inadmissibility. As a result, the applicant cannot appeal or bring an action before a

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13 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection (2022/C 126 1/01), p. 4. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0321\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0321(03)&from=EN).

court of law. Without the possibility of an effective remedy, the applicant is effectively excluded from temporary protection.

### **2.3. *The possibility of changing the country of protection***

Ukrainian citizens already had visa-free access to Schengen countries before the implementation decision.<sup>14</sup> Ukrainian nationals can choose the Member State where to exercise their rights as beneficiaries of temporary protection.

However, Ukrainian nationals often arrive in a country where they feel safe, which is their primary objective at that moment, and apply for temporary protection. They get clothed, toileted, housed and receive a humanitarian allowance. After a while, people start to think about employment opportunities or access to schools for their children. They may even find a better job in another Member State. The Czech Republic has thus de facto excluded them from applying simply because they have applied for temporary protection elsewhere. However, other Member States allow this change of country of temporary protection. I have information from Poland, Sweden, Germany, and Bulgaria.

Temporary protection is valid only in one EU country. However, this does not mean that EU rules prohibit beneficiaries of temporary protection from moving to other Member States to benefit from temporary protection there. The Member State where the person no longer resides should withdraw the residence permit, and the rights deriving from it will cease.

In order to prevent fraud, the Commission recommends<sup>15</sup> that a beneficiary wishing to move to another Member State should proactively inform the authorities of the Member State in which he/she resides in good time so that the Member State can withdraw the residence permit and the associated rights. A Member State should also do so if it discovers that a person previously registered by it has subsequently registered in another Member State without informing the Member State in which he or she was initially registered.

Neither the TPD nor the Council's Implementing Decision make it clear that a holder of temporary protection can, after being granted temporary protection in one

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14 Article 4 and Annex II of the Regulation of the European Parliament and of the Council (EU) 2018/1806 of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing external borders and those whose nationals are exempt from that requirement Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018R1806&from=cs>. See also, Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, p. 9. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022XC0321\(03\)&from=CS](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022XC0321(03)&from=CS).

15 Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection (2022/C 126 I/01), p. 4. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0321\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022XC0321(03)&from=EN).

country, obtain temporary protection in another state. The Directive was not originally intended to give temporary protection holders this possibility. However, its wording and the Council's Implementing Decision have changed this view. Citizens of Ukraine who meet the definition set out in the Council's implementing Decision can obtain temporary protection precisely because they meet specific requirements set out in that Decision. Article 11 is the only provision of the TPD that restricts secondary movements. This mechanism allows the transfer of the beneficiary of temporary protection to the Member State that granted it and is similar to the Dublin cooperation mechanism.<sup>16</sup> Member States agreed not to apply Article 11<sup>17</sup> of the Temporary Protection Directive to allow the free movement of persons within the EU.<sup>18</sup> Member States have therefore decided to renounce readmission throughout the EU, enshrined in recital 15 of the Council Implementing Decision. Ultimately, this means that newcomers can register in one Member State and then in another and have their temporary protection withdrawn by the original Member State.

The declared temporary protection status applies to all persons within the personal scope of the Council Implementing Decision, and there is no territorial limitation. Therefore, any attempt by a Member State to impose a territorial limitation through national law should be considered as an obstacle or condition to the temporary protection status, which is not provided for in the Council Implementing Decision.

Czech legislation does not provide for the possibility of applying for temporary protection if the applicant has already obtained it in another Member State. It also excludes judicial review in such cases. Consequently, all applications are declared inadmissible. Exclusion from temporary protection goes beyond the exhaustive grounds listed in Article 28 of the Temporary Protection Directive. The inadmissibility provisions in Lex Ukraine are, therefore, in my view, incompatible with EU law.

## 2.4. *Practical examples*

The Ombudsman's Office handled the case of a man who lived in Crimea and had a Ukrainian and a Russian passport. On 17 March 2014, the Crimean parliament

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16 See also, Morgese, G. (2019) 'Dublin System, "Scrooge-Like" Solidarity and the EU Law: Are There Viable Options to the Never-Ending Reform of the Dublin III Regulation?' [online] [accessed 28 February 2023]. Available

at: [https://www.academia.edu/40805457/Dublin\\_System\\_Scrooge\\_Like\\_Solidarity\\_and\\_the\\_EU\\_Law\\_Are\\_There\\_Viable\\_Options\\_to\\_the\\_Never\\_Ending\\_Reform\\_of\\_the\\_Dublin\\_III\\_Regulation](https://www.academia.edu/40805457/Dublin_System_Scrooge_Like_Solidarity_and_the_EU_Law_Are_There_Viable_Options_to_the_Never_Ending_Reform_of_the_Dublin_III_Regulation).

17 Proposal for a Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection – Statement of the Member States. Available at: <https://data.consilium.europa.eu/doc/document/ST-6826-2022-ADD-1/en/pdf>.

18 Carrera, S. et al. (2022) 'The EU grants temporary protection for people fleeing war in Ukraine. Time to rethink unequal solidarity in EU asylum policy'. CEPS Policy Insights [online]. March 2022 [accessed 19 February 2023], p. 16. Available at: <https://www.ceps.eu/ceps-publications/eu-grants-temporary-protection-for-people-fleeing-war-in-ukraine/>.

declared an independent sovereign state called the Republic of Crimea, which immediately applied to join the Russian Federation as a new entity, and Ukraine lost de facto control over this territory.<sup>19</sup> As part of its policy, Russia issued travel documents to citizens of Crimea. This man travelled from Crimea to Kazakhstan on a Russian passport. He then flew from Kazakhstan to Germany on a Ukrainian passport. Afterward, he crossed the borders into the Czech Republic and asked for temporary protection at the registration center. The administrative authority considered the temporary protection application inadmissible in line with the personal scope of protection as defined in Article 5 of Lex Ukraine. There was no evidence that the foreigner was a person who fell within the scope of the Council's Implementation Decision. They advised him to seek protection in Russia.

In this case, the administrative authority immediately excluded the applicant from protection. By refusing to grant protection to the person concerned without any assessment and advising him to seek protection from the aggressor, the Czech Republic legitimized the invasion of the territory of a foreign state. At this stage, it is likely that the applicant, upon his return to Russia, would have had to enlist and go to fight against Ukraine. In this context, one can assume that also other Ukrainian nationals, such as those from the so-called Donetsk or Luhansk Republic,<sup>20</sup> will also want to enter the EU.

The administrative authority should not consider the application inadmissible. Later, after the intervention of the Czech Ombudsman's Office, the complainant informed us that he got temporary protection.<sup>21</sup>

Another complaint that the Ombudsman's Office encountered was from a woman who had lived in Ukraine for 20 years. She got permanent residence there. She stated that she had previously applied for Ukrainian citizenship and was in the process of renouncing her Russian citizenship. Her children went to school and lived in Ukraine since birth. They have spent their entire lives in Ukraine.

She arrived in the Czech Republic with her daughters in March 2022. She then wished to apply for temporary protection. At the same time, the applicant had a sister and her daughter in the territory of the Czech Republic, with whom they had a close bond. However, the administrative authorities judged her application as inadmissible and advised her to seek protection in Russia without any assessment.

However, the Council's Implementing Decision and Lex Ukraine affect this category of persons. Therefore, the Czech Republic has included them as beneficiaries under the Lex Ukraine Act. In any case, the administrative authority must receive,

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19 Subsequently, UN General Assembly Resolution 68/262 reaffirming Ukraine's territorial integrity and underlining the nullity of the referendum on Crimean independence was adopted on 27 March 2014. The Czech Republic, among others, has confirmed this integrity.

20 On 30 September 2022, this territory became part of the Russian Federation (according to the Russian Federation), along with three other regions of Ukraine, following an annexation referendum similar to that of the Republic of Crimea in 2014.

21 In this context, it should be noted that the Council has decided not to accept Russian travel documents issued in Ukraine and Georgia. This is because Russian travel documents issued in the territories of Ukraine occupied by Russia or in the separatist territories of Georgia, or travel documents issued to persons residing there, are not considered valid travel documents to obtain visas or cross the borders of the Schengen area.



examine and assess the application for temporary protection in the context of a duly initiated procedure. The children's best interests had to be a primary consideration in assessing the case by the administrative authorities and the Court.<sup>22</sup>

## 2.5. *Judicial review*

Article 47 of the Charter of Fundamental Rights of the European Union (EU Charter) states that '[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'<sup>23</sup>

The Court of Justice of the European Union (CJEU) enshrined this right as a general principle of Union law.<sup>24</sup> In this respect, the scope of the Charter is defined in Article 51(1), according to which the provisions of the Charter are addressed to the Member States only when they apply Union law.<sup>25</sup> The EU Charter, therefore, applies where the situation in question falls within the scope of EU law<sup>26</sup> and the applicant must have a specific 'right or freedom' guaranteed by EU law, based on which the specific provision of Article 47(1) applies.<sup>27</sup> According to the CJEU, '[t]he fundamental rights guaranteed in the legal order of the Union apply in all situations governed by Union law, but not outside those situations.'<sup>28</sup> There is a right to a fair and lawful hearing of an application, and this right may form the basis for judicial review of a decision on an application.

When applying the TPD, the Czech Republic directly applies EU law and must therefore apply the EU Charter and its Article 47. The interpretation of the TPD must then respect the fundamental rights and principles recognized by the EU Charter. Essential rights include adequate access to dispute resolution, the right to a fair and timely resolution of disputes, the right to an adequate remedy, and the general application of the principles of efficiency and effectiveness in the administration of justice.

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22 The complainant brought an action before the Regional Court. The case is now before the Supreme Administrative Court of the Czech Republic.

23 Charter of Fundamental Rights of the European Union. Available at: [https://www.citizensinformation.ie/en/government\\_in\\_ireland/european\\_government/eu\\_law/charter\\_of\\_fundamental\\_rights.html](https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/charter_of_fundamental_rights.html).

24 Case C-222/86 *Unectef v Heylens*, ECLI:EU:C:1987:442.

25 In this respect, in particular, Case C-299/95 *Friedrich Kremzow v Austria*, ECLI:EU:C:1997:254, para 15; Case C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio*, ECLI:EU:C:1997:631, para 13; Case C-349/07 *Sopropé – Organizações de Calçado Lda v Fazenda Pública*, ECLI:EU:C:2008:746, para 34; Case C-256/11 *Murat Dereci and others v Bundesministerium für Inneres*, ECLI:EU:C:2011:734, para 72.

26 Case C-617/10 *Åklagaren v Hansi Åkerberg Fransson*, ECLI:EU:C:2013:105.

27 Opinion of the Advocate General Michal Bobek in case C-403/16 *Soufiane El Hassani v Minister Spraw Zagranicznych*, ECLI:EU:C:2017:659, para 74.

28 Case C-403/16, *Soufiane El Hassani v Minister Spraw Zagranicznych*, ECLI:EU:C:2017:960, para 33.

According to the settled case law<sup>29</sup> of the Czech administrative courts, if a provision of national law is contrary to EU law to the applicant's detriment, the Court must disregard and not apply that national provision of law. In its recent Judgment, the Regional Court stated that: '[w]here an administrative authority returns an applicant's application for temporary protection under the first sentence of Article 5(2) of Lex Ukraine with an indication of the grounds of inadmissibility, thereby effectively excluding him from the granting of temporary protection.'<sup>30</sup>

Exclusion of judicial review is contrary to EU law, and the second sentence of Article 5(2) of Lex Ukraine, which contains an exclusion of jurisdiction, cannot apply.<sup>31</sup> According to the Court, 'even the return of an application for temporary protection as inadmissible under the first sentence of Article 5(2) of Lex Ukraine is subject to judicial review in the light of Article 29 of Council Directive 2001/55/EC since that procedure excluded the applicant from the grant of temporary protection'.<sup>32</sup>

### **3. OBLIGATIONS OF THE MEMBER STATES TOWARDS PERSONS ENJOYING TEMPORARY PROTECTION**

The TPD aims to provide immediate protection to those in need and to avoid overburdening Member States' asylum systems. The objective of the TPD is 'to establish minimum standards for the provision of temporary protection in the event of a mass influx of displaced persons from third countries who cannot return to their country of origin and to contribute to a balance between the efforts made by Member States to receive such persons and the consequences of doing so'.<sup>33</sup>

The TPD similarly to other directives in the field of asylum and migration, lays down minimum standards thus allowing the Member States to adopt more generous rules<sup>34</sup> for certain entities. Restrictions must be compatible with other Community law, in particular with the Treaty'.<sup>35</sup> The TPD lays down minimum standards for the granting of temporary protection. Recital 12 and Article 3(5) allow Member States to 'introduce or maintain more favorable conditions for beneficiaries of temporary

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29 For example, the Judgment of the Supreme Administrative Court of the Czech Republic of 29 November 2017, case no. 6 Azs 320/2017-20, paras 68-72, available at: [www.nssoud.cz](http://www.nssoud.cz), collection of decisions 3683/2018. The Court refused to apply the provisions of the Asylum Act that do not allow judicial review of the detention of foreigners. Also, Judgment of 4 January 2018, case no. 6 Azs 253/2016-49, para 45, collection of decisions 3718/2018 in which the Court found that the exclusion of judicial review of decisions not to grant long-term visas is also incompatible with EU law.

30 Judgment of the Regional Court in Ústí nad Labem of 25. July 2022, case no. 59 A 45/2022-30, para 30. Available at: [www.nssoud.cz](http://www.nssoud.cz).

31 Judgment of the Regional Court in Ústí nad Labem of 25. July 2022, case no. 59 A 45/2022-30, para 29. Available at: [www.nssoud.cz](http://www.nssoud.cz).

32 Ibid, para 34.

33 Article 1 TPD.

34 For example, 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.

35 Prechal, S. (2005) *Directives in EC Law*. Oxford: Oxford University Press. Second edition, p. 44.

protection'. However, the measures taken may not go below those laid down in the Directive. In these situations, Czech national legislation inadmissibly limits the scope of the rights provided for in the Directive.

### 3.1. *Accommodation*

Article 13 of the TPD guarantees holders of temporary protection that the Member States will provide adequate accommodation once they receive temporary protection.

After the start of the war, there was a tremendous outpouring of solidarity, and people began to offer accommodation in their homes to new arrivals. Currently, around 35 % of people from Ukraine live in private accommodation. In addition, the state provides a solidarity allowance to owners of flats and houses.

Conversely, about 30 % of beneficiaries of temporary protection live in non-residential accommodation (hostels, hotels, guesthouses, student's accommodation, etc.), i.e., in forms of accommodation classified as emergency accommodation. People who end up in hostels often find it challenging to move to better accommodation – 75 % stayed in guesthouses, and only 17 % moved to independent accommodation.<sup>36</sup> Temporary protection beneficiaries who have been in the Czech Republic since March 2022 and are living in residential accommodation can speak Czech better than those living in the more marginalized environment of emergency accommodation.<sup>37</sup> Children of families provided with housing by Czechs are more likely to attend school, as the type of housing relates to the level of integration. Housing segregation leads to increased vulnerability.

Other research shows that the income poverty rate among Ukrainians in the Czech Republic is incomparably higher than among the Czech population. However, according to the analysis, humanitarian benefits and free housing protect most beneficiaries from poverty.<sup>38</sup>

Considering the above, the state should be proactive and try to find more affordable forms of accommodation for people to avoid segregated housing. The solution could be to support the housing supply for refugees and the vulnerable Czech population. For example, support for the reconstruction of municipal housing stock, the construction of affordable housing, a robust system of guaranteed rental housing (the municipality and the state guarantee the risks for landlords), or tax incentives, such as a tax rebate on rental income when housing refugees and other socially vulnerable people.<sup>39</sup>

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36 PAQ Research. Hlas Ukrajinců: Zkušenosti uprchlíků s bydlením v Česku a výhled do budoucna [online] [accessed 28 February 2023], p. 4. Available at : <https://www.paqresearch.cz/post/ubytovani-ukrajinsky-ch-uprchliku-v-cesku>

37 Ibid, p. 11.

38 PAQ Research. Voice of Ukrainians: Education, Housing, Employment, Poverty, Mental Health [online] [accessed 28 February 2023], p. 11. Available at: Voice of Ukrainians: Education, Housing, Employment, Poverty, Mental Health (paqresearch.cz)

39 PAQ Research. Hlas Ukrajinců: Zkušenosti uprchlíků s bydlením v Česku a výhled do budoucna [online] [accessed 28 February 2023], p. 4. Available at: <https://www.paqresearch.cz/post/ubytovani-ukrajinsky-ch-uprchliku-v-cesku>.

### **3.2.      *Employment***

Holders of temporary protection granted by the Czech Republic are considered permanent residents for employment purposes. This means they have free access to the labor market and can register as job seekers. Currently, more than 50 % of economically active beneficiaries work,<sup>40</sup> and their employment rate is gradually increasing. In addition, approximately 15 % work remotely in Ukraine, some of them combining this with work in the Czech Republic.<sup>41</sup>

However, since the start of the war, they have faced the problem that temporary protection holders work in low-skilled, menial jobs despite their high level of manual skills. As a result, their wages remain low. The main barriers to employment or upgrading qualifications are the Czech language, the recognition of qualifications, and the lack of kindergartens. In the Czech Republic, there are large differences in labour activity depending on whether holders of temporary protection speak Czech (70 % of them work), know at least some Czech (51 % work) or have no knowledge (38 % work). Temporary protection holders with knowledge of the Czech language work almost twice as much as refugees with no knowledge of the Czech language and use their qualifications more often and better.<sup>42</sup> There is a need to speed up the recognition of qualifications and to strengthen the incentives for temporary protection holders and employers to retrain. Currently, only the qualifications of workers in children's groups are recognized, and the practice of language therapists is simplified. In the long term, there is a decrease in the employment of temporary protection beneficiaries with preschool children, which is linked to the need for more kindergarten capacity.

When we talk about employment, we must also focus on labor exploitation. The Ombudsman's Office has not received any complaints related to exploitation. But we know from discussions with NGOs and on various platforms that it is happening. Foreign workers are more at risk. They often need more basic information about working hours, mandatory breaks, and entitlement to holidays or sick leave. They have limited access to legal aid and face language, cultural and information barriers. They may also receive false or misleading information about their employment rights or residence status. The problem is under the surface, and slowly but surely growing. Foreigners working in precarious conditions usually have no contacts and are generally not in a position to ask anyone for help. We need to give people an alternative if we want them to report their employers and fight labor exploitation.

The only measure the state took was to allow free access to the labour market and the possibility of registering with the employment office. The latter helps foreigners to find employment.

The state should strengthen labour market support to help Ukrainians find stable employment that matches their skills. This means targeting labour supply for the unemployed and temporary protection beneficiaries working in under-qualified and unstable jobs.

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40 PAQ Research. Hlas Ukrajinců: Práce, bydlení, chudoba a znalost češtiny [online] [accessed 2 February 2023], p. 5. Available at: <https://www.paqresearch.cz/post/ua-prace-bydleni-prijmy-jazyk>.

41 Ibid, p. 6.

42 Ibid, p. 29.

The state should also actively inform refugees about the possibilities of retraining courses and expand their offer. On the other hand, employers should also be targeted and encouraged to provide job placements for Ukrainian workers during working hours (or consider an obligation to release them during working hours).

### **3.3.      *Education***

Temporary protection beneficiaries have the same educational rights and obligations as Czech citizens. The child must start school by 90 days after getting temporary protection. After that, the pupil must apply for admission to education. If children do not attend classes, the school will expel them. Returning to Ukraine is a widespread reason for not attending school. The school cannot keep students' place. For children, there are special rules for admission to education. In the enrolment procedure, documents certifying that the conditions for enrolment are met may be replaced in whole or in part by an affidavit.

In 2022, around 50 % of Ukrainian pupils and students attended school. Many Ukrainians still attended remote lessons. By the beginning of 2023, attendance had increased significantly to 90 %.<sup>43</sup> It is also optimistic that a small proportion of children learn in classes with a large number of Ukrainian children. However, limited capacity, especially in kindergartens, low parental awareness, and inadequate Czech language continue to be a problem, resulting in little progress in attending schools.<sup>44</sup> It would be appropriate to increase support to families in school enrolment or to prepare information campaigns on when and how to enrol children. Another measure could be busing children from overcrowded areas to other nearby schools.

### **3.4.      *Health insurance***

On the day temporary protection is granted, the foreigner becomes a 'Czech' insured. That means he does not pay insurance premiums; the Czech state pays them for him. After 150 days, the state does not automatically pay insurance premiums for people aged 18 to 65, but the participation in the insurance continues. The holder of temporary protection must take out health insurance for himself/herself.

There may be a situation where the insured person will not have to pay the premium himself/herself. Instead, the employer pays the insurance premium based on the employment contract. State pays for jobseekers registered with the Laborur Office, persons caring for a child under the age of 7 or for two or more children under the age of 15, and secondary or higher education students (up to 26 years of age) and for people older than 65 years.

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43 PAQ Research. Hlas Ukrajinců: vzdělávání dětí [online] [accessed 2 February 2023], p. 6. Available at: <https://www.paqresearch.cz/post/vzdelavani-ukrajina-nova-vlna>.

44 Ibid.

#### **4. DURABLE STATUS**

We are still determining how the situation in Ukraine will develop. We do know that some people with temporary protection will want to stay in the Czech Republic. At the same time, many of them will want to return to Ukraine after a relatively long stay in the Czech Republic. At this point, the state should recognize that it would have to offer people a return to Ukraine or some form of residence when temporary protection ends. Transitioning to a long-term residence is currently not possible and is not planned. The only exception is for applications for family reunification after a six-month stay in the territory. Temporary protection holders can apply for an employment card and a residence permit for study purposes after three years of residence in the territory. As long as there is no certainty that they will be able to stay in the Czech Republic, it isn't easy to expect them to settle here and for Czech institutions to be more responsive to their needs.

Is it possible to draw inspiration from the situation after the Balkan wars? Most newcomers got permanent residence because they met the criteria - they had jobs, they spoke Czech, and their children were in school. Those who did not, and there were very few, got humanitarian status. From my point of view, the permanent residence would be ideal. However, the parameters of the future status must be carefully considered to protect Ukraine from depriving itself of the experts and human resources it needs for its reconstruction. The future status of temporary protection holders is a political question, not necessarily a legal one.

#### **5. CONCLUSIONS**

The immediate activation of the Temporary Protection Directive for people fleeing the war in Ukraine is a very positive step to ensure that people receive protection immediately. The current experience with Ukrainian beneficiaries of temporary protection suggests that the free choice of country of protection model provides a practical and flexible framework for dealing with emergencies, through which solidarity towards applicants for protection and solidarity between Member States can be implemented and balanced. The Czech Republic coped very well with the initial onslaught of arrivals from Ukraine. However, new problems and challenges are emerging and need to be addressed.



# The implementation of temporary protection for people fleeing the war in Ukraine in Germany

Wiebke Judith\*

One year after Russia started its war of aggression against Ukraine, over one million refugees from Ukraine were registered in Germany.<sup>1</sup> It should also not be neglected that 2022 saw a rise in asylum applications after a few rather low-level years in Germany, with 217.774 new applications.<sup>2</sup> As for Europe generally, this is thus the biggest refugee movement Germany has seen in many years. It compares to the record years of 2015 and 2016.

While the housing and registration of over one million refugees and asylum-seekers in 2022 and early 2023 has certainly not been without challenges, it still went rather smooth – largely because of the activation of temporary protection for people fleeing Ukraine. This is confirmed in the first representative study on the situation of Ukrainian refugees in Germany which found that the majority of them feel welcomed or very welcomed in Germany.<sup>3</sup> Nevertheless, the debate on the rising number of refugees and housing capacities is picking up in Germany in the first months of 2023 – the debate focuses on limiting the number of asylum seekers, often neglecting that many flee autocratic regimes with terrible human rights records like the Assad regime in Syria or the Taliban in Afghanistan.

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- 1 1.066.951 refugees from Ukraine were registered by the 23 February 2023 in the German registry for foreigners, according to Mediendienst Integration (2023), *Flüchtlinge aus der Ukraine* <https://bit.ly/3NiA7uO>.
- 2 BAMF (2023) *Schlüsselzahlen Asyl 2022*, <https://bit.ly/3Lz8Se0>.
- 3 Institut für Arbeitsmarkt- und Berufsforschung (IAB), Bundesinstitut für Bevölkerungsforschung (BiB), Bundesamt für Migration und Flüchtlinge (BAMF), Sozio-oekonomisches Panel (SOEP) (2022) *Geflüchtete aus der Ukraine in Deutschland. Flucht, Ankunft und Leben*, p 7, <https://bit.ly/40QGwqA>.



## 1. THE GERMAN IMPLEMENTATION OF TEMPORARY PROTECTION

The possibility of temporary protection is foreseen in § 24 German Residence Act (Aufenthaltsgesetz), which refers to the EU Temporary Protection Directive. Due to lack of activation at the European level it had never been used before.

There was thus no further national decision necessary to start implementing temporary protection after the Council decision was taken on 4 March 2023.<sup>4</sup> To lay out how exactly Germany would implement the Council decision and to ensure uniform application, the Federal Ministry of Interior sent a circular on 14 March 2022 to all federal states, as it would be their local foreigner offices that would grant temporary protection. A second circular was sent on 14 April 2022 giving additional details, especially on the question of third country nationals who lived in Ukraine.<sup>5</sup>

On 7 March 2022, one and a half weeks after the beginning of the war, a new decree was published: the Ukraine Residence Transitional Regulation (Ukraine-Aufenthaltsübergangsverordnung).<sup>6</sup> The decree stipulated that everyone fleeing Ukraine could enter Germany legally and stay in Germany without a visa or residence permit. This was crucial to ensure that no biometric passport was necessary to enjoy visa free travel for Ukrainians and that also non-Ukrainians could enter Germany without having to worry about the possibility to be prosecuted for illegal entry. In this first week of flight PRO ASYL was for example contacted by people wanting to help African students fleeing from Ukraine to Germany asking if it would be illegal to drive them across the border – which technically was the case at that time. Such problems were solved by the decree.

## 2. WHO CAN GET TEMPORARY PROTECTION IN GERMANY?

Germany fully follows the Commission's suggestions with regard to the persons who can receive temporary protection in Germany. According to the circulars by the Ministry of Interior, the following persons should receive temporary protection:

- a) **Ukrainians who have been forced to flee to Germany since 24 February 2022 of course fall under temporary protection.** Ukrainians who entered the country before 24 February, provided they fled Ukraine “not long” before the war started or were in the EU “shortly before that date” can also receive temporary protection. The period “not long before 24 February 2022” is to be assumed to be no longer than 90 days. This means, for example, that people who were already visiting Germany or another EU state before the start of the war are also covered by temporary protection. Ukrainian nationals with a residence permit in the federal territory can also apply for a residence permit according to

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4 See Federal Ministry of the Interior (2022) Circular on the implementation of the council decision on temporary protection, 14 March 2022, <https://bit.ly/446fAiK>.

5 See Federal Ministry of the Interior (2022) Circular No. 2 on the implementation of the council decision on temporary protection, 14 April 2022, <https://bit.ly/41GFR5N>.

6 Federal Ministry of the Interior (2022) Verordnung zur vorübergehenden Befreiung vom Erfordernis eines Aufenthaltstitels von anlässlich des Krieges in der Ukraine eingereisten Personen (Ukraine-Aufenthalts-Übergangsverordnung – UkraineAufenthÜV), <https://bit.ly/3oOTFg4>.

§ 24 German Residence Act if the extension of the existing residence permit is not possible.

- b) Non-Ukrainian third-country nationals or stateless persons who had international protection or a comparable national protection status in Ukraine before 24 February 2022.
- c) **Family members of Ukrainians and beneficiaries of international protection** in Ukraine also receive a residence permit for temporary protection if the family already existed in Ukraine and regardless of whether the family members could return to their home countries. The nationality of the family members does not matter for temporary protection.
- d) Third-country nationals who have stayed in Ukraine with a **valid unlimited residence permit** are to be assumed to be unable to return safely and permanently to their country of origin because they have closer ties to Ukraine than to their country of origin.
- e) For people with a **temporary Ukrainian residence title**, the important question arises whether they can safely and permanently return to the country of origin. If that is not the case, they should receive temporary protection.

## **2.1. Broad definition of family**

Firstly, family members in the sense of the regulation are spouses and underage children. The children must have been minors on the day the war began. However, it is not a problem if they have already reached the age of majority at the time of application for temporary protection. Non-Ukrainian parents of Ukrainian minors who have custody and a permanent Ukrainian residence permit are also granted temporary protection if the other Ukrainian parent cannot leave Ukraine, for example. In their case, it should be assumed that this parent cannot safely and permanently return to the country of origin.

In addition, unmarried couples, including same-sex couples, in long-term relationships, as well as other relatives living in the same household who lived in a family bond with the main person before the outbreak of war and who are fully or mostly dependent on the main person, are also considered family members for the purposes of the regulation. Thus, one does not necessarily have to be married to receive temporary protection and a residence permit under § 24 German Residence Act. This is a much broader understanding of family than is usual in German asylum and residence law. However, the question of the respective individual proof arises since a mere household or economic community is not supposed to be sufficient to be considered a family member in the sense of temporary protection. In the case of non-married partners or other relatives living in the household, it should be a long-term community that does not allow for any other cohabitation of the same kind. The relationship must be characterized by inner ties that justify a mutual commitment of the persons in case of need. Thus, if necessary, very close ties to each other must be demonstrated, which go beyond a common residential address. On the other hand, as the circular letters explain, evidence gaps caused by the war should be taken into account in a conclusive factual presentation in favour of the persons concerned.

## 2.2. *Third country nationals with a temporary Ukrainian residence title*

Not all people fleeing the Russian bombs in Ukraine receive temporary protection easily. While Germany is more open than many other Member States, the legal situation of many so-called third-country nationals who fled Ukraine is still uncertain one year after the beginning of the war. The group makes up less than 4% of people who fled from Ukraine to Germany.<sup>7</sup> Ukraine hosted many students and workers from other countries; many lived there for several years, made it their home and also invested money to use opportunities for studying. Even if Ukraine is not their country of nationality, having to flee the country was often also traumatic and much hope and perspective was lost.

Due to the decree that allows legal entry and stay in Germany, many non-Ukrainians fleeing the war were able to come to Germany and stay with friends, relatives and supporters. If they did not clearly fall under the scope of temporary protection, they were not pressed to immediately decide what their next step would be (returning home, applying for temporary protection or a different residence permit or applying for asylum). This changed however when the decree was renewed for the second time, as a new limit was introduced by September 2022: since then, the legal stay without a residence permit is only possible for 90 days after entering Germany.<sup>8</sup>

The question if temporary protection applies has thus become much more important since September 2022. If the person only had a limited stay in Ukraine, then he or she has to show that a safe and durable return to the home country is not possible (stays of less than 90 days in Ukraine are generally excluded). The EU Commission's communication of 21 March 2022 and the second circular of the German Federal Ministry of the Interior of 14 April 2022 provide additional information on when this would be the case.

A safe return to the country of origin would be impossible, for example, if armed conflicts or ongoing violence pose an obvious risk to the safety of the person concerned. Other risks of persecution or inhuman or degrading treatment must also be examined. For the countries of origin Eritrea, Syria and Afghanistan, it is generally assumed in Germany that safe return is not possible, and the persons concerned should be granted residence permits for temporary protection by the foreigners authorities.

However, people from other countries of origin may also be granted temporary protection under certain circumstances. In assessing whether a 'safe and durable' return is possible, the authorities should consider and examine the individual circumstances of the people concerned, in addition to the general situation in their country of origin.<sup>9</sup> This means that in the procedure, people must have the opportunity to individually justify why they cannot return to their country of origin under safe and durable conditions.

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7 See Mediendienst Integration (2023) *Flüchtlinge aus der Ukraine*, <https://bit.ly/3NiA7uO>.

8 PRO ASYL (2022) *Drittstaatsangehörige aus der Ukraine: Was ändert sich nach dem 31.08.2022?*, <https://bit.ly/41J3ivk>.

9 High administrative court Mannheim decision from 26.10.2022, case number 11 S 1467/22, <https://openjur.de/u/2456837.html>.

Since the beginning of the war, there were strong support circles also for third-country nationals in Germany, the public debate often focused on university students from African countries. There was also a strong push for political solutions for third-country nationals to either be included in temporary protection without any exclusion or that the German government should offer a different residence option.<sup>10</sup> As such political decision was not taken on the national level, some federal states (Bundesländer) came up with interim solutions for third-country nationals to avoid them having to leave the country. They offered the possibility to prolong the fictional certificate one receives after making an application for a residence permit for six months or even prolonged it to up to 12 months. While this continues the limbo situation many third-country nationals find themselves in, it nevertheless allows them to seek options to work or to study in Germany. Most of the federal states did however not follow this path. If a residence permit for temporary protection was refused in those states and other options to stay in Germany were not given, third-country nationals that fled Ukraine can be obliged to leave the country, be taken into deportation detention and be forcibly removed to their home country.

### **3. THE ISSUING OF TEMPORARY PROTECTION**

One of the major benefits of temporary protection is of course, that there does not need to be an individual assessment (at least not in most of the cases) whether the person deserves the protection. As long as they fall under the scope of the council decision, people fleeing the war in Ukraine can simply apply for a residence permit according to § 24 German Residence Act for temporary protection at the foreigners authority. This is a big difference with regard to asylum applications which are handled centralised by the German Department for Migration and Refugees. Issuing residence permits is part of the tasks of the over 500 local foreigners offices in Germany who are thus also in charge of Ukrainian refugees.

If someone who fled the war in Ukraine already has a place of residence, they have to go to that local foreigners' office. Persons who lack a place of residence can apply at any foreigners' office in Germany. If persons from Ukraine are claiming social benefits and do not have private and permanent housing, they will be distributed to a specific location in Germany. Only at this place they can apply for a residence title, the authorities responsible for this place are then also responsible for social benefits and for their residence title.

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10 See e.g. the press release by more than 50 organisations (2023) Ein Jahr nach Kriegsbeginn in der Ukraine: Zivilgesellschaftliches Bündnis fordert gleiches Recht für alle Geflüchteten, <https://bit.ly/3AyQcoh>; also Amnesty International, Brot für die Welt, PRO ASYL and others (2022) Solidarität jetzt – Internationale Studierende aus der Ukraine brauchen Perspektive auf Fortsetzung ihres Studiums in Deutschland, <https://bit.ly/445yh6h>; PRO ASYL, Refugee Councils (2022) PRO ASYL und Flüchtlingsräte warnen: Einige Kriegsflüchtlinge aus der Ukraine werden ab September ausreisepflichtig!, <https://bit.ly/3oEE96a>.

Until the residence permit is issued, the people temporarily receive a so-called fictitious certificate. The residence permit itself is to be issued in Germany for two years, according to the circular of the Ministry of Interior.

One year after the beginning of the war, 771.691 people have received temporary protection in Germany. 125.806 people only had the fictitious certificate, meaning they made the application but no decision has been taken yet. Another 127.534 people are registered as having made the request for temporary protection.<sup>11</sup>

The gap between people having asked for temporary protection and those who already received it may partially be explained by the generally overburdened local foreigners' offices. Since the Corona pandemic in many of the over 500 local foreigners' offices in Germany files started to pile up. This situation deteriorated in 2022 as the offices now had to also process the applications for temporary protection. While the national asylum authority was thus not as overburdened as in 2015/2016, this time the work fell on the local foreigners' offices resulting in often several months of waiting time for anyone needing an appointment to renew their residence title, work permit or tolerated stay.<sup>12</sup>

#### 4. LIVING IN GERMANY WITH TEMPORARY PROTECTION

The living circumstances for beneficiaries of temporary protection and even applicants of temporary protection stand in stark contrast to the living reality of asylum-seekers in Germany. People fleeing the war in Ukraine basically have immediately the same rights as recognized refugees would have. This also impacts how quickly people can integrate in Germany.

##### 4.1. *Work, language classes and education*

Importantly, the status of temporary protection always allows the person to work: for Ukrainians there will already be a statement on the fictitious certificate that they have the right to work. According to the German Employment Agency, 164.000 Ukrainians were employed in Germany by February 2023.<sup>13</sup> A big challenge to enter the job market is the German language.

According to the study on Ukrainians in Germany, only 4% of Ukrainians had good or very good German skills at the time of the survey. Eight out of ten Ukrainians said that they had no or only little German knowledge. But 51% of the interviewed people were currently visiting a German class or already finished it.<sup>14</sup> People from

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11 See Mediendienst Integration (2023) Flüchtlinge aus der Ukraine, <https://bit.ly/3NiA7uO>.

12 Brosel, Judith, Beres, Eric & Janssen, Fabian (2022) *Ausländerbehörden in BW: SWR-Umfrage zeigt dramatische Lage bei Personal und Fallbearbeitung*, <https://bit.ly/40Rh5P4>; PRO ASYL (2023) *Entlastung der Ausländerbehörden: Mehr Personal, Mentalitätswechsel und schnelle Maßnahmen*, <https://bit.ly/3oWhxhy>.

13 These figures can be downloaded in an excel sheet at Federal Employment Agency's statistics and labour market reporting (March 2023) *Beschäftigte aus der Ukraine - Deutschland, Bundesländer und Regionaldirektionen*, <https://bit.ly/44eITQv>.

14 IAB, BiB, BAMF, SOEP (2022) *Geflüchtete aus der Ukraine in Deutschland. Flucht, Ankunft und Leben*, p 7, <https://bit.ly/40QGWqA>, p 8f.

Ukraine can attend an integration course that is financed by the state. For people who can already speak German upon arrival, free professional language courses are offered.<sup>15</sup>

The study also showed that especially high-skilled Ukrainians came to Germany: 72% of the Ukrainian refugees in Germany have an academic education, in comparison to 50% of the general population in Ukraine.<sup>16</sup> The study showed that high qualifications make it easier to find a job in Germany. Another determining factor for the chances of employment is that of child care.<sup>17</sup>

According to the study, 22% of the Ukrainian children under the age of three years and 59% of children of three years and older (till school age) are in day care facilities.<sup>18</sup> 204.000 Ukrainian children go to school in Germany.<sup>19</sup> A third of these children goes to special classes for refugees and is not integrated in the normal school classes. In 23% of Ukrainian families at least one child also follows Ukrainian online classes, but only in 3% of the cases exclusively.<sup>20</sup>

#### 4.2. *Social benefits, housing and distribution in Germany*

One big advantage for Ukrainian refugees has been that they were able to look for private housing from the start or stay with families, friends or supporters. At the time of the cited study, 74% of Ukrainian refugees were living in private housing, 17% in hotels and only 9% in shelters. In contrast, asylum-seekers are legally obliged to live in shelters for the entirety of their asylum procedures in Germany, for up to 18 or in some cases even 24 months.<sup>21</sup> As these centres of first reception are often large and remotely located, the inhabitants are quite isolated from the rest of the population. Due to lack of privacy and agency, this type of shelter can be very tough on the people concerned.<sup>22</sup>

One aspect to consider is however, that refugees from Ukraine who need to be accommodated by the state are distributed among the individual German states. As is the case with asylum seekers, the distribution is carried out according to the so-called “Königstein Key”, and the Federal Office for Migration and Refugees (BAMF) is responsible for carrying out the distribution.<sup>23</sup> As soon as the BAMF has

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15 BAMF (2022) *Willkommensangebote und Sprachförderung für Geflüchtete aus der Ukraine*, <https://bit.ly/41DH7qh>.

16 IAB, BiB, BAMF, SOEP (2022) *Geflüchtete aus der Ukraine in Deutschland. Flucht, Ankunft und Leben*, p 7, <https://bit.ly/40QGwqA>, p 6.

17 Ibid, p 11.

18 Ibid, p 9.

19 See Mediendienst Integration (2023) *Flüchtlinge aus der Ukraine*, <https://bit.ly/3NiA7uO>.

20 IAB, BiB, BAMF, SOEP (2022) *Geflüchtete aus der Ukraine in Deutschland. Flucht, Ankunft und Leben*, p 7, <https://bit.ly/40QGwqA>, p 9f.

21 § 47 section 1 Asylum law.

22 Huke, Nikolai (2021) *Bedeutet unser Leben nichts? Erfahrungen von Asylsuchenden in Flüchtlingsunterkünften während der Corona-Pandemie*, publication by PRO ASYL, <https://bit.ly/3LNavoJ>.

23 The system is called FREE. BAMF (2022) *IT-Fachanwendung: "FREE" im Einsatz*, <https://bit.ly/424FP7n>.

determined a place of residence, this is referred to as allocation to a specific municipality or city.

People who are privately accommodated can be exempt from this. The internal distribution within the respective federal state also essentially follows the same rules as those for asylum seekers. What is important here is that the household community of family members is to be taken into account in the allocation. This means that the extended circle of family members compared to asylum seekers should not be separated by allocation and distribution. Thus, for example, unmarried couples should be distributed together.

Like recognised refugees and beneficiaries of subsidiary protection, people with temporary protection do not have the right to freely choose where they want to live in Germany. They have to take their residence and actual stay in an assigned place (according to § 12a German Residence Act). However, the residence requirement is not imposed or it is lifted – among other things – if a family member earns a certain income through employment subject to social security contributions or takes up vocational training or studies. The requirement is also lifted if an integration or vocational language course or a qualification or further training measure is available for a family member “in a timely manner”.

For an intended move, people must apply for the cancellation or change of the residence requirement at the foreigners authority responsible for them at the place of residence, and the foreigners authority at the place of move must agree. If the request is denied, reasons must be given. If the foreigners’ authority does not object within four weeks, consent is deemed to have been granted and the foreigners authority at the place of residence must change or delete the residence requirement.

## **5. REVOCATION OF TEMPORARY PROTECTION AND SECONDARY MOVEMENT WITHIN THE EU**

Another circular by the Ministry of Interior, dated 8 August 2022, explains under what conditions people who have already received temporary protection in an EU country can continue to migrate within the EU.<sup>24</sup> Due to the non-application of Article 11 of the Temporary Protection Directive, as agreed in Recital 15 of the EU Council Decision, beneficiaries of temporary protection enjoy extensive freedom of movement within Europe. Persons who have already received temporary protection in one EU country are therefore entitled to receive protection again in another EU country. The prerequisite for this is a renewed application to the competent foreigners’ authority. Through an automatic comparison of personal data on the European Registration Platform (Temporary Protection Directive Platform – TPD-Platform), the authorities can see whether protection has already been granted in another country. If this is the case, the relevant Member State will be informed. As soon as the person has been granted temporary protection in Germany, social welfare benefits in the other European country, for example, are discontinued. It can be assumed that temporary protection in the first country will also expire.

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<sup>24</sup> Federal Ministry of Interior (2022) Circular on the European registration platform for Ukraine, <https://bit.ly/3HkG5HD>.

If a person moves from Germany to another EU country and is granted temporary protection there again, this leads to the expiration of the residence permit in Germany according to § 24 German Residence Act. The reason for this is that the authorities assume a permanent departure (see § 51 para. 1 no. 6; 7).

It should also be noted that as a general rule, foreigners with a residence title in Germany cannot leave the country longer than six months without losing their residence title (§ 51 German Residence Act).

## 6. CONCLUSION AND OUTLOOK

One year after the start of the brutal Russian war against Ukraine, it is possible to conclude that the activation of temporary protection was the absolute correct decision to at least allow refugees to flee in relative safety to the EU and to find protection quickly. While hosting one million war refugees of course comes with challenges, it should also be noted that many of those just highlight existing structural problems in Germany – such as lack of social housing, a lack of teachers and few childcare options. It is also commendable that there still is a strong commitment from the German government in favour of protection for Ukrainian refugees. The Minister of Home Affairs Nancy Faeser said in April 2023 with reference to refugees from Ukraine that there is “no limit to humanity”.<sup>25</sup>

However, it is not without reason that there is a strong debate on Germany now having a “two class refugee system”. While it has always been the case to a certain extent that some refugee groups were treated more favourably than others, the contrast of the conditions Ukrainian refugees receive to the situation during the asylum procedure in Germany is very stark – not even to mention the terrible journeys other refugees have to take, including pushbacks and violence at Europe’s borders. The pressure from the municipalities, some of them being at their limit of capacities, is used against non-Ukrainian refugees to call for closing borders and increasing forced returns – thus making the differentiation between refugees even starker.<sup>26</sup>

The upcoming most relevant question for Ukrainian refugees in Germany will of course be what happens when temporary protection ends. So far, this question has not been loudly raised in the public. Germany does have a history of revoking the status of refugees too quickly and trying to send them back to their home country, e.g., after the American troops invaded Iraq and killed Saddam Hussein. Also after the end of the Yugoslav war, Germany quickly raised the pressure for people who had fled to Germany to return to the region.<sup>27</sup> It can be hoped however, that such

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25 Süddeutsche Zeitung (2023) “*Da kann es keine Höchstgrenzen für Menschlichkeit geben*”, <https://bit.ly/3Lj7QBH>.

26 PRO ASYL (2023) *Grenzen schließen und abschieben? Die Vorschläge von Friedrich Merz im PRO ASYL Faktencheck*, <https://bit.ly/3ACV7Vp>.

27 Also at that time there was the option of temporary protection for war refugees in the German residence law, which was however not activated. As most were rejected in the asylum procedure for not fulfilling the refugee definition, people from e.g. Bosnia only lived with a tolerated stay in Germany. See also Oltmer, Jochen (2023) “*Geduldet*” und “*rückgeführt*” Schutzsuchende aus den



mistakes would not be made with Ukrainians and that the strong political support for them will allow for better solutions. Also from a purely practical perspective, the German government should have no interest to either have thousands of Ukrainians applying for asylum or even all having to go to the local foreigners' offices to apply for a different residence title.

# The implementation of the temporary protection regime in Belgium

*Christine Flamand\**

## 1. INTRODUCTION

As all other Member States of the EU when Russia invaded Ukraine, Belgium activated a temporary protection regime for people fleeing Ukraine instantly after the EU decision of 4 March 2022.<sup>1</sup> The Belgian government made the decision the same day, enacting this law to be fully applied.<sup>2</sup> The Temporary Protection Directive<sup>3</sup> had been transposed in Belgian law since 2003.<sup>4</sup>

This contribution aims at examining the concrete implementation of the temporary protection in Belgium. The second section will describe the protection regime in Belgium, the different categories of beneficiaries and some difficulties in its implementation. The third section will address the housing of the beneficiaries and the fourth section the other social rights they may enjoy. The fifth section will explain the challenges in the short term and longer term.

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1 Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71, 4.3.2022, pp. 1–6.

2 Law of 15 December 1980 on entry, stay, settlement and removal of foreign nationals, MB, 30 December 1980, art. 57/29 to 57/36 (hereafter, Aliens Act).

3 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 L 212, 7.8.2001, pp. 12–23.

4 Law of 18 March 2003 modifying the Law of 15 December 1980 on entry, stay, settlement and removal of foreign nationals, MB, 11 April 2003.

## 2. DESCRIPTION OF THE PROTECTION REGIME IN BELGIUM

### 2.1. *Registration*

As in the other EU Member States, Ukrainians have been exempted from visa requirements to enter Belgium since September 2017.<sup>5</sup> As soon as they enter Belgium, they can apply for temporary protection without having to apply for international protection. If they do so, the examination of the asylum application is suspended until the end of the temporary protection.

The registration procedure has been quite simple. If the applicant falls into the category of protected person as described in the law (see next section), s/he should register as such. Registration takes place at one federal registration centre and requires documents proving nationality and status. Registrations began on 8 March 2022 and were centralized by the Aliens Office within a single registration centre for Belgium (Heyssel). Once registered, the applicant was issued a temporary protection certificate (Annex 15).<sup>6</sup> With this document, beneficiaries can go to the local administration of their place of residence in order to obtain a one-year residence card (the so-called A card).<sup>7</sup>

At the end of March 2023, 67,532 people were granted temporary protection in Belgium. The beneficiaries are mainly women, who represent 60% of all beneficiaries, and children, who account for nearly 33% of the total number. Some of these children are unaccompanied (1,182 unaccompanied children).<sup>8</sup>

### 2.2. *Beneficiaries of temporary protection*

The beneficiaries of temporary protection in Belgium are listed below.

#### 2.2.1. *Ukrainian nationals*

A first category of beneficiaries are Ukrainian nationals whose principal residence was in Ukraine before 24 February 2022.

#### 2.2.2. *Family members*

The second category involves the family members of Ukrainian nationals. In the first place, these family members are those belonging to the nuclear family:

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5 Consolidated text: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 077 23.3.2016, p. 1.

6 Circular of 1 March 2023 amending the circular of 1 March 2022 : L'inscription des bénéficiaires de protection temporaire au Registre national des personnes physiques. [https://www.ibz.rrn.fgov.be/fileadmin/user\\_upload/fr/pop/circulaires/Circulaire\\_01032023.pdf](https://www.ibz.rrn.fgov.be/fileadmin/user_upload/fr/pop/circulaires/Circulaire_01032023.pdf)

7 All useful information is available on the website of the Aliens Office <https://dofi.ibz.be/en/themes/ukraine>.

8 Available at StatBel: <https://statbel.fgov.be/fr/visuals/deplaces-ukrainsiens>.

- (a) the spouse or unmarried partner in a stable relationship in accordance with the Belgian legislation on foreigners.<sup>9</sup>
- (b) Unmarried minor children, including those of the spouse, whether legitimate, born out of wedlock or adopted.

This applies irrespective of the nationality of the spouse and/or children. If the family members are arriving at a later stage or were living in another country before arriving, they are entitled to family reunification. The family relationship may have been created after 24 February 2022. In addition, the Aliens office specifies that the family member did not have to reside in Ukraine at the time of the invasion, as long as they can prove a family link with the Ukrainian national.<sup>10</sup> Next, the case law clarifies that the Ukrainian national does not necessarily need to reside in Belgium when a family member is applying for temporary protection, as long as this person can demonstrate the existence of a family link with the Ukrainian national.<sup>11</sup> In other words, the status of family member is sufficient to reside in Belgium, regardless of whether the Ukrainian is effectively present physically in the country.

Finally, other close relatives who do not belong to the nuclear family but were living within the family unit at the time of the circumstances surrounding the mass influx are also entitled to temporary protection<sup>12</sup> provided that they were wholly or mainly dependent on the family for support. Examples of such persons are the partner (*de facto* or registered partnership), a parent of a child over 18, a child over 18, a brother or sister, a cousin, a nephew or niece, etc.

The inclusion of the latter represents a considerable expansion of the scope of the notion of family members in Belgian law. In this regard, the European Commission recommends that Member States use their margin of appreciation in the most “humanitarian” way possible.<sup>13</sup> This broad approach to family unity in the Temporary Protection Directive is probably explained by the fact that it predates the Family Reunification Directive<sup>14</sup> and is justified by the need to consider the specific circumstances of a mass influx.

Unlike other foreigners residing in Belgium whose family members would like to apply for family reunification, no material conditions are required.<sup>15</sup> Indeed, family members belonging to the nuclear family solely need to prove the existence of a family link. Flexibility is applied by the authorities in the assessment of the proof of these

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9 Aliens Act, art. 57/34(1)(1). The person with whom they are in a partnership considered equivalent to marriage in Belgium and includes partnerships concluded in Germany, Sweden, Denmark, Norway, Finland, Iceland and the UK. This limits the scope of the concept of partner.

10 <https://dofi.ibz.be/fr/themes/ukraine/regroupement-familial-avec-un-etranger-beneficiaire-dune-protection-temporaire>.

11 CALL, 24 January 2023, No. 283 740.

12 Aliens Act, art. 57/34(1)(2).

13 Communication from the commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, C/2022/1806, OJ C 1261/1, 21.3.2022.

14 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, pp. 12–18. Transposed in art. 10 and following of the Aliens Act.

15 Aliens Act, art. 57/34 §2.

family ties. In contrast, the other close relatives will need to demonstrate their dependency on the Ukrainian national living in Belgium. According to the case-law, this flexibility seems less applicable when it comes to prove dependency in order to secure protection. Indeed, in the case of a Ukrainian couple, parents of a Ukrainian woman and her family who were residing in Belgium on the basis of temporary protection, this relation of dependency was not found.<sup>16</sup>

Persons living abroad may introduce a visa request to the Belgian embassy in the country of residence (visa D of 90 days).

### 2.2.3. *Foreigners*

In addition to Ukrainian nationals and their family members, three other categories of foreigners who were residing in Ukraine as of 24 February 2022 are also eligible for temporary protection. The first category results from international law. These are foreigners recognized as refugees or beneficiaries of equivalent protection in Ukraine and stateless persons. Their status equates them with Ukrainians, as they cannot, by assumption, be returned to their country of origin.

The second category is foreigners who, as of 24 February 2022, were established in Ukraine, i.e. had a permanent residence permit. In practice, this should mean that they had been staying in Ukraine for more than five years. However, the Council Implementing decision of the EU<sup>17</sup> adds a condition. Only foreigners established in Ukraine “who are not able to return to their country or region of origin under safe and sustainable conditions” are concerned.

The third category refers to other foreigners who were residing in Ukraine on a temporary residence permit such as students or workers.<sup>18</sup> They also have to prove that they are unable to return to their country or region of origin under safe and sustainable conditions. The Council Implementing Decision leaves the choice to Member States to include them as beneficiaries of temporary protection. Belgium decided to exclude them (unlike in the Netherlands, for instance). As a consequence, they will not be eligible for temporary protection.<sup>19</sup>

As Belgium does not allow foreigners who resided on the basis of a limited stay in Ukraine to benefit from temporary protection, those persons have no other choice than to apply for international protection or to introduce a regularization request.<sup>20</sup> In practice, this concerns a lot of students who were staying in Ukraine during their studies, and other foreign workers residing on a non-permanent basis in Ukraine. For international protection requests submitted in Belgium, theoretically, the Dublin Regulation determining the Member State responsible for the examination of this

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16 In addition, they also had a legal stay in Czechia where they could return to. CALL, 27 September 2022, No. 278 015.

17 Council Implementing Decision (EU) 2022/382 of 4 March 2022, cited above, art. 2.2.

18 Ibidem, art. 2.3.

19 J.-Y. Carlier, C. Flamand, “La protection temporaire des personnes fuyant le conflit en Ukraine” in *La guerre en Ukraine sous l'angle du droit international JT*, 26 November 2022, No. 6918, p. 745-751.

20 Aliens Act, art. 9bis (see further).

application will apply.<sup>21</sup> The application will be processed just as all other applications for international protection but the applicants will have to demonstrate a fear of persecution against their country of origin and Ukraine. This means that the access to protection will depend on their individual claim and the evidence they are providing (see further, Section 4).

An additional difficulty is that Belgian authorities decided not to extend the temporary protection regime to Ukrainians already living in Belgium before the date of 24 February 2022 or to those who left Ukraine before 2022.<sup>22</sup> For them too, it is still possible to introduce an asylum request. However, the Ukrainian nationals will not receive a decision on their application for international protection in the short term.<sup>23</sup> As such, they are left with the status of an applicant for international protection, which grants less access to social rights than someone with temporary protection.

Finally, if a Ukrainian national already has a residence permit in another EU country (required to implement the EU decision before applying in Belgium),<sup>24</sup> temporary protection may sometimes be denied. Jurisprudence is not unitary in this regard.<sup>25</sup>

### **2.3. *Period of protection***

Temporary protection lasts for one year from the date of its implementation. In Belgium, the temporary protection regime has been automatically renewed for one year, until 4 March 2024. However, in order to renew their residence card (A card), all beneficiaries needed to apply for renewal to the local administration. Persons who received a temporary protection certificate after 4 January 2023 have received an A card which is valid until 4 March 2024.

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21 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 (recast), OJ L 180, 29.6.2013, p. 31–59.

22 CALL, 20 September 2022, No. 277 646. In this case, the Ukrainian national left Ukraine in October 2021 and stayed in Poland. This period of four months is considered too long to benefit from the Temporary Protection Directive, even with the interpretation given by the guidelines of the Commission.

23 The CGRS communicated on 17 March 2022, the suspension of the examination of asylum requests introduced by Ukrainians: [www.cgra.be/fr/actualite/situation-en-ukraine-le-point-sur-les-demandes-de-protection-en-belgique](http://www.cgra.be/fr/actualite/situation-en-ukraine-le-point-sur-les-demandes-de-protection-en-belgique).

24 Aliens Act, art. 57/30(2).

25 This is the case in the following decisions: CALL, 27 September 2022, No. 278 016 (the person already benefited from a legal stay in Poland until 2024); CALL, 27 September 2022, No. 278 015 (the person had a legal stay in Czechia until end of 2023). In contrast, CALL, 29 November 2022, No. 281 074 (the person had a short legal stay in Poland but did not apply for temporary protection there) and CALL, 27 September 2022, n°277 962 (the person had a short legal stay in Poland but did not apply for temporary protection there).

## 2.4. *The appeal procedure*

In case of refusal of temporary protection, notified by the Aliens Office, an appeal is open to the Aliens Law Litigation (CALL), the competent administrative jurisdiction. It concerns an appeal for annulment, which has no suspensive effect and must be lodged within 30 days of the notification of refusal. Given the fact that the CALL only has an annulment competence in this regard, it can only annul (and thus not reform) decisions taken by the Aliens Office. In case of annulment, the case is returned to the latter authority, which will need to make a new decision. The same annulment procedure applies to appeals against refusals to consider family reunification.

However, when it comes to appeals against asylum decisions taken by the Commissioner General for Refugees and Stateless Persons (CGRS), the CALL has a “full judicial review” competence. In this context—contrary to the annulment procedure where decisions can only be annulled—the CALL can also confirm or overturn the contested decision. In addition, this “full jurisdiction appeal” is suspensive, which means that applicants cannot forcibly be removed and they retain their right to reception.

## 3. **THE HOUSING OF BENEFICIARIES OF TEMPORARY PROTECTION**

After having discussed the categories of persons who are eligible for temporary protection, we will now focus on the benefits and rights granted to beneficiaries of this status.

When it comes to the reception of asylum seekers, Belgium already faced capacity issues even before the arrival of the Ukrainian refugees. In addition, Fedasil, the federal agency responsible for the reception of asylum seekers under the Reception Act, has no competence regarding the reception of persons granted temporary protection. Instead, this falls within the responsibility of the cities and regions (three regions in Belgium). Therefore, Fedasil initially only intervened on an *ad hoc* basis providing emergency accommodation for a few nights or directing beneficiaries towards accommodation offered by municipalities.

Approximately 60% of all beneficiaries of temporary protection are residing in Flanders, with another 20% in the Brussels Region, and 20% in the Walloon Region.

Luckily, most of the displaced Ukrainian were able to find housing on their own. As such, less than 30% of the displaced persons needed accommodation at first. This situation later evolved to 25%. The other 75% found housing by themselves, relying on the existing Ukrainian community or family.

Indeed, the municipalities and regions were able to rely on the generosity of the population and on spontaneous reception rather than on a structured network. Many municipalities put in place support mechanisms for hosts and reception arrangements for Ukrainians. However, the possibility of reception has faded away over time. Those who, in the first days of the mass arrival, spontaneously committed themselves to providing accommodation ran out of steam, mainly because of the lack of guidance. A more sustainable alternative seemed necessary in view of the prolonged conflict in Ukraine, which requires a long-term structural response. An overview of the reception

arrangements by region, combining private reception and the provision of infrastructure, is given below.

In the Brussels Region, a hospitality model was adopted in late March 2022. It was based on three pillars: the provision of temporary regional reception structures,<sup>26</sup> secure individual accommodation, and the traditional property market. This threefold solution enabled the Brussels Region to create 10,600 places by the end of October 2022. In order to encourage private accommodation, a digital platform was made available to prospective hosts where Brussels residents could submit their accommodation offers.<sup>27</sup> A model agreement was also made available to each host. Hosting is limited in time (free choice, but the Region proposes three months renewable). Finally, a hosting fee covering charges and a charter for hosts and lodgers to support living together in shared accommodation are also provided.

In the Walloon Region, a regional strategy for the reception of Ukrainian nationals was quickly put in place. This strategy is equally based on three pillars, focusing on: (i) private accommodation (also governed by a charter), (ii) the identification of public, associative and private collective accommodation likely to be mobilized,<sup>28</sup> and (iii) the provision of modular accommodation. The Region has made financial resources available that have been used to find appropriate or new solutions adapted to each local area. Finally, the strategy recalled the right of requisition of buildings by the municipalities in case of an emergency justified by the massive influx of Ukrainian nationals for whom the reception capacity could not be met.

In the Flemish Region, a project for the construction of “emergency villages” (*nooddorpen*) was quickly launched. These are collective dwellings (containers) comprising at least 200 housing units, with associated facilities. Two villages have been built, one in Mechelen and one in Antwerp, representing 1,730 living units in 2022. A third one is currently being built near Gent, comprising 200 living units (for approximately 600 people). Flanders also relies on existing infrastructure and buildings to be refurbished to organize this reception.<sup>29</sup> Finally, it is counting on the accommodation of private individuals, which it intends to manage.<sup>30</sup>

#### 4. OTHER SOCIAL RIGHTS

Next to housing, beneficiaries of temporary protection are entitled to a large range of other social rights, including financial assistance for beneficiaries who do not have sufficient resources and medical care. Employed or self-employed beneficiaries receive an amount of material help based on their ability to support themselves.

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26 A first specific reception center was opened in July 2022.

27 [www.helpukraine.brussels/en/hosting](http://www.helpukraine.brussels/en/hosting).

28 Plateforme solidarité Ukraine : [https://lampspw.wallonie.be/dgo4/site\\_logement/site/ukraine](https://lampspw.wallonie.be/dgo4/site_logement/site/ukraine).

29 Besluit Vlaamse Regering 8 april 2022 tot toekenning van een subsidie aan lokale besturen opvang Oekraïne, wijziging diverse besluiten en intrekking besluit Vlaamse Regering, 14 March 2022, B.S., 26 April 2022.

30 Vlaanderen helpt Oekraïne: huisvesting, [www.vlaanderen.be/vlaanderen-helpt-oekraïne/huisvesting](http://www.vlaanderen.be/vlaanderen-helpt-oekraïne/huisvesting).



#### **4.1.      *Entitlement to financial assistance***

The Public Centre for Social Welfare of the beneficiaries' municipality of usual residence provides financial assistance after an assessment of their available means. This financial assistance is an aid equivalent to the living wage. Its concrete amount depends on the composition of the household, the individual income and the income of the household members.

#### **4.2.      *The right to work***

Beneficiaries of temporary protection in possession of an A card have the right to work without a work permit. They can also develop self-employment activities without a professional card (which is normally required for third country nationals). Meanwhile, they have the opportunity to follow language courses and training in order to facilitate their employment. Most Ukrainian workers in Belgium found employment in hospitality, in the cleaning sector and in the temporary work industry. Most workers are women. If they work, the financial assistance will be adapted accordingly.

#### **4.3.      *The right to health insurance***

As soon as beneficiaries obtain their temporary protection certificate (Annex 15 or A card) they can register for health insurance in Belgium as resident holders.

#### **4.4.      *Entitlement to family allowances***

Beneficiaries of temporary protection who have dependent children can receive family allowances by applying for a family allowance fund.

#### **4.5.      *Access to health care***

A platform is dedicated to providing information on access to various health care services. In the Brussels Region, a specific centre has been set up: the Brussels Health Orientation Center (BHOC), which offers initial health and mental health care. In Flanders, accessible psychosocial support in their own language has been made available.<sup>31</sup> In the Walloon region, information related to access to care is made available via a specific platform.<sup>32</sup>

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31 Vlaanderen helpt Oekraïne, [www.vlaanderen.be/vlaanderen-helpt-oekraïne/nieuwsberichten/video-toegang-tot-laagdrempelige-psychosociale-hulpverlening-bij-solentra](http://www.vlaanderen.be/vlaanderen-helpt-oekraïne/nieuwsberichten/video-toegang-tot-laagdrempelige-psychosociale-hulpverlening-bij-solentra).

32 [www.aviq.be/fr/soins-de-sante](http://www.aviq.be/fr/soins-de-sante).

#### 4.6. *Specific reception of children*

The Temporary Protection Directive provides that Member States shall give access to their education system to persons under 18 years of age under the same conditions as for their own nationals and for European citizens.<sup>33</sup> In Belgium, children represent about 35% of the hosted population, i.e. nearly 18,000 people. Access to school has been guaranteed in all three regions.<sup>34</sup> Access to higher education has also been facilitated by universities.<sup>35</sup> For instance, in Flanders, 7,760 Ukrainian children were enrolled in education: 1,885 in pre-primary, 3,325 in primary and 2,556 in secondary school. Another 390 Ukrainian students were enrolled in higher education.<sup>36</sup>

Unaccompanied minors have the right to be assigned a guardian. However, even before the arrival of Ukrainian minors, those are more and more difficult to find.

#### 4.7. *Diploma equivalence*

An important aspect of integration is related to the recognition of diplomas. In Belgium, many job seekers do not have a recognized diploma which would give them access to the labour market. Each community has its own equivalence procedures (three different regions) and has developed its own ways to facilitate the recognition of diplomas for “refugees” including beneficiaries of temporary protection. Indeed, a specific difficulty faced by the latter group is the inability to contact the country’s authorities for authentication of diplomas and the lack of relevant documents.

In the French-speaking community the Equivalence Department for compulsory education (primary and secondary school) accepts incomplete files, such as a missing key document, in the case of refugees (or in the process of applying for asylum) and of beneficiaries of temporary protection provided that they present proof of their status. The administration also accepts simple copies instead of certified copies, diplomas without transcripts, transcripts without the diploma, or certificates of achievement. In principle, this service is not free of charge as the applicants are not exempted from paying procedural fees (which can reach up to €200).<sup>37</sup> However, the service is free of charge for minors who are newcomers, in order to facilitate their reintegration into the Belgian school system. The equivalence procedure for higher education diplomas is free of charge for recognized refugees, beneficiaries of subsidiary and temporary protection. However, in view of the requirement of certified copies and—in many cases—sworn translations, the procedure is *de facto* not completely free of charge.

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33 Council Directive 2001/55/EC of 20 July 2001, art. 14.

34 [www.enseignement.be/upload/circulaires/000000000003/FWB%20%20Circulaire%20850720\(8762\\_20220310\\_143750\).pdf](http://www.enseignement.be/upload/circulaires/000000000003/FWB%20%20Circulaire%20850720(8762_20220310_143750).pdf).

35 Example of the access program of the UCLouvain access2university:  
<https://uclouvain.be/fr/decouvrir/we-stand-with-ukraine.html>.

36 Office des étrangers, Accueil en Belgique des personnes en provenance d’Ukraine : bilan après un an de conflit, <https://dofi.ibz.be/fr/news/accueil-en-belgique-des-personnes-en-provenance-dukraïne-bilan-apres-un-de-conflit>.

37 CIRE, Les procédures d’équivalence de diplôme pour les réfugiées, 25 October 2022.

In the Flemish Community, the equivalence procedure, which is carried out by NARIC is free of charge for refugees, asylum seekers and beneficiaries of temporary protection. Nevertheless, there is still a need to provide a budget for sworn translations. In general, neither certified copies nor originals are required at NARIC, regardless of the status of the applicants. Simple copies are therefore sufficient in Flanders. In addition, various devices have been designed to enable the applicant to reconstruct the missing elements and to prove their academic background in other ways: specific questionnaires, interviews, immersion in universities or colleges.

Noteworthy in all regional systems is the collaboration between the equivalence services and the Belgian universities and colleges universities.

## 5. CHALLENGES

After one year of implementation of the temporary protection, we can affirm that the above-mentioned rights and benefits have been offered and applied to all beneficiaries and are still available to new applicants at the moment. In contrast to the disastrous situation of reception of other asylum seekers in Belgium, the implementation of the benefits for the Ukrainian beneficiaries and their family members are consolidated.

Still, in order to maintain those benefits, a few challenges can be identified. In the short term, from a social point of view, the housing system should be professionalized in a structural way, as the Ukrainian conflict may become a long-term conflict. From the point of view of residence, movement between the Member States, and even back and forth between Ukraine and the host country, should be clarified.

Clarification is also needed regarding the status of the foreigners who were residing in Ukraine on a non-permanent basis and who have fled Ukraine, Ukrainians having left Ukraine before February 2022, those having a pending claim at the CGRS and those who were illegally staying in Belgium. Although the latter obviously have the possibility to apply for international protection, their situation will remain unexamined for a few more months.

### 5.1. *Students or workers with limited residence permit in Ukraine*

As Belgium decided not to grant them temporary protection, foreigners who were residing on a temporary basis in Ukraine at the time of the Russian invasion only have the possibility of applying for international protection through an asylum procedure. As already mentioned, in order to meet the refugee criteria<sup>38</sup> they need to prove that they have a fear of persecution or face a real risk of a serious violation of human rights in their country of origin.

As illustrated by Belgian case law, this is not an easy task. For example, in a decision contested before the CALL, the CGRS refused to grant refugee status to a Congolese national (RDC) who left his country to study medicine in Ukraine in 2021 and who fled Ukraine in February 2022. The burden of proof was not lowered and the jurisdiction found that he did not show evidence of a fear of persecution in

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<sup>38</sup> Convention relating to the Status of Refugees Geneva convention, 28 July 1951.

RDC.<sup>39</sup> Of course, his intention while studying in Ukraine was to study medicine and not necessarily to flee his country of origin. However, he could not obviously stay in Ukraine either. In another ruling relating to an Angolan national who was working on a temporary basis in Ukraine before fleeing, the fear of persecution in Angola was not recognized either.<sup>40</sup> In one case observed, the CALL annulled the decision of the CGRS and sent it back for further instruction. This case was related to persecution on the basis of sexual orientation.<sup>41</sup>

These persons whose asylum request were rejected have no possibility to settle in Belgium. At the same time, they do not want to be sent back to their country of origin while still having a legal residence permit in Ukraine. As such, they are left in limbo.

## **5.2. *Ukrainians having left Ukraine before February 2022***

Ukrainians who left Ukraine before February 2022 face two concrete problems: the first one is related to the notion of having left Ukraine before February 2022 and the second concerns Ukrainians already living in Belgium at that time. In this regard, consideration 14 of decision 2022/382/EU (recommendation to the Member States “not to apply the date of 24/02/22 too strictly”) is interpreted by the CALL at its own discretion. In recent decisions of the jurisdiction, the fact that Ukrainians left to Poland in October 2021 was considered a “too long period” before February 2022.<sup>42</sup> In another case, the same reasoning was applied to someone who left Ukraine in November 2021.<sup>43</sup> Consequently, the jurisdiction confirmed the refusal of the temporary protection status for those Ukrainians.

## **5.3. *Ukrainians having an asylum case pending in Belgium***

The situation of Ukrainians with a pending asylum application who are left in limbo in Belgium is problematic. The same is true for Ukrainian nationals who were already living in Belgium before the date of the invasion. If an asylum request was pending at that time and a negative decision was taken, the CGRS cancelled the negative decision in view of the new objective situation in Ukraine. The examination of these requests is currently suspended. As discussed above, the administrative situation of asylum seekers is less favourable than the situation of those under temporary protection.

## **5.4. *Ukrainians without a legal stay in Belgium***

For those residing in Belgium without a legal stay, the only way forward is a regularization request on the ground of exceptional reasons.<sup>44</sup> This request for “humanitarian regularization”, which must be introduced at the Aliens Office, is aimed at asking for a legal stay based on the war situation in Ukraine and on a possible

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39 CALL, 26 January 2023, No. 283 924.

40 CALL, 9 December 2022, No. 281 618.

41 CALL, 14 March 2023, No. 286146.

42 CALL, 27 September 2022, No. 278 015.

43 CALL, 24 January 2023, No. 283 764.

44 Aliens Act, art. 9 bis.

violation of Article 3 of the European Convention on Human Rights.<sup>45</sup> In this regard, it must be noted that the applicants have no control over the course of the regularization procedure as there is no time limit for consideration of a decision. In addition, people have no rights during the procedure, except for urgent medical aid. The decision itself is entirely left at the full discretion of the Secretary of State or his delegate, the Aliens Office.

In the longer term, nobody can predict how long this war will last... If beneficiaries of temporary protection are safe in Belgium until March 2024 (and maybe 2025<sup>46</sup>), which perspectives do they have if the war is not yet over by then? Temporary protection is inherently a short-term perspective. As such, it limits integration while families are slowly adjusting to their new environment. The future is still very uncertain, making it difficult to make informed choices.

## 6. CONCLUSION

One year after the implementation of the Temporary Protection Directive, the main challenge is still to protect the people fleeing the war in Ukraine as much as possible. In Belgium, a lot of efforts have been deployed to that end. However, the fact that the authorities decided not to extend the protection to foreigners residing on a temporary base in Ukraine produces additional difficulties and, therefore, remains problematic. The limited case law dealing with applicants in this particular situation is not always coherent or unitary, not allowing to draw clear consequences.

The temporary nature of the protection is also a challenge. If temporary protection will be stopped at the European Union level, it is not clear which opportunities will be open for them. The persons could possibly follow procedures in order to continue to reside and work in Belgium, such as an application for a change of residence status, as a third country national worker. This would be asked through a regularisation request on exceptional grounds.<sup>47</sup> Or the person could introduce an asylum request, which could allow them to have a stable and qualitative protection during the asylum process. It is difficult to have prospects as we assume that the Commission of the EU could give some guidance to the Member States in order to have a coherent response to this end of protection. For the moment, the Commission decided to continue the temporary protection status until 2025 (if the war still goes on).

Another issue is the difference in treatment between Ukrainian and other refugees in Belgium, in the context of a deep reception crisis in Belgium. Whatever the reasons for the temporary protection of Ukrainians, other refugees cannot escape a sense of double standards.<sup>48</sup>

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45 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

46 Infographic, EU temporary protection for displaced persons, [www.consilium.europa.eu/fr/infographics/temporary-protection-displaced-persons/](http://www.consilium.europa.eu/fr/infographics/temporary-protection-displaced-persons/).

47 Aliens Act, art. 9bis.

48 J.-Y. Carlier, C. Flamand, "La protection temporaire des personnes fuyant le conflit en Ukraine", *op.cit.*, p. 751.

Looking ahead, there are two possible ways forward. In one, the decision to activate the temporary protection remains unique. It would then be refused for other major influxes linked to (sometimes more distant) conflicts, which exist today and will continue to exist in the future. European solidarity would then be closed in on itself. In this hypothesis, the values that Europe stands for would be used for internal use only. In a second hypothesis, this decision could be a step towards the deepening of solidarity systems between EU Member States applied to all refugees. In this case too, refugees would have a free choice of the country of asylum. As such, secondary movements of refugees and the cumbersome Dublin mechanism, sending the exile from one EU country to another, could be avoided.



# Implementation and Practice of the Temporary Protection Directive in the Netherlands

Karen Geertsema<sup>\*1</sup>

## 1. INTRODUCTION

As in other countries, the authorities and public in the Netherlands reacted in shock to the Russian invasion of Ukraine on 24 February 2022. At several levels, the Dutch authorities offered helpful responses by creating housing, education and access to the labour market for the displaced persons who fled Ukraine. By April 2023, just over 91,000 displaced people had been registered at a Dutch municipality.<sup>2</sup>

This rather smooth acceptance contrasts with a pre-existing crisis in the asylum procedure and the lack of housing for asylum seekers.<sup>3</sup> The Netherlands was, and still is, facing a serious shortage of about 800,000 houses that are needed for refugees, international students, migrant workers and national citizens. This shortage means that refugees who hold legal status may wait in reception centres for long periods, occupying beds meant for new arrivals. In the summer of 2022, asylum seekers had to sleep in the streets, prompting the Dutch Red Cross to intervene in its own country for the first time. This ‘reception crisis’ must be seen together with a crisis in the decision-making process that has arisen through a shortage of personnel at the immigration authorities, resulting in a vast backlog and exceedance of legal decision periods.

In addition, another crisis was raging within Dutch public services and the rule of law, following a scandal about childcare allowances being withdrawn from part of the population with a variety of ethnic backgrounds. The highest administrative court had long agreed on this practice of withdrawal of allowances and the obligation to refund the received allowances. However, the higher court changed its reasoning in October 2019.<sup>4</sup> The scandal resulted in the resignation of the state cabinet in January 2021, and all public services and courts embarked on the process of reflecting on their roles within the democratic state. Also the Venice Commission of the Council of Europe

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1 This contribution takes into account developments up to 1 June 2023.

2 <https://www.rijksoverheid.nl/onderwerpen/opvang-vluchtelingen-uit-oekraïne/cijfers-opvang-vluchtelingen-uit-oekraïne-in-nederland>, (last accessed 23 April 2023).

3 ECRE (2022) *Update Aida Country Report: Netherlands*, 14 April 2023, <https://ecre.org/2022-update-aida-country-report-netherlands/>.

4 Council of State 23 October 2019, ECLI:NL:RVS:2019:3535, ECLI:NL:RVS:2019:3536, ECLI:NL:RVS:2019:257.



recommended several reforms for the legislative, executive and judicial power in order to strengthen the democratic institutions and safeguards for the rule of law.<sup>5</sup> These reforms were ongoing in 2022.

Against this background of crises, the Netherlands prepared for the arrival of Ukrainian displaced people, and the context influenced the approach the authorities chose to follow in law and practice. In this chapter, I first outline the Dutch implementation and practice of the Council Directive 2001/55/EC in 2004 and of the EU decision after the Russian invasion in Ukraine activating the Temporary Protection Directive (TPD) in Section 2.6. The problematic issues in the Netherlands relate, firstly, to the status given to beneficiaries (Section 2.2.1); and secondly, to the scope of persons to whom the directive applies, especially the case of third-country nationals who hold temporary residence permits in Ukraine (Section 2.2.2). The available legal remedies are explained in Section 2.2.3. Central themes are the material rights such as reception conditions, access to the labour market, healthcare and education (Section 3). The successes and challenges of the Dutch practice are the subject of Section 4.

## 2. IMPLEMENTATION

### 2.1. *Original implementation in 2004*

Although Article 32 of the TPD required EU member states to implement the directive before 31 December 2002, the Netherlands published its implementation law two years too late, in 2004.<sup>7</sup> The implementation law is minimal and lacks a transposition table. Typical for the Dutch implementation is the choice to construct a legal stay instead of a residence permit. The application for temporary protection qualifies as an asylum application, which is put on hold for the duration of the temporary protection. Article 1 Aliens Act 2000 defines temporary protection as 'legal stay in the meaning of Article 8 (f) or (h) [of the *Aliens Act 2000*] of the applicant of an asylum claim who will not be expelled because of the Temporary Protection Directive'.<sup>8</sup> The reference to Article 8 Aliens Act caters for the general ground for a legal stay during an asylum procedure. Hence, no residence permit is given, but a sticker in one's passport – or a displaced-document if no passport is available – proves the legal stay for the duration of the temporary protection.

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5 European Commission For Democracy Through Law (Venice Commission), The Netherlands, Opinion on the legal protection of citizens, 18 October 2021, no. 1031/2021, CDL-AD(2021)031.

6 Council Implementing Decision (EU)2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and having the effect of introducing temporary protection.

7 Law of 16 December 2004 to change the Aliens Act 2000 in order to implement Directive nr. 2001/55, Official Gazette (Staatsblad) 2004/691, publication 28 December 2004.

8 Own translation, (<https://wetten.overheid.nl/BWBR0011823/2022-10-01>).

In justifying this approach,<sup>9</sup> the Minister referred to Article 2(g) TPD, which prescribes that ‘any permit or authorisation’ must be given. According to Dutch authorities, the implementation fulfils the requirement to give authorisation.

In the Aliens Act, furthermore, a provision has been implemented on the extension of the decision period (Article 43 Aliens Act) and another provision on the general extension of the duty to leave (Article 45 Aliens Act).

The scope of persons to whom the temporary protection applies is laid down in the Aliens Decree (Article 3.1a Aliens Decree), which follows the text of Articles 5 and 7 in the TPD.<sup>10</sup> This provision grants the general competence to issue a ministerial regulation regarding the scope for when the TPD is activated.

Apart from these provisions regarding legal residence and personal scope, no implementation was made for the rights on reception conditions, access to education and access to healthcare. However, to ensure access to the labour market, the Aliens Decree includes a provision about residence permits for TP beneficiaries who find work and apply for a residence permit based on their employment. The visa requirement for those applications does not apply to TP beneficiaries.<sup>11</sup> It should be noted that a labour market test continues to apply, to check if no priority of other employees on the Dutch labour market is available. It is interesting that after the TPD was activated in 2022, this last requirement was dropped, which is discussed in Section 3.2 below. Overall, the minimal implementation gave the legislature freedom when the EU Council activated the TPD on 4 March 2022.

## 2.2. *Implementation after activation*

After the Council decision and publication of the operational guidelines of the European Commission in March 2022, the Minister of Justice informed the parliament by letter of 30 March 2022 about the rules and practice regarding displaced persons from Ukraine.<sup>12</sup> At the legislative level, laws were immediately drafted to provide the displaced persons easy access to the labour market and to activate emergency law for housing and for reception conditions.<sup>13</sup> The crises regarding

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9 See Franssen, K., *Tijdelijke bescherming van asielzoekers in de EU* (dissertation Radboud University), The Hague: Bju 2011.

10 Ministerial Regulation 25 January 2005, Official Gazette 2005, 25.

11 Article 3.71(2)(h) Aliens Decree, Official Gazette 2005, 25.

12 Letter of the Secretary of Justice of 30 March 2022, Parliamentary Documents 2021/22, 19637, nr. 2839.

13 Labour: Decision of 29 March 2022, changing the Decree on the performance of the Dutch Migrant Employment Act (Wijziging BuWAV 2022) on the temporary waiving of working permit, Official Gazette 2022, 130 and Decision of 1 April 2022 Amendment Migrant Employment Act on obligation to register the employment of TP beneficiaries: Wijzigingsregeling Regeling melding Wav tijdelijke vrijstelling twv plicht, State Gazette 2022, 8954. Housing: Decision of 31 March 2022, implementation Art. 2c and 4 Act Displacement of population, Official Gazette, 2022, 133 in use as of 1 April 2022 (Extension of this law was accepted by Parliament on 4 April 2023, Parliamentary Documents 2022/23, 36081) and the Regulation on the reception of Displaced from Ukraine: Regeling Opvang Ontheemden Oekraïne, State Gazette 2022, 9469 (1 April 2022).

reception conditions and asylum procedures resulted in municipalities playing a key role in organising housing and obtaining TP status. Rules and regulations about the procedure to be followed to obtain temporary protection and regarding the personal scope were published only in August 2022.<sup>14</sup>

### 2.2.1. *Authorisation of stay instead of residence permits*

After the TPD activation, the Dutch authorities adhered to the reading of the TPD that there is no obligation to issue a residence permit and that the authorisation of stay is in line with the TPD. Therefore, they kept the construction of a legal stay as described before.<sup>15</sup> This means that the group of displaced persons is formally seen as asylum seekers. The existing capacity problems within the immigration authorities were an important reason to keep the burden as light as possible for those authorities. The responsibility for registering displaced people was assigned to municipalities instead of the central immigration authorities.

In the first months after activation, it was unclear how the official registration of the asylum application was organised. Specifically, the timing of formal activities related to registering an asylum application, such as fingerprinting, was uncertain.<sup>16</sup> It became clear that the procedure is as follows. Displaced persons are required first to register at the municipality in the personal record database (BRP)<sup>17</sup> by showing their passport or other identification documentation. In cases with a lack of documents, the Ukrainian embassy is asked to help, and no legalisation of documents issued by the Ukrainian embassy or the Dutch Ministry of Foreign Affairs is needed. Within the BRP, the TP beneficiaries are registered under a special code (code 46) instead of the general code for asylum seekers (code 30). The BRP registration gives the TP beneficiary a social security number, which is essential to gain access to employment or social services and to open a bank account.

After the BRP registration, the municipality communicates the registration to the immigration authorities. They scan the existing passport and visa to assess possible risks to the public order, which could be a reason for exclusion from temporary protection (Article 28 TPD, as implemented in Article 3.1a(2) Aliens Decree). Then, the immigration authorities invite the displaced person to formally sign the asylum application and collect proof of residence, which is a sticker in their passport. If there is no passport, the person is given a special document called an ‘O-document’. This proof was valid for one year, up to 4 March 2023, the day the activation of the TPD ended in first instance. For the extension to 4 March 2024, following the EU extension of the temporary protection, no new stickers or documents were issued,

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14 Art. 3.9a Regulation on Aliens, State Gazette 2022, 22623, published 25 August 2022 and the informal policy document a so-called Working Instruction, WI 2022/17 (4 August 2022), available at [www.ind.nl](http://www.ind.nl).

15 For critique on this approach see Meijers Committee, ‘Commentaar op de gebrekkige uitvoering van de tijdelijke beschermingsrichtlijn in Nederland’, CM2204, June 2022, <https://www.commissie-meijers.nl/wp-content/uploads/2022/06/220629-Commentaar-op-de-gebrekkige-uitvoering-van-de-Tijdelijke-Beschermingsrichtlijn-Meijers-Commissie-.pdf>, last accessed 11 May 2023.

16 <https://verblijfblog.nl/oekrainers-moeten-toch-asiel-aanvragen/> (last accessed 11 May 2023).

17 <https://www.rvig.nl/brp/inschrijven-oekrainers-in-de-brp> (last accessed 11 May 2023).

but a letter of proof was sent to the TP beneficiaries.<sup>18</sup> This proof is essential for employers who risk a fine if they employ someone without proof of legal stay. A delay in 2022 in issuing stickers and documents due to a technical problem was therefore not only problematic for the TP beneficiaries but also for employers.<sup>19</sup>

By constructing this path for obtaining temporary protection, the authorities kept the procedure for TP beneficiaries separate from the general asylum procedure and avoided further overburdening the asylum system. When the temporary protection ends (Article 6 TPD), the immigration authorities will have to decide on the pending asylum application.<sup>20</sup>

#### *2.2.2. Scope of persons*

At first, the Dutch authorities applied the Council's decision more widely than the minimum stated requirements. Displaced persons who had left Ukraine within 90 days before 24 February 2022 – namely, on or after 27 November 2021 – also fell within the scope of temporary protection. In line with the Council's decision, not only persons with Ukrainian nationality but also stateless persons or persons with another nationality and a residence permit in Ukraine and their family members could apply for temporary protection.

##### *a) Family members*

For family members, the definition of Article 15 TPD applies: the partner, child or another dependant and close relative of the TP beneficiary may receive temporary protection as long as the relationship already existed in Ukraine, was stable and were living together before the date of the invasion.<sup>21</sup> The Commission's operational guidelines for implementing the Council Decision of 21 March 2022 encourage Member States to 'use their margin of appreciation in the most humanitarian way' in this matter.<sup>22</sup> Generally the Dutch authorities follow these operational guidelines. Problems in practice have arisen regarding the requirement of proof of living together in Ukraine at the time of the invasion.<sup>23</sup> It seems that the authorities require proof of living together for at least six months, which might be a stricter interpretation than the TPD requires.

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18 <https://ind.nl/en/ukraine/extension-sticker-or-card-temporary-protection-ukraine> (last accessed 11 May 2023).

19 Reaction to question in Parliament, 13 September 2022, Parliamentary Documents 2021/2022, Aanhangsel Handelingen nr. 3668 and 3990.

20 IND Working Instruction 2022/17, [www.ind.nl](http://www.ind.nl).

21 Article 15 TPD and Article 3.1a(1) Aliens Decree 2000.

22 Operational Guidelines 21 March 2022, with reference to the Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification, 3 April 2014, COM/2014/0210 final.

23 Article 3.1a(1) Aliens Decree and IND Working Instruction 2022/17, p. 3.

*b) Third-country nationals*

In the earlier mentioned letter to the parliament dated 30 March 2022, the authorities called for broad application and therefore included third-country nationals who held temporary residence permits in Ukraine within the scope of application. Examples include (short-term) labour migrants and international students, of which a significant number were medical students in Ukraine.<sup>24</sup>

In a debate in Parliament in July 2022, municipalities provided information about signs of people misusing the procedure for TP beneficiaries by stating they had a short-term visa for Ukraine.<sup>25</sup> This led to immediate restriction of the personal scope for TP beneficiaries.<sup>26</sup> As of 19 July 2022, third-country nationals with temporary residence in Ukraine could no longer apply for TP, and this protection was ceased for third-country nationals who had received TP status between March 2022 and August 2022 – a group of about 6,000 TP beneficiaries.<sup>27</sup> The result was chaos within this last group, as the authorities sent out different letters to announce the withdrawal, without making it clear whether a legal remedy was available.<sup>28</sup> The restriction was published as a ministerial regulation only in August 2022, in which the previous broad scope is not mentioned explicitly.<sup>29</sup>

The Dutch Government did not consult the European Commission about the choice to end the temporary protection for this group of third-country nationals who had initially been included in the scope of the TPD. Nor did it inform the European Commission in the first instance about broadening the personal scope as Article 7(1) TPD requires.<sup>30</sup> According to Article 6 TPD, the ending of temporary protection is only possible by Council decision or when the maximum duration has been reached. Because temporary protection was extended in the first instance to the group of third-country nationals who had temporary residence in the Ukraine, legal scholars reason that the TPD and EU law also apply to this group.<sup>31</sup> The principle of legal security

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24 M. van Twillert 'Een studie in Oekraïne, gevlucht en nu bij ons op dood spoor', Medisch Contact 26 April 2023, <https://www.medischcontact.nl/nieuws/laatste-nieuws/artikel/een-studie-in-oekraïne-gevlucht-en-nu-bij-ons-op-dood-spoor> (last accessed 23 May 2023).

25 There is no objective information on this, although this courtcase on immigration detention might show this background, Court of first Instance in the Hague, seated in Middelburg 17 April 2023, ECLI:NL:RBDHA:2023:5360.

26 Letter of the Secretary of Justice of 18 July 2022, Parliamentary Documents 2021/22 19637, nr. 2945. See <https://verblijfblog.nl/verschil-in-behandeling-tussen-asielzoekers-uit-oekraïne-en-asielzoekers-uit-andere-landen/>.

27 Article 3.9a Regulation on Aliens, State Gazette 2022, 22623, published 25 August 2022.

28 See C. Grütters, Beëindiging Tijdelijke bescherming van ontheemden die in Oekraïne tijdelijk verblijfsrecht hadden is onrechtmatig, *Asiel- en Migrantenrecht* 2023 (2) p. 81-87.

29 Article 3.9a Voorschrift Vreemdelingen, Staatscourant 2022, 22623, published 25 August 2022.

30 European Commission 8 March 2023, COM(2023)140 final 'Temporary protection for those fleeing Russia's war of aggression against Ukraine: one year on' p. 4, footnote 14.

31 See i.e. CJEU 7-11-18, *K&B*, C-380/17 and CJEU 7 November 2018 *C&A*, C-257/1. See also CJEU 18 October 2012, C-583/10, par. 47.

and trust therefore should apply to the group that first was granted TP and who are now in insecurity.<sup>32</sup>

At the time of writing, the Dutch authorities were maintaining the withdrawal of temporary protection for this group of third-country nationals with a Ukrainian temporary residence permit. However, they delayed that withdrawal until 4 September 2023 – which nonetheless still causes insecurity for TP beneficiaries and their employers.<sup>33</sup> This group of displaced persons automatically falls under the general asylum procedure, in which a safe country of origin can lead to the asylum application being rejected.

In addition to the legal route of rejection and withdrawal of temporary protection, the authorities started giving repatriation assistance.<sup>34</sup> About 1,000 TP beneficiaries made use of this assistance, which leaves about 4,660 persons waiting for the outcome of the legal procedures regarding their protection. Displaced persons falling outside the scope of temporary protection can still apply for asylum within the general asylum procedure. A district court ruled that in case the authorities decide on the asylum application, they should also address the question if there is a situation of general violence (Article 15c Qualification Directive) in Ukraine.<sup>35</sup>

### 2.2.3. *Legal remedy*

By the end of 2022, problems arose for the first time for persons who were registered at the municipality as TP beneficiaries but the BRP registration was doubted by the immigration authorities. Such doubt was mostly because the TP beneficiary had left Ukraine before 27 November 2021, which was found out by the immigration authorities when doing the passport and visa check. Formally, these people fall outside the scope of the TPD and could stay and receive protection in the country where they stayed before 27 November 2021. They often were not informed properly about this rejection though. They either never received an invitation by the immigration authorities to collect their proof of residence, or they received a letter from the same authorities giving a general explanation that someone fell outside the scope of the TPD; a third possibility was that they received an order by the mayor to leave the reception centre. No information on legal remedies was given to this group, resulting in questions in Parliament for the authorities.<sup>36</sup> Because the TP registration

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32 CJEU 26 May 2016, *Județul Neamț and Județul Bacău*, C-260/14 and C-261/14, EU:C:2016:360, par. 54; CJEU 7 August 2018, *Ministru kabinetu*, C-120/17, EU:C:2018:638, par. 50

33 Letter of the Secretary of Justice of 10 February 2023, Parliamentary Documents 2022/23 19637, 3070. Circular instruction of Ministry of Justice to Dutch Municipalities of 17 February 2023, <https://www.rijksoverheid.nl/onderwerpen/opvang-vluchtelingen-uit-oekraïne/documenten/circulaires/2022/09/09/aanpassing-instructieadvies-voor-derdelanders-uit-oekraïne>.

34 In line with art 21TPD and par. 8 of the Commission Operational Guidelines.

35 Court of first instance the Hague, seated in Arnhem, 28 October 2022, ECLI:NL:RBDHA:2022;12000, *Jurisprudentie Vreemdelingenrecht* 2023/12.

36 After questions of Members of Parliament it became clear that the objection procedure was followed, Parliamentary Documents 2022/23, *Aanhangsel van de Handline* 988.

is, as described before, an asylum application, one would expect that the existing legal remedy of the asylum procedure should be followed.

In January 2023 it became clear though that the Dutch authorities chose the legal remedy of an administrative objection procedure without suspensive effect. This has been communicated in the written rejections since 1 January 2023. The displaced persons that received these rejections requested for provisional measures at several courts, in order to be able to work and stay at the reception centre during the administrative objection procedure. Most courts have granted these measures, referring to the overburdened asylum system in the Netherlands, the right of TP beneficiaries to work and the fact that rejections were made without personal circumstances being considered.<sup>37</sup> Legal procedures about the position of TP beneficiaries who lack Ukrainian nationality but have temporary residence rights in the Ukraine are expected during 2023.<sup>38</sup> A pilot trial regarding the withdrawal of TP status for third-country nationals holding temporary residence in Ukraine will be held before 4 September 2023.<sup>39</sup>

### 3. MATERIAL RIGHTS

Although TP beneficiaries do not receive a residence permit, their access to the material rights following the TPD is well organised. The key role of local authorities almost certainly helped the TP beneficiaries to find housing, schools and work – more easily than asylum seekers in the general asylum procedure. By 1 April 2022, TP beneficiaries were allowed to work without needing a work permit; by 1 July 2022, all TP beneficiaries received health insurance; and by 3 October 2022, all TP beneficiaries were able to open a Dutch bank account.

#### 3.1. *Reception conditions*

As explained, at the time of the invasion, there was a general housing crisis and more specifically a crisis in asylum reception centres. By way of emergency law,<sup>40</sup>

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37 Preliminary Relief Judge the Hague 6 December 2022, ECLI:NL:RBDHA:2022:14589, JV2023/34 with case note F. Larsson; Preliminary Relief Judge Amsterdam 20 January 2023, NL 22.2233; Preliminary Relief Judge Den Bosch 2 February 2023, ECLI:NL:RBDHA:2023:1008; Preliminary Relief Judge Amsterdam 23 March 2023, ECLI:NL:RBDHA:2023:3815; Preliminary Relief Judge Roermond 4 April 2023, ECLI:NL:RBDHA:2023:4638; Preliminary Relief Judge Roermond 31 March 2023, ECLI:NL:RBDHA:2023:4686. Rejection of provisional measures: Preliminary Relief Judge Utrecht 30 January 2023, ECLI:NL:RBDHA:2023:871, Preliminary Relief Judge Middelburg 24 February 2023 ECLI:NL:RBDHA:2023:2526; JV2023/83 nt Larsson; Preliminary Relief Judge Haarlem 11 April 2023, ECLI:NL:RBDHA:2023:5885.

38 For a first case see Preliminary Relief Judge Groningen, 26 April 2023, ECLI:NL:RBDHA:2023:6093.

39 The authorities selected 17 cases for this trial. The Dutch Council of Refugees and 8 lawyers are involved.

40 Decision of 31 March 2022, implementation Articles 2c and 4 Act Displacement of population, Official Gazette, 2022, 133 in use as of 1 April 2022; Extension of this law was accepted by Parliament on 4 April 2023, Parliamentary Documents 2022/23, 36081.

municipalities managed relatively smoothly to arrange housing – both private and municipality-run – for around 90,000 displaced persons. A crucial element seemed to be the wide discretion offered to municipalities to arrange housing. Especially in the beginning, private families offered housing.<sup>41</sup> Combined, these fast responses avoided an aggravation of the existing housing crisis. A financial allowance is given to TP beneficiaries who are housed privately.

Date	TP beneficiaries registered at municipality	Beds utilised in municipal reception centre	Private housing
14 April 2023	91,980	72,710	19,270

*Source: Rijksoverheid.nl for municipal reception centres*

National legislation governing the reception conditions was issued on 1 April 2022, namely the Ministerial Regulation for the Reception of Displaced from Ukraine (hereafter ROO).<sup>42</sup> The ROO gives mayors the responsibility for meeting the minimum requirements for the reception centres and the competence to grant financial allowances to TP beneficiaries who stay in private homes or municipal centres. As of February 2023, another crucial change in the regulation on reception – with the potential to create further chaos – was the withdrawal of a financial allowance from TP beneficiaries who are employed or have a family member who earns an income.<sup>43</sup> This change was effectuated to bring about balance between the financial allowances for general asylum seekers and the allowance for TP beneficiaries.

	<b>TP beneficiaries until 1 February 2023</b>	<b>TP beneficiaries after 1 February 2023</b>	<b>Asylum seekers in general procedure</b>
Food	€205 pp/month	Sliding scale depending on household size: between €215,06 pp/month and €150,45 pp/month + extra allowance of €93,00 pp/month	Sliding scale depending on household size: between appr. €130 pp/month and €187,88 pp/month
Clothing	€55 pp/month	€56,12 pp/month	€51,80 pp/month

41 TakecareBNB and Refugee Home NL: <https://www.rhnl.nl>.

42 Regulation on the Reception of Displaced from Ukraine: Regeling Opvang Ontheemden Oekraïne, Stcr. 2022, 9469.

43 Change of Regulation on the Reception of Displaced from Ukraine: Wijziging regeling Opvang Ontheemden Oekraïne, Stcr. 2022, 31970.



Extra for private housing	€215 adult, €55 child per month	€215 adult, €55 child per month	€75/€125 per week
Influence of work	No influence	Financial allowance ceased for TP beneficiary and family members	Reduces the financial allowance

*Source: ROO and RVA regulation*

The legislature has the duty to keep the situation of emergency law, as grounds for the reception conditions, as short as possible. Hence, the legislature drafted a formal law on reception conditions in December 2022.<sup>44</sup> Municipalities retain the responsibility for reception conditions until the end of the temporary protection, after which the responsibility will be transferred from the local to the governmental level. Municipalities have asked for assistance with the difficulties they face, mostly regarding education facilities and the housing shortage but also in relation to the ongoing crisis regarding the lack of reception centres for asylum seekers.<sup>45</sup>

### **3.2. *Employment and recognition of qualifications***

An important aspect of the implementation of temporary protection in 2022 was the willingness of authorities and employers to stimulate access to the labour market for TP beneficiaries. One of the first measures taken by the government after activation of the TPD was the temporary waiving of the work permit requirement that – under normal conditions – requires for a labour market test by the Ministry of Economic Affairs to determine whether a priority workforce is present.<sup>46</sup> The waiving of this requirement meant that employers did not need a work permit for salaried employment of TP beneficiaries,<sup>47</sup> which took away a barrier for labour participation. At the time of the TPD activation, the government was already aware of labour exploitation of mostly EU labour migrants.<sup>48</sup> Therefore, the measure was applicable only for salaried employment, not for self-employment, as the latter was seen as labour more at risk for labour exploitation.<sup>49</sup> For self-employment of TP

44 Temporary Act on the Reception of Ukrainians, 12 December 2022 in consultation, <https://www.rijksoverheid.nl/actueel/nieuws/2022/12/12/tijdelijke-wet-opvang-ontheemden-oukrajne-in-consultatie> and <https://www.internetconsultatie.nl/oekwet/b1>.

45 Reaction of the Association of Dutch Municipalities to draft legislation, and ‘uitvoeringsscan’ 20 January 2023, <https://vng.nl/nieuws/tijdelijke-wet-haalt-opvang-oukrajners-uit-crisisstructuur>.

46 Decree of 29 March 2022 State Gazette. 2022,130 and Decree of 1 April 2022, Official Gazette 2022, 8954.

47 Despite the earlier mentioned Article 6.5 Buwav 2022.

48 See among others the recommendations to the Minister of 11 June 2020, Parliamentary Documents 2019/20, 29861, nr. 51 and 30 October 2020, Parliamentary Documents 2020/21, 29861, nr. 53.

49 Letter of the Secretary of Justice of 30 March 2022, Parliamentary Documents 2021/22 19637, nr. 2839.

beneficiaries, the general rules apply.<sup>50</sup> The only obligation that is connected to the employment of TP beneficiaries is for employers to notify the Employment Agency two days prior to the commencement of the employment.<sup>51</sup> A special form has been made available to employers for this purpose, and as of April 2022 an online dashboard has tracked the number of notifications.<sup>52</sup> If the employer fails to register the employee at the Employment Agency and this is detected, it would be labelled as illegal employment and an administrative fine of up to € 8,000 could result.<sup>53</sup>

The notification enables the authorities to verify whether the beneficiaries of protection are working in accordance with collective bargaining agreements and the laws and regulations on proper working conditions. In addition, they can keep track of labour participation. The Minister of Social Affairs and Employment has explained that this approach helps to identify and reduce the risk of abuses such as underpayment and poor working conditions.

The dashboard indicates that the Netherlands has the highest level of labour market integration within the EU. Around 45% of the adult TP beneficiaries in this country are in salaried employment.<sup>54</sup> The Minister of Social Affairs and Labour informed the Parliament in February 2023 about the lessons learned to date from the labour participation of TP beneficiaries.<sup>55</sup> Apart from the positive results in terms of early labour-market entry, authorities need to address reported exploitation and gaps between a person's skills profile and their actual employment. Language skills are another area requiring attention. Most salaried employment is mediated by temporary employment agencies, which cater mainly for jobs in production work, cleaning and warehouses. Other employment occurs in agriculture, commercial services and hospitality. The high level of labour participation of TP beneficiaries contrasts with the actual labour participation of asylum seekers, who are only allowed to start working six months after the date of their asylum application, and only for 24 weeks a year, and for whom the employer has to request a work permit.<sup>56</sup> The public debate about changing the rules for asylum seekers by broadening their right to work has been positively influenced by the lessons learned from labour participation by TP beneficiaries.

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50 Requests regarding exemption for self-employment of Ukrainian psychologists have not resulted in changes so far, Motion by MP Podt et al of July 7, 2022 Parliamentary Documents 2021/22, 19637 nr. 2926, Answer of Minister, 16 December 2022, Parliamentary Documents 2022/23, 19637, nr. 3021, p. 7.

51 Amendment Migrant Employment Act: Wijzigingsregeling Regeling melding Wav tijdelijke vrijstelling twv plicht, Stc. 2022, 8954. The Employment Agency is known as the UWV.

52 <https://www.werk.nl/arbeidsmarktinformatie/dashboards/vluchtelingen-oekraïne>, last visited 12 April 2023.

53 Policy Guidelines on administrative fines Migrant Employment Act 2020.

54 <https://www.oecd-ilibrary.org/docserver/c7c694aa-en.pdf?expires=1676016648&id=id&accname=guest&checksum=E6BBA2FE1F8FDDEA7F8440D588B82754>

55 Letter of Minister of Social Affairs and Labour affairs to Parliament of 22 February 2023, TK 2022/23, 36045, nr. 149.

56 Article 6.2 paragraph 1 under a of the Decree relating to the Dutch Migrant Employment Act (Buwav).

Regarding diploma recognition of TP beneficiaries, the Minister of Education referred to the recommendation and communication by the European Commission on the recognition of qualifications among displaced persons from Ukraine.<sup>57</sup> It is known that refugees face difficulties in having their qualifications recognised and valued in an appropriate manner by the countries in which they receive protection.<sup>58</sup> The framework in which the Dutch organisation for internationalisation in education (Nuffic) and the International Centre for Diploma Recognition (IDW) are responsible for diploma recognition applies equally for TP beneficiaries, with the difference that each TP beneficiary can have one diploma recognised for free.<sup>59</sup> Nonetheless, the procedure is an obstacle to finding employment that reflects the person's actual skills profile. The process takes time, and the standard of Ukrainian diplomas does not always fulfil the Dutch requirements. An example is the degrees obtained by psychologists, who are highly needed but have difficulties getting their diplomas recognized.<sup>60</sup>

The right to work, as enshrined in Article 12 TPD, enables not only access to the labour market but also the application of general laws that are applicable to remuneration and access to social security systems relating to employed or self-employed activities. Employed TP beneficiaries began to receive family benefits as of July 2022.<sup>61</sup> Formal legislation regarding childcare benefits and rental benefits for TP beneficiaries is still being prepared.<sup>62</sup> Unlike the topic of access to the labour market, there is less of a push to facilitate equal access to these social benefits.

### 3.3. Access to health

TP beneficiaries receive free access to healthcare. A special regulation for persons with a registration classed as code 46 entered into force on 1 July 2022, namely, the Regulation Medical Care for Displaced out of Ukraine (RMO).<sup>63</sup> The RMO relates to the regulation for medical care for asylum seekers and informs healthcare workers about which care is financed by the government. For persons without registration,

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57 European Commission Recommendation of 5 April 2022 on the recognition of qualification for people fleeing Russia's invasion of Ukraine, EU 2022/554, L 107/1; Communication on Guidance for access to the Labour market, vocational education and training and adult learning of people fleeing Russia's war of aggression against Ukraine, 14 June 2022, C(2022)4050.

58 Bonfanti, S. and T. Xenogiani (2014), Migrants' skills: Use, mismatch and labour market outcomes – A first exploration of the International Survey of Adult Skills (PIAAC), in *Matching Economic Migration with Labour Market Needs*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264216501-11-en>.

59 <https://idw.nl/nl/werken.html>.

60 Volkskrant 17 February 2023, 'Ze willen graag, maar makkelijk is het niet voor Oekraïense psychologen om hier betaald werk te krijgen'.

61 Letter to Parliament of 15 June 2022, Parliamentary Documents 2021/22, 36 045 en 26 448, nr. 95.

62 Amendment of Childcare Allowances Law: Wijziging wet kinderopvang, Parliamentary Documents 2022/23 ,36241 and Amendment of Rental Allowances Law: Wijziging wet op de huurtoeslag, Parliamentary Documents 2022/23, 36301.

63 Regulation on medical care for displaced persons 'Regeling medische zorg ontheemden' (RMO), <https://www.rmoekraine.nl/Verzekerden>.

the general regulation for necessary medical care for people without insurance applies, in which only the most basic healthcare is financed.<sup>64</sup>

### **3.4. Education**

All minors up to the age of 16 years must receive compulsory education according to Dutch law. The Minister of Education established temporary educational facilities to give primary and secondary education to TP beneficiaries.<sup>65</sup> The temporary law makes it possible to hire Ukrainian teachers, sets the boundaries for the content of education and allows for the possibility to facilitate distance education. Ukrainian students are therefore allowed to receive online education from a Ukrainian school, but learning the Dutch language is obligatory.

Special schools for so-called newcomers host most of the TP beneficiaries who attend secondary school (89%). For primary education, special schools for TP beneficiaries were also developed and are attended by 44% of the registered students. As of 17 April 2023, a total of 18,400 students were registered at primary and secondary schools, among a total of 20,700 students registered as TP beneficiaries.<sup>66</sup> The municipality in which the TP beneficiary is registered is responsible for access to education.

For adults, no special arrangements have been made by the government. Students receive no financial loans, but several schools and universities have lowered the tuition fees for students who hold temporary protection for the years 2022/2023. The obligation in Article 12 TPD to authorise TP beneficiaries to engage in 'educational opportunities for adults, vocational training and practical workplace experience' was thus fulfilled with little precision. The Dutch Government left it to municipalities to offer language education to adults.<sup>67</sup> Some employers offer 'language buddies' on the work floor.<sup>68</sup> This resulted in diversity among the programmes offered by municipalities and employers.

## **4. SUCCESS AND CHALLENGES**

The Dutch reaction to the activation of the Temporary Protection Directive has been positive in many ways. The Dutch legislature displayed an approach which facilitated

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64 CAK, (<https://www.hetcak.nl/zakelijk/regelingen/regeling-onverzekerden>). Financial regulation on necessary medical care for people without Insurance, SOV, subsidieregeling medisch noodzakelijke zorg aan onverzekerden.

65 Act on temporary education facilities in case of mass influx, Wet tijdelijke onderwijsvoorzieningen bij massale toestroom van ontheemden, State Gazette 2022,293.

66 Central Educational Authorities (DUO), Weekly review of registration of Ukrainian students at Dutch schools, <https://informatieproducten.duo.rijkscloud.nl/public/nieuwkomers-oekraine/> (last accessed 29 April 2023).

67 Berenschot Onderwijsmonitor January2023 Eerste Monitor Taalonderwijs volwassen Oekraense ontheemden, TK 2022-2023, 19637, 3071.

68 Letter of 13 March 2023, Parliamentary Documents 2022/23, 32824 nr 381, Plan van aanpak 'Statushouders aan het werk', p. 6.

not only the creation of reception centres but also a high level of labour participation among TP beneficiaries. The broad discretion that was given to municipalities in creating housing and their cooperation with employment agencies to arrange access to the labour market appear to have been crucial. However, the authorities have now restricted their initially wide approach to the application of the TPD to the summer of 2022, causing insecurity for a group of displaced people who were initially classed as TP beneficiaries. Three challenges for Dutch practice are in place.

The first challenge for the Dutch practice lies in the legal construction that the asylum procedure starts immediately after the temporary protection ends. The overburdened asylum system should not be further burdened. In the near future, the outcome of legal procedures of TP beneficiaries who held temporary resident rights in Ukraine and whose temporary protection is withdrawn will clarify this first challenge.

A second challenge is the ongoing crisis in finding enough housing in general and specifically for asylum seekers. Political tension between the central and local governments indicates the burden on municipalities to find housing for TP beneficiaries and asylum seekers. The use of emergency law asks for more durable solutions in order to be proportionate.

The third and last challenge is a long-term solution in general. The legal construction of the asylum application steers the discussion about a durable solution in the direction of asylum law. However, the high rate of labour participation might be reason to explore other legal routes for durable solutions for TP beneficiaries. This is a question not to be answered on a national level but asking for a European approach.<sup>69</sup>

Given the ongoing delays in the asylum procedure as well as the general lack of housing and the lack of personnel in education and healthcare, the Dutch authorities will be challenged to find long-term solutions for the various crises. The way in which TP beneficiaries are received in the Netherlands might be inspirational for addressing all these problems.

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69 Guild E. and Groenendijk K. (2023) The impact of war in Ukraine on EU migration. *Front. Hum. Dyn.* 5:1189625. doi: 10.3389/fhumd.2023.118962, Sections 4 and 5.

# The implementation of the Temporary Protection Directive in 2022 in Portugal to persons fleeing the war in Ukraine

*Ana Rita Gil\**

## 1. INTRODUCTION

After learning about the full-scale invasion of Ukraine by the Russian Federation, Portugal decided almost immediately to provide temporary protection to persons fleeing the war. A decision in this regard was made as early as 3 March 2022 - thus, even before any activation of the Temporary Protection Directive at the EU level. Portugal was keen to provide a full and almost automatic protection to all citizens fleeing the war. A Governmental working group was quickly activated to prepare the integration of displaced persons seeking protection in this country. Displaced persons should have immediate access to a wide range of rights, from housing, access to employment, health care, education, recognition of academic qualifications and even of driving licenses. Furthermore, access to all these possibilities had to be made with the least bureaucratic requirements possible. Bearing these goals in mind, the Portuguese Government enacted a series of acts to provide a broad, swift, effective and easy integration of displaced persons fleeing the Ukrainian war.

Such measures must be read in the context of a country which has changed a few decades ago from an emigration country to an immigration country. Even though, its geography has preserved it, so far, from being affected by massive influxes of migrants. Moreover, until quite recently, immigration was not a decisive dividing topic on national politics. As such, the Portuguese Government had all conditions to develop broad public policies dedicated to the integration of migrants, namely through the creation of a specific institution aimed at promoting such goal – the ‘High Commissioner for Migrations’. This institution’s activity is one of the reasons why Portugal is internationally seen as having one of the best practices as regards immigrants’ integration policies.<sup>1</sup> Portugal has also been adopting important measures aimed at transposing some of the most important initiatives on migration adopted internationally. That is the case of the Global Compact for Safe, Orderly and Regular

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1 In 2009, the Human Development Report of the United Nations has qualified Portugal as the most generous country regarding integration of immigrants. In 2015, this country was voted, together with Sweden, the best country for integrating migrants by the Migration Integration Policy Index (MIPEX) report.

Migration, adopted in Marrakech in 2018. In 2019, Portugal was one of the first countries in the world to adopt a national plan to implement the Global Compact.<sup>2</sup>

These good practices were maintained during times of crisis. In 2016, in the peak of the so-called “European Union refugee crisis”, Portugal offered 5.800 places for asylum seekers in the context of the relocation mechanism, exceeding the quota that had been decided for its territory (which was of 4.295).<sup>3</sup> Additionally, during the COVID-19 crisis, Portugal was once again mentioned internationally as an example on protecting human rights of migrants, for having issued temporary regularization measures enabling all irregular migrants residing in the territory to access health care.<sup>4</sup>

The prompt response to the Ukraine’s displacement crisis was one more measure in this context of a solid commitment to receive forced migrants in a humane manner. The rapid mobilization, and the broadness of the integration measures decided in 2022, confirm such philosophy.

After providing a brief overview of the national legal scheme on temporary protection for contexts of mass displacement, this chapter will analyse the specific measures that were adopted, in 2022, to protect displaced persons fleeing Ukraine in the Portuguese territory. The policies aimed at providing integration and access to social rights of the beneficiaries in the territory will be detailed, and their practical application will be discussed.

## **2. TEMPORARY PROTECTION OF DISPLACED PERSONS IN PORTUGAL: PREVIOUS EXPERIENCES**

The Portuguese Law has been guaranteeing, for more than 30 years, a scheme of temporary protection for internationally displaced persons. Since 2003, this scheme is foreseen in a special Act, which was approved to transpose the 2001 Temporary Protection Directive.

Previously, in 1998 Portugal had adopted a solution for the “protection of displaced persons who had fled their countries of origin due to serious armed conflicts”. Contrarily to what happens currently, the 1998 scheme was enshrined in the general Law on Asylum.<sup>5</sup> The solution was based on the EU Council Resolution of 25 September 1995 on burden sharing regarding the admission and residence of displaced persons on a temporary basis”.<sup>6</sup> That protection was granted for a

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2 The Plan was adopted by the Council of Ministries’ Resolution dates of 1st Aug. 2019. For an analysis of the Global Compact, see The relevance of migration for the 2030 Agenda for Sustainable Development: The Global Compact for Safe, Orderly and Regular Migration, Constança Urbano de Sousa (org.), 2019.

3 <https://expresso.pt/politica/2016-02-19-Costa.-Portugal-deve-trazer-solucoes-a-UE-em-vez-de-falar-dos-seus-problemas>.

4 See, on this topic, Ana Rita Gil, *Regularisation of migrants’ status in Portugal: immigration or public health policy?*, <https://eumigrationlawblog.eu/regularisation-of-migrants-status-in-portugal-immigration-or-public-health-policy/>.

5 Law 15/98, of 26 March.

6 OJ C 262, 7.10.1995. This resolution was adopted – as it would be the case of the Temporary Protection Directive - due to the displacement of persons from the conflict in the former Yugoslavia.

maximum period of two years, “to people displaced from their country as a result of serious armed conflicts that give rise, on a large scale, to refugee flows”. Although it mentioned “refugee flows”, it was naturally aimed at protecting persons that would fall outside the scope of the 1951 Geneva Convention on the Status of Refugees, namely those that were escaping wars and conflicts. The Law’s teleology was, indeed, the protection of the so called “war refugees”. The criteria on the basis of which the temporary protection could be granted were defined, in each situation, by resolution of the Portuguese Council of Ministers. Still, the Law established that the Government should articulate the measures to be adopted with possible measures taken at European Union level.

In the very same year of 1998, the scheme was activated for the first time, to protect citizens of Guinea Bissau affected by a civil war in the country. This protection was activated due to the special cultural and historic ties that unite Portugal and Guinea Bissau, and the belief that there would be a large number of displaced persons seeking Portugal as a place to shelter.<sup>7</sup> The Portuguese Government decided to award temporary protection to citizens that would fulfil some requirements (1) had come directly from Guinea Bissau, (2) whose physical integrity was or had been directly threatened, (3) did not have any other form of protection in their region of origin and (4) could not return there because of the armed conflict and violations of human rights. It extended protection also to foreign citizens of other nationalities who proved to be family members<sup>8</sup> of citizens having Guinean nationality. The protection was initially awarded for one year, with the possibility of being renewed for two years more.

In 1999, this protection scheme was enacted for the second time, as a response to the displacement caused by the 1999 Kosovo war.<sup>9</sup> The Council of Ministries established very similar conditions to those that had been foreseen the year before: protection would be granted to (1) citizens of Kosovo, (2) coming directly from that region, (3) whose life or physical integrity was or had been directly threatened (4) where any other form of protection was possible in their region of origin, and (5) could not return there as a result of human rights violations and the situation of armed conflict. Contrarily to the other decision, though, protection was only awarded for an initial period of six months; however, it could be renewed up to one year overall. Moreover, no mention was made to the protection of family members.

In both cases, those who would have the temporary protection would benefit from the rights and were subject to the same duties of all foreigners residing in Portugal.

### **3. TEMPORARY PROTECTION LAW**

In 2003, a special Law providing a scheme for temporary protection – the Law no. 67/2003, of 23 August, on Temporary Protection of Displaced Persons (TPL) was

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7 Resolution of the Council of Ministries no. 94/98, of 14 July.

8 Spouses, ascendants or descendants in a straight line, or collateral relatives up to the 2nd degree.

9 Resolution of the Council of Ministries no. 44/99 of 25 May.



enacted. It had two aims: first, to transpose the 2001 Temporary Protection Directive (TPD).<sup>10</sup> Second, to maintain a “temporary protection national scheme”.

Starting with the latter: Portugal wanted to maintain a purely “national scheme”, allowing it to provide, sovereignly, temporary protection to displaced persons irrespective of any EU decision in this regard. As such, this “national scheme” is solely dependent on a “national activation” procedure in case of mass displacement of persons. As with the previous 1998 law, this procedure is based on a decision made by the Council of Ministries, which shall take into account several factors: the risk faced by the displaced persons, the urgency and the need for protection, as well as the consequences for the public order and national security.

On the other hand, the law transposes the EU Temporary Protection scheme, which, in order to be activated, is dependent on the procedure established by the Temporary Protection Directive – namely, on a decision made by the EU Council that establishes “the existence of a mass influx of displaced persons”, and includes (a) a description of the specific groups of persons to whom the temporary protection applies; (b) the date on which the temporary protection will take effect, etc. However, even in this context, the Portuguese Law allows the Government to protect additional categories of persons, not foreseen in the EU Council Decision, “as long as that they are displaced for the same reasons and are coming from the same country or region” (Article 9 of the TPL). This decision shall immediately be communicated to the EU Council and to the EU Commission.

As it can be seen, the Portuguese Law wanted to maintain some Governmental discretionary powers on awarding temporary protection to displaced persons in Portugal. Such discretion could function not only when no such protection was decided at the EU level, but also when the EU protection was activated: if the Government considered that the EU protection was too restrictive, it could enlarge it in the national territory. In this latter case, however, additional protected persons always need to be related to the origin of the mass influx of persons.

Pursuant to Article 4 of the TPL, in cases where the scheme is activated by a decision of the Council of the European Union, the Portuguese State shall take the measures foreseen for the application of that decision through the competent Ministries. It is incumbent upon the Ministry of the Interior to preside over an interministerial commission that will coordinate the application of all actions deemed necessary for the reception of displaced persons. This is also the body that is competent to determine the reception capacities in the territory. In a very impressive way, and innovative in relation to the Directive, the Portuguese Law sets forth that the interministerial commission must, if possible, listen to women representatives of the communities that are to be received, both in the process of organizing the reception, and in their stay in Portuguese territory.

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10 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.

#### 4. ACTIVATION IN 2022: THE SCOPE OF PROTECTION

As already mentioned, Portugal activated the Temporary Protection Law for providing protection to displaced persons fleeing from the war in Ukraine as early as 3 March 2022.<sup>11</sup> The reasons invoked for such “activation” were linked to the urgency of the humanitarian crisis, as well as the existence of a “vast community of resident Ukrainian citizens and national citizens of Ukrainian origin”<sup>12</sup>, which would certainly welcome displaced people. The deeply integrated Ukrainian diaspora in the country was, therefore, one of the reasons that made the Government foresee that Portugal would be selected by many displaced persons.

However, at first, the national protection granted by Portugal was more limited than the one that would be later decided by the EU Council: the Portuguese Government awarded automatic protection only to national citizens of Ukraine and their family members. Citizens of other nationalities would only benefit from such protection if they were family members of Ukrainian nationals. However, after the EU’s TPD’s activation, the Government extended the scope of the protection to all foreigners that were encompassed by the EU Council’s decision.<sup>13</sup> First, to foreign citizens of other nationalities or stateless persons who benefited from *international protection* in Ukraine, as well as to their family members. Second, to *permanent residents* in Ukraine, as well as their family members. Finally, foreigners who were living in Ukrainian territory with a *temporary residence permit*, or who benefited from a *long-term visa* for obtaining this type of permit, and whose “safe and lasting return to their country of origin” was not possible, were also covered. Thus, in this second version, Portugal chose the highest scope of protection provided for in the Council decision.<sup>14</sup>

The Portuguese decision chose not to define “family members” in an exhaustive way. It only mentioned that they would encompass “namely” – and at least - the spouses or *de facto* partners, blood relatives and the relatives by affinity. The decision thus provided for a large concept of family, in line with the TPL. According to Article 17 TPL, for the purposes of family reunification, the following categories of persons are deemed to be family members: a) the sponsor's spouse; b) minor unmarried children of the sponsor or his/her spouse and c) other close relatives who lived in a common economy, as elements of the family unit dependent on the sponsor at the time of the events that led to the massive influx. Therefore, it should be interpreted

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11 Resolution of the Council of Ministries n. 29-A/2022, of 1 march. For a detailed analysis, see Constança Urbano de Sousa, “The Protection of Displaced Persons from Ukraine in Portugal”, *European Journal of Migration and Law* 24 (3), 2022, pp. 313-329.

12 According to the Aliens and Borders’ annual report, in 2021 Ukrainians represented the fifth larger community of third-country nationals residing in Portugal (after Brazilians (1), United Kingdom citizens (2), Cape-Verdeans (3) and Indians (4)). See Serviço de Estrangeiros e Fronteiras, Relatório de Imigração, Fronteiras e Asilo 2021, May 2022.

13 This extension was made by the Resolution of the Council of Ministers no. 29-D/2022, of 11 March.

14 The extension of the protection to some of the mentioned categories of persons was merely optional for the Member States. On this topic, see Ana Rita Gil, “O instituto da proteção temporária como resposta ao fluxo massivo dos deslocados da guerra da Ucrânia”, *Julgar*, n.º 49, março de 2023, pp. 137-156.

that these latter categories of persons would also benefit from the Government's decision.

In 2022, Portugal issued 56.599 temporary protections.<sup>15</sup> Although the number of received persons seem quite limited, comparing to other countries, the number is higher than the percentage of refugees received in Portugal during other migratory waves. The statistical report on asylum of the Migration Observatory of 2022 informs that, in 2020, Portugal hosted around only 0.1% of all refugees in the EU. On the contrary, in 2022, it had received 1,13% of displaced persons from Ukraine.<sup>16</sup> The following table is particularly telling about how Portugal has received a substantial number of displaced persons fleeing the war in Ukraine, by comparison with other migratory contexts:<sup>17</sup>

Arrival mechanism	Period	Numbers
Relocation	December 2015 – April 2018	1.500
EU Member States-Turkey Deal	June 2016 – December 2017	142
Resettlement Turkey-Egypt	2018	930
Humanitarian Protection of citizens fleeing from Afghanistan	2021	768
Asylum applications in the Portuguese Territory	2019	1.834
Temporary Protection Ukraine	2022	56.599

## 5. THE TEMPORARY PROTECTION PROCEDURE

The Portuguese Government intended to establish a fast and easy procedure to provide automatic protection to all those encompassed by the Ministerial Resolution. Thus, all requests for temporary protection could be made in person or digitally,

15 Data of 2 January 2022: <https://eco.sapo.pt/2023/01/02/portugal-atribuiu-quase-56-600-protecoes-temporarias-a-pessoas-que-fugiram-da-guerra-na-ucrania/>. The majority of titles were issued to women (33.119), with 23.480 titles issued to men. 25% of all titles were awarded to children (13.961 in total).

16 Gabriele de Angelis, Elizabeth Challinor; Emellin de Oliveira & Marta Lemos, O acolhimento em Portugal de pessoas deslocadas da Ucrânia, *NOVA Asylum Policy Lab*, Faculdade de Ciências Sociais e Humanas, Universidade Nova de Lisboa, DOI: <https://doi.org/10.34619/s2rm-qv2o>, p. 4.

17 Gabriele de Angelis et al, op. cit., p. 4.

inside or outside the national territory.<sup>18</sup> In cases of need, the authorities could issue a single travel title.

In principle, applicants should present the following documents: photographic identification confirming their nationality (e.g., biometric passport, national identification card), or a Ukraine-issued residence permit or similar proof of a residence status in Ukraine, if applicable. Family members additionally should submit proof of the family relationship (e.g., marriage certificate, birth certificate). However, to provide for a swift response, the Governmental decision established that any means of proof were admitted. Actually, through the procedure, the administration enjoyed concentrated inquisitorial powers, and thus, the presentation of some documents, such as the criminal record certificate, was waived. To guarantee the public order and national security, the authorities would proceed to searches in databases, such as the Schengen Information System.

Perhaps due to the demands for technological adaptation imposed by the immediately preceding COVID-19 crisis, the Portuguese authorities decided to establish a full electronic procedure. Upon request for temporary protection, applicants would be issued with a certificate that would be conveyed to the Social Security, the Tax and Customs Authority and the Ministry of Health, for the purposes of automatically assigning a social security identification number, a tax identification number, and a national health user number. This certificate – a proof of acceptance and validation of the request – would also prove that its owner was legally staying in the territory, until the residence permit was issued. The application would also be communicated to the Employment and Professional Training Institute for registration purposes.

Persons having temporary protection would be issued with a residence permit of one year, renewable for two periods of six months each. The Law Bar Association decided to offer free legal aid to all displaced persons, not only as regards the temporary protection procedure, but also any eventual judicial proceedings.

## 6. INTEGRATION

As mentioned, the responsibility for the integration of displaced persons in Portugal belongs to an *ad hoc* interministerial commission, that shall be organized to deal with each situation of mass influx of persons (Article 5 TPL). The Commission is created by the Resolution that activates the protection scheme, and is responsible for defining the reception conditions, as well as how the rights of displaced persons will be guaranteed.

In 2022, the first Resolution of the Council of Ministers determined immediately some principles that should be applicable to the reception of displaced persons in Portugal. First, holders of temporary protection should be *treated in the same way as the beneficiaries with refugee status*, for the purpose of accessing social benefits under the *non-contributory regime*. This option was larger than the protection offered by the TPL, which only mentions the access to necessary support in terms of social benefits and

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18 However, in the case of minors, it was mandatory to make the application in person, so that identity and parenthood could be confirmed.

means of subsistence (Article 15(4)). With this decision, temporary protection holders would have access to all benefits guaranteed to refugees residing in Portugal – to whom is fully applicable the Social Security Law.<sup>19</sup> This means that they had the right, not only to receive a minimum income (which is called “social integration income benefit”), but also, in case of need, all social pensions, the social unemployment benefit, the solidarity supplement for the elderly and social supplements and other benefits or transfers for specific purposes.<sup>20</sup> However, it must be highlighted that this access would not preclude the special benefits provided for in the TPL, which can be higher than those foreseen in the ordinary social security scheme. That was foreseen in the Council of Ministries’ Resolution and is obviously justified by the specific humanitarian context of the persons involved, who might arrive to the territory in a situation of complete destitution. Therefore, temporary protection holders could gather the two types of benefits: the ordinary benefits provided in the general Social Security Law, and the special benefits provided for displaced persons in the TPL. These latter include adequate housing and sufficient means of subsistence (Article 15 TPL).

To implement all integration measures in a speedy and responsive way, the Government created the webportal “Portugal for Ukraine”,<sup>21</sup> where all interested persons could find information on how to access several rights in the Portuguese territory, such as housing, health care, employment and education. Moreover, a special law was enacted, aimed at facilitating and waiving several bureaucratic requirements in a range of administrative procedures when beneficiaries of temporary protection would be included.<sup>22</sup> Some of these measures will be detailed below.

## 6.1. *Housing*

Providing an effective access to an adequate housing was seen as particularly important from the beginning. This was even more pressing, because, at the time of the displacement, the media had reported several cases where migrants were found living in inhuman conditions in Portugal: either in the streets or in overcrowded

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19 Article 72 of the Asylum Law (Law no. 27/2008 of 30 June, as last amended by Law no. 18/2022, of 25 August).

20 Article 41 of the Social Security Basic Law (Law no. 4/2007 of 16 January, as last amended by Law no. 83-A/2013 of 30 December). This Law rests on the principle of equality, embodied in Article 7 which “consists in the non-discrimination of beneficiaries, namely on grounds of sex and nationality, without prejudice, in this regard, to conditions of residence and reciprocity”. It should be stressed that the principle of reciprocity is not to be applied to Refugees. On this topic, see Ana Rita Gil, “Imigrantes e Direitos Fundamentais Sociais”, in AA.VV., *O contencioso de direito administrativo relativo a cidadãos estrangeiros e ao regime da entrada, permanência, saída e afastamento do território português, bem como do estatuto de residente de longa duração*, Sofia David (coord.), Centro de Estudos Judiciários, 2017, pp. 55-76.

21 <https://portugalforukraine.gov.pt/>.

22 Decree-Law n. 24-B/2022, of 11 March, which establishes exceptional measures in the context of granting temporary protection to displaced persons from Ukraine.

rooms.<sup>23</sup> Housing problems within the migrant population were well-known and caused social alarm, which showed that the Portuguese society considered that migrants' housing was primarily a public responsibility. Therefore, a special care concerning the reception of displaced persons fleeing the war in Ukraine was needed in this regard.

The Government decided to create a specific program for guaranteeing urgent accommodation. This initiative was developed by the Municipalities together with the High Commissioner for Migration and was developed within the public support plan "Porta de Entrada" ("Gateway"), which was a regime applicable to anyone who have been left, temporarily or permanently, without a home, because of an unpredictable and exceptional event.<sup>24</sup> All displaced persons from Ukraine who have been granted temporary protection, regardless of financial condition, could benefit from the program, by enrolling online at the governmental portal "Portugal for Ukraine".

Support for housing happened within three stages of intervention. In phase one, the authorities were responsible for finding a provisional housing solution, namely in a reception center. In phase two, the goal was to find temporary housing, including sharing accommodation, which could be provided by civil society entities or by a tourism facility. Finally, phase three was destined at arranging a permanent solution. Several types of support were created: for example, beneficiaries could receive a financial contribution, by a direct transfer to the household, or to the housing bank account, to bear the costs of rents or accommodation in tourism facilities. The support was granted for a period of up to 18 months, which could be extended up to a maximum of 30 months.

In order to make this support effective, the Decree Law no. 24-B/2022, mentioned above, waived several requirements that are mandatory for other citizens, such as lack of financial means.

## **6.2. Health Care**

The Government decided that all beneficiaries of temporary protection should have access to the *National Health Service*. To make this right effective, the mere request for temporary protection automatically assigned a national user number of the National Health Service (NHS).

As users of the NHS, temporary protection holders were granted all benefits of citizens as regards health care. In general, beneficiaries of NHS benefit in Portugal from a broad range of health care services, which are usually free of charge. They can have access to a hospital or health center and, at most, pay a user fee for hospital emergency services. In cases where there is a prior referral by the NHS, or which results in admission to hospitalization through urgency, the fee is waived. Maternal and child health programs were also included. Moreover, the National Health Service also developed a special procedure to monitor the state of health of children arriving from Ukraine.

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23 See, <https://sicnoticias.pt/pais/2022-06-15-Migrantes-continuum-a-viver-sem-condicoes-em-Odemira-36c5569e>.

24 Article 5 of the Decree-Law 24-B/2022.

The Directorate-General for Health considered that vaccination would be one of the priorities of the host program in terms of health. As a result, a campaign aimed at promoting access to the vaccines was developed in several languages. Access to the vaccination was free of charge in the National Vaccination Program, including vaccination for COVID-19.<sup>25</sup>

### **6.3. *Employment and professional activities***

The Portuguese Government opted to provide full access to the *labour market, independent economic activities, and professional training* to all the temporary protection holders. This, again, was more generous than the solution established in the TPL. The law sets forth that the beneficiaries' access to those activities cannot preclude that *priority* must be given to nationals of the European Union and of the Members of European Economic Area, as well as to foreigners residing in national territory who benefit from unemployment benefits (Article 14, no. 2). However, it stems from the Council of Ministers' Resolution's wording that the employment market should be *completely opened* to the temporary protection holders. A Decree-Law, later approved to regulate the recognition of qualifications of temporary protection beneficiaries clearly stated that the general protectionist rule on priority on access to labour market would not be applicable to holders of temporary protection in this migratory context.<sup>26</sup>

Access to work was, thus, clearly seen as pivotal for the integration of the displaced persons in Portugal. It was also seen as especially urgent: as explained above, the application for protection would be automatically communicated to the Employment Public Institute. Enrolment in the Employment Institute would give free access to a range of services, such as job search support, access to job and internship opportunities, training sessions in Portuguese language, access to support and incentives for employment and mobility.

The platform "Portugal for Ukraine" provided information on available jobs, training opportunities and coworking initiatives. It was also opened for employers, who could post jobs offers to displaced persons. This possibility was broadly used, but there were some difficulties on matching offers with the beneficiaries' qualifications, which were usually higher than those implied in the available jobs.

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25 As stated in the campaign, the citizens' original vaccination schemes should be adapted to those recommended in Portugal. Moreover, it considered that "there is a greater risk of certain vaccine-preventable diseases in countries with low vaccination coverage" and in that, in "the face of disruptive circumstances, such as armed conflict", priorities for vaccination were defined as encompassing measles and poliomyelitis. Additionally, recommendations were issued regarding vaccination against tuberculosis, according to the National Vaccination Program, the Vaccination Campaign against COVID-19 and the Vaccination Campaign against seasonal flu.

26 Article 6 of Decree-Law no. 28-B/2022, of 25 March.

#### **6.4. Recognition of Academic Qualifications**

The Decree-Law no. 24-B/2022 also established several measures aimed at facilitating the recognition of academic qualifications to citizens coming from Ukraine. As such, Article 6 established that all applications for the recognition of professional qualifications submitted by beneficiaries of temporary protection would assume priority. Additionally, several bureaucratic requirements were waived, such as a) legalization formalities of documents issued by foreign entities, b) certification or authentication of translations into Portuguese of documents written in a foreign language, c) certification or authentication of photocopies of original documents, d) fees for registration or of any other nature.

These measures were then developed by Decree-Law no. 28-B/2022 of 25 March. This decree presented several mechanisms to make the recognition of qualifications more efficient. For example, it determined that, when the application had been fully filed and referred to a profession that the Portuguese authorities had already recognized the Ukrainian professional qualifications, if no decision was taken within the legally established period, the request would be considered as tacitly granted. As for the other professions, when the applicant had filed all required documents, the applicant would be authorized to carry out the professional activity in question, if no decision was taken within the deadline. In this case, however, the beneficiary could only work if supervised and accompanied by a recognized professional. For this purpose, he or she should inform the competent authority of the beginning of the activity.

This Decree-Law also established that, when the documentation presented by the applicant was insufficient due to the war situation, the certifying entity should officially contact the European Commission to issue duplicates. If this was not possible, then the applicable solution would differ, depending on the specific professional activity in question: (i) if it was a professional activity in relation to which the competent Portuguese authorities have already assessed the Ukrainian qualifications, the applicant would be authorized to work, in a supervised manner; (ii) for other professions, a procedure similar to that of the European Qualifications Passport for Refugees would be used.

This regime was applicable to regulated professions whose competent authorities for the recognition of support were services or entities of the direct and indirect administration of the State, or independent administrative entities, not being applicable to professions regulated by professional public associations. However, professions exercised in the scope of the operation, management or maintenance of critical infrastructures or that imply a serious safety risk were excluded, as well as professions related to the national sovereignty or to economic and social well-being.<sup>27</sup> This solution would, nonetheless, be periodically reviewed.

The extraordinary measures also provided protection to holders of an academic degree who did not meet the minimum training requirements for the respective

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27 Ordinance no. 144/2022 of 13 May detailed the professions that would be excluded. These would encompass technicians in health, aeronautics, gas and energy, electrical installations, railways, drivers of children's public transport, dangerous goods and security advisors.



recognition. They would be granted admission to a higher education institution that awarded the degree or diploma in the same training area or field of study.<sup>28</sup>

The measures on recognition of degrees were independent of the nationality of the applicant. However, given that nationals of other countries could also benefit from temporary protection, for applications submitted by citizens who had obtained their qualifications in institutions located in territories outside Ukraine, recognition would be handled according to the country in question.

### **6.5. Access to Education**

The right to education was granted to children with temporary protection status, who would have access to public schools in the same conditions as national children. This was also in line with the Portuguese tradition of guaranteeing a universal right to basic education to all children living in the territory, irrespective of their status.<sup>29</sup> Ukrainian children could follow either the Ukrainian Education program (remotely available) or the Portuguese Education program.<sup>30</sup> In both cases, they had the right to be immediately integrated in a Portuguese school upon their arrival, which would accompany their education, even in cases where families chose to follow the Ukrainian program.

Placement and insertion of children in a specific year of schooling was made through simplification of procedures.<sup>31</sup> To accompany their integration, schools have created professionals' multidisciplinary teams, who would be responsible for accompanying the progressive integration into the Portuguese curriculum and reinforcement of Portuguese language learning. The Government created and disseminated, for this purpose, guidelines for the reception, integration and inclusion of children and young Ukrainians in schools.<sup>32</sup>

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28 Article 3 of Decree-Law no. 28-A/2022, of 25 March.

29 This right is guaranteed to children who might live without a valid legal permit, which is foreseen in Decree-Law no. 67/2004, of 25 March. This Law created a registry for children who are illegally staying in Portugal, for the purposes of guaranteeing them the right to access to schools and basic health care.

30 For this purpose, children should be integrated into the national curriculum in a progressive manner. In an initial phase, they would attend subjects deemed appropriate according to their sociolinguistic profile and the school career. The learning of Portuguese as a non-mother tongue would be crucial, bearing in mind its development as a vehicle of knowledge for other subjects in the curriculum in a later stage.

31 For example, translations into Portuguese of documents written in a foreign language should be accepted without the need for certification or authentication. In the absence of any information and/or document on the applicant's school career, age and the corresponding school year/teaching cycle, other elements would be considered. If necessary, diagnostic tests could be carried out for this purpose.

32 General-Directorate of Education, *Orientações para o acolhimento, a integração e a inclusão de crianças e jovens ucranianos*, 2022. These documents provided several guidance for education professionals, stressing important principles such as the development of respect and appreciation of the language and culture of both the country of origin and the host country.

Finally, school social support was also fully granted to children, which could encompass school meals, school materials and scholarships.

Access to basic education also encompassed access to kindergartens. To facilitate and make effective the right to work for mothers – and bearing in mind that the majority of displaced persons arriving to Portugal were women – the Government decided to pass extraordinary measures for enlarging the national network of day care centers. A special guide for helping the integration of children in kindergartens was also enacted.<sup>33</sup>

The right to access to education comprised all levels. As such, access to public universities and other higher education establishments was also guaranteed. The Portuguese Law had created, in 2014, the category of “student in an emergency situation for humanitarian reasons”.<sup>34</sup> Students with the temporary protection would have access to this status.<sup>35</sup> Those who were attending higher education in Ukraine could apply for registration and enrolment in a similar higher education course.<sup>36</sup> The admission of these students was not subject to quantitative limitations, and could occur in all study cycles, including within Medical Schools. Therefore, all universities and other superior education institutions opened additional vacancies for these new students. Integration in the High Education studies would take place immediately, in the academic year of 2021/2022. Naturally, students had to prove that they were enrolled in the corresponding course in Ukraine. However, when the qualifications could not be supported by documents, the Ministry of High Education instructed the higher education institutions to carry out alternative procedures to verify these conditions, namely by using the European Qualifications Passport for Refugees or apply other procedures (e.g., interviews, tests, analysis of school transcripts extracted from the institutions’ websites, among others). Higher Education Institutions would have autonomy to identify the appropriate procedures. As with the other procedures, under the terms of article 6 of Decree-Law no. 24-B/2022, applications for recognition would assume a priority and were exempted from several bureaucratic requirements, such as legalization formalities of documents issued by foreign entities.

Students with temporary protection status would benefit from equal treatment with national citizens, including access to scholarships and social support, such as indirect social action mechanisms (access to food in canteens and bars, accommodation, access to health services). However, some more favourable measures were foreseen, due to the special humanitarian context faced by these pupils. As such, they could be awarded with a basic annual scholarship, without applying the principle of proportionality to the beginning of the studies’ date.

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33 General-Directorate of Education, *Integração de crianças refugiadas na educação pré-escolar*, 2022. The guide provides, for example, orientations on how to promote a healthy learning of the Portuguese language.

34 Decree-Law no. 36/2014, of 10 March.

35 Article 3 of Decree-Law no. 24-B/2022 of 11 March.

36 A similar course was considered to be one that, although eventually designated differently, had the same academic level and provided equivalent training.

## 6.6. *Unaccompanied Minors*

Unaccompanied migrant children in Portugal are integrated in the national system of protection of children at risk and receive the same protection as national children.<sup>37</sup> When confronted with an unaccompanied asylum seeker child, the Aliens and Borders Service shall immediately inform the UNHCR representative on the filing of an application, and also the competent Family and Children Court. The Court will then designate a legal guardian and decide on urgent accommodation of the child.<sup>38</sup>

As regards long-term solutions, unaccompanied children shall be placed, by order of preference, with relative adults, in foster families and, only as last resort, with specialized juvenile housing centers. However, in Portugal, there are traditionally very few families registered as foster families. Thus, there is a high percentage of children that end up being institutionalized. An individual care plan for the child is then designed, containing the medical, educational and training measures, amongst others. The Plan is periodically reviewed and updated on the basis of a best interest's assessment. Unaccompanied children who have been the object of an institutionalization measure according to the Portuguese Law may acquire Portuguese nationality through naturalization (Article 6(3) of the Nationality Law).

Bearing in mind the special duty to protect unaccompanied minors during contexts of mass influx of displaced persons, enshrined in Article 18 TPL, the Government enacted special measures aimed at the registration and protection of displaced children from Ukraine. In this regard, it created a special multidisciplinary monitoring group, with teams from the Ministry of Labour, Solidarity and Social Security, the Ministry of Justice, the Aliens and Borders Service, and the High Commission for Migration.

One month after the invasion of Ukraine, Portugal had already received 65 unaccompanied children fleeing the country.<sup>39</sup> And, in opposition with the trend in Portugal as regards lack of foster families, immediately after, several Portuguese families volunteered to receive unaccompanied children fleeing the war in Ukraine. They could register their readiness to receive children in the public portal “Portugal for Ukraine” and would then have special training to become foster families. By May 2022, and according to the data of the Commissioner for the Protection of Children and Young People’s Rights, there were already 3.000 families that had volunteered to receive unaccompanied children,<sup>40</sup> which is an undoubtedly remarkable number, showing the large mobilization of the civil society for protecting displaced children from this conflict.

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37 The Law on Protection of Children and Youngsters in Danger is thus applicable: Law no. 147/99 of 1 September, as last amended by Law no. 26/2018, de of 5 July.

38 See, on this matter, Luísa Oliveira Alvoeiro, “Notas sobre o acolhimento de menores não acompanhados: O caso grego e o modo de integração dos refugiados da guerra da Ucrânia”, *Julgar*, n.º 49, 2023, pp. 157-180.

39 <https://www.publico.pt/2022/03/29/sociedade/noticia/portugal-recebeu-65-menores-naoacompanhados-ucrania-2000455>.

40 <https://www.dn.pt/sociedade/tres-mil-familias-disponiveis-para-acolher-criancas-refugiadas-14825033.html>.

## 7. AMENDMENTS MADE IN DECEMBER 2022

In December 2022, the Government decided to amend the Resolution that established the group of beneficiaries for temporary protection.<sup>41</sup> The new resolution was meant “to adapt the protection to the current scenario and to the particular needs of those who need protection”. However, it narrowed the scope of the beneficiaries, by excluding protection for holders of temporary residence in Ukraine. As such, from December 2022, Portugal ceased to enact automatic protection for temporary residents in Ukraine. Although the grounding for the amendment is quite vague and general, it is to be believed that this change was meant to fight against abuses of some integration measures, namely by persons who only migrated to Portugal to benefit from the free access to the National Health System.

Even though, two precisions should be made: first, this rule would only affect new applications, and not those who already resided in the territory with a temporary protection status. Moreover, the new rules should be applicable with the full respect of the *non-refoulement* principle. Therefore, persons who had a temporary residence permit should be protected against refoulement, both in the countries of origin and in the transit countries. This naturally meant that these persons should have access to international protection in the Portuguese territory, through the application of the ordinary Portuguese Asylum Law.

The new measure received some criticism from scholars. It was pointed out that the fact that the Portuguese State initially embraced a large personal scope of protection represented, in the International and European context, a very important sign of respect and promotion of International Human Rights Law. Therefore, the amendment should have been made only after a public debate on the reasons for the revision of the temporary protection criteria.<sup>42</sup>

## 8. EXTENSION OF THE PROTECTION

On 13 March 2023, the Council of Ministries enacted the Resolution no. 22-D/2023, which extended the validity of temporary protection titles granted to displaced persons fleeing the war in Ukraine. Although the EU had decided to extend the temporary protection scheme for one year more, the Portuguese Government decided to extend the titles only for six months, although “with the possibility of a subsequent extension for another six months”. Even though, it is to be regrettable that, after presenting itself as a good example in so many measures adopted to respond to the displacement crisis, Portugal opted for a lower threshold of protection as regards the extension period of protection.

Those individuals who already had temporary protection would have their status automatically extended and did not need to take any additional action.

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41 Council of Ministries’ Resolution no. 135/2022, of 28 December.

42 Emellin de Oliveira & Gabriele de Angelis, *A proteção temporária em Portugal para não-Ucranianos deslocados: uma breve análise*. Asylum Policy Lab Blog, January 2023.

## 9. EVALUATION IN PRACTICE

As seen, the Portuguese response to the displacement crisis from Ukraine was swift, broad, and welcoming. Not only did the Government create a contingency plan almost immediately after the Russian invasion, as it provided for specific and concrete measures aimed at making protection successful and easy. The plethora of actions aimed at effectively integrating displaced persons in the Portuguese society was comprehensive and active. There was, as seen, a permanent concern with making access to social rights in the territory successful, and thus administrative procedures and ordinary requirements were facilitated, or even waived, in many contexts.

However, some less positive points must be highlighted at this stage. First, as seen, the extreme generosity that has characterized the first impetus seemed to have given place, some months after, to a stricter approach. In December, the Portuguese Government decided to narrow the personal scope of protection, excluding some categories of persons that were initially eligible to receive temporary protection. Then, the extension of the protection was only made for six months, when the EU decided to extend the activation of the TPD for one year more. The reasons for this approach remain unclear but may be connected to some abusive uses of the mentioned “generosity”.

Secondly, even though the Government tried, as seen, to adopt all sort of measures and expeditions to make integration in the territory a reality, some shortcomings happened from the beginning. Research data highlighted some difficulties faced by temporary migrants fleeing Ukraine who were welcomed in Portugal. The biggest problem seemed to have been finding accommodation – which was not a surprise, since Portugal was facing a housing crisis at the time. First, much of the responses presented by local authorities and the civil society, including citizens’ initiatives, were aimed at accommodating Ukrainian nationals and their family members, not considering foreigners residing in Ukrainian territory. Consequently, migrants from other national origins faced more obstacles to find accommodation outside reception centers, staying in these centers longer than Ukrainian nationals.<sup>43</sup> But even as regards accommodation of Ukrainian citizens, several difficulties arose. It is true that in an early first stage, there was a notable mobilization, both by civil society organizations and individuals, who offered several solutions, including home care for displaced people from Ukraine, either in private homes (permanent housing) or in a second home. Such accommodations were, however, usually temporary: the common expectation was that they would not exceed 2-3 months.<sup>44</sup> Finding suitable independent accommodation was, however, repeatedly reported as being a difficult challenge, namely due to the high price of the rents or other demands from the landlords.<sup>45</sup> As a result, many persons ended up finding solutions next to the members of the Ukrainian diaspora already residing in Portugal – which, in its turn, led to situations of overcrowding.

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43 Emellin de Oliveira & Gabriele de Angelis, cit.

44 Gabriele de Angelis et. al., p. 11.

45 Gabriele de Angelis et. al., p. 15.

The efficiency of the integration in the education system was also questioned by a study: it reported that of the nearly 14.000 minors who arrived in Portugal since the beginning of the conflict, only around 4.000 appeared to be integrated into the Portuguese school system by mid-October, with information missing on the remaining 10.000.<sup>46</sup> The study mentions that several reasons may explain this discrepancy, such as difficulties on finding accommodation, which inevitably delayed the integration procedure.

Discrimination between Ukrainian national citizens and other migrants from other nationalities living in Portugal was also pointed out. Some communities already residing in the country considered to be discriminated against, for not being able to benefit from the same integration measures as those fleeing Ukraine, as regards, for example, recognition of academic and professional qualifications.

Some of the mentioned problems were not specifically related to the temporary protection scheme enacted in 2022: in fact, some difficulties on access to social rights are becoming systemic in the Portuguese territory and affect not only migrants but also national citizens. The access to an adequate housing is perhaps one of the biggest problems affecting the territory.

Portugal is a country that still needs to find its balance between a readiness to welcome all migrants who have chosen the territory to live, and its limited reception conditions. The practice seems not to fully accompany the good welcoming values, as some systemic problems seem to exist as regards access to some social rights in the territory. This may impair a fully successful integration of displaced persons in Portugal, which may deeply contrast with the generosity of the policies decided in 2022 to protected citizens fleeing the war in Ukraine.

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46 Gabriele de Angelis et. al., p. 22.



# (Temporary) Protection of Ukrainians in the UK

*Anna Kirby and Erin Brown\**

## 1. INTRODUCTION TO THE UK IMMIGRATION AND ASYLUM SYSTEM

Following the United Kingdom's official departure from the European Union in 2020, the country is no longer bound by the Union's asylum acquis. Consequently, the UK, in what then Home Secretary Priti Patel dubbed a 'bespoke humanitarian route'<sup>1</sup>, adopted a distinct approach outwith the ordinary UK asylum system in response to persons fleeing the conflict in Ukraine. In doing so, the UK introduced three new visa schemes, allowing for entry, residence and access to a number of other rights. This relatively generous framework of protection was enacted against more than a decade of restrictive immigration policies designed to create a hostile environment for undocumented migrants residing within the territory of the UK.<sup>2</sup> Intended to make life difficult for "illegal" immigrants and thus deter migrants from entering the UK to claim asylum,<sup>3</sup> these policies have had wide-ranging consequences for all groups of migrants, including those with settled status.<sup>4</sup> This political trajectory of heightened anti-immigration rhetoric culminated in the recently proposed Illegal Migration Bill, which if approved would mean that anyone entering the UK "illegally" will be detained, pending removal to their country of origin or a safe third country, and will have no access to the modern slavery support system.<sup>5</sup>

While the UK's approach towards the people of Ukraine is more liberal than that offered to other groups of refugees, for example the Afghan Citizens Resettlement

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1 Walsh, P. & Sumption, M. '*The UK and the Ukraine Refugee Situation*', The Migration Observatory (24 August 2022). Available at: <https://migrationobservatory.ox.ac.uk/resources/briefings/qa-the-uk-and-the-ukraine-refugee-situation/> [accessed 16/03/2023].

2 JCWI, '*The Hostile Environment Explained*', The Joint Council for The Welfare of Immigrants. Available at: <https://www.jcwi.org.uk/the-hostile-environment-explained> [accessed 16/03/2023].

3 Hill, A. '*Hostile environment: the hardline Home Office policy tearing families apart*', The Guardian (28 November 2017). Available at: <https://www.theguardian.com/uk-news/2017/nov/28/hostile-environment-the-hardline-home-office-policy-tearing-families-apart> [accessed 16/03/2023].

4 Liberty, '*Hostile Environment*', Liberty. Available at: <https://www.libertyhumanrights.org.uk/fundamental/hostile-environment/> [accessed 16/03/2023].

5 Home Office, 'Ground-breaking new laws to stop the boats,' GOV.UK (7 March 2023). Available at: <https://www.gov.uk/government/news/ground-breaking-new-laws-to-stop-the-boats> [accessed 16/03/2023].



Scheme<sup>6</sup> which is capped at 20,000 people, or the Scheme for Hong Kong British Nationals (Overseas)<sup>7</sup> which incurs high application fees, it is more restrictive than the EU-wide Temporary Protection Directive (TPD). There are two principal differences between the UK's approach and the TPD, being the eligibility criteria which dictates that a Ukrainian individual or family must have UK family connections or sponsorship and they must apply for a visa in advance.

The three visa schemes introduced by the UK government include the Ukraine Family Scheme, the Ukrainian Sponsorship Scheme (informally referred to as "Homes for Ukraine") and the Ukraine Extension Scheme. As of 16 March 2023, the total number of applications received under the first two visa schemes, permitting entry to the UK, was 278,200; the total number of visas issued was 222,000; and the total number of successful visa applicants that have arrived in the UK was 166,800.<sup>8</sup> Of these numbers, the majority of people have entered through the Sponsorship Scheme.

Each of these three schemes will be examined in a general sense before turning to look at the rights conferred by these schemes in the realms of housing, education, work and healthcare. People displaced due to the conflict in Ukraine may also make an asylum claim through the usual procedure, however they must already be within the territory of the UK to do so.<sup>9</sup>

## **2. LEGAL FRAMEWORK: UKRAINE VISA SCHEMES**

### **2.1. *Ukraine Family Scheme***

The Ukraine Family Scheme was introduced on 4 March 2022. It is designed for those who have family settled in the UK and does not require the applicant to have a UK-based sponsor and gives the right to live, work and study in the UK as well as access to public funds.<sup>10</sup> To be eligible, the applicant must be applying to join a UK-based family member, be Ukrainian or the family member of a Ukrainian national applying to the scheme in order to join UK-based immediate family member and have been living in Ukraine on or immediately before 1 January 2022. The UK-based family member must either be a British national, someone settled in the UK, someone with pre-settled status under the EU Settlement Scheme and living in the UK before 1 January 2021 or someone with refugee status or humanitarian protection in the UK. Every person seeking to obtain a visa through the Ukraine Family Scheme must make an individual application and if successful, this visa entitles one to stay in the UK for

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6 Home Office, 'Afghan citizens resettlement scheme,' GOV.UK (16 August 2022). Available at: <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme> [accessed 16/03/2023].

7 UK Government, 'British National (Overseas) Visa,' GOV.UK Available at: <https://www.gov.uk/british-national-overseas-bno-visa> [accessed 16/03/2023].

8 Home Office, 'Transparency data,' GOV.UK (16 March 2023). Available at: [ukraine-family-scheme-and-ukraine-sponsorship-scheme-homes-for-ukraine-visa-data-2](https://data.gov.uk/dataset/ukraine-family-scheme-and-ukraine-sponsorship-scheme-homes-for-ukraine-visa-data-2) [accessed 16/03/2023].

9 Walsh & Sumption (n.1).

10 Home Office, 'Apply for a Ukraine Family Scheme visa,' GOV.UK (4 March 2022) Available at: <https://www.gov.uk/guidance/apply-for-a-ukraine-family-scheme-visa> [accessed 16/03/2023].

up to three years. The UK Home Office has published detailed guidance on how to decide applications under the Family Scheme - this advice states that persons arriving at the border without the correct entry clearance but who meet the requirements for family relationship should be considered for leave to remain outside of the rules for a period of 6 months, after which they can apply to switch onto the Family visa scheme.<sup>11</sup> On the UK Government's website, it is stated that applications made under this visa scheme will be prioritised by the Home Office.<sup>12</sup>

## **2.2. *Ukrainian Sponsorship Scheme***

Informally referred to as “Homes for Ukraine”, the Ukrainian Sponsorship Scheme was introduced on 18 March 2022. This scheme allows those fleeing Ukraine, who have a sponsor in the UK able to provide accommodation, to apply for a visa.<sup>13</sup> In exchange for providing accommodation, hosts receive a £350 per month “thank-you payment” for the first 12 months of hosting, which then increases to £500 per month during the next 12 months.<sup>14</sup> An individual is eligible to apply if they are either a Ukrainian national ‘resident in Ukraine prior to 1 January 2022’ or an immediate family member of an eligible Ukrainian national.<sup>15</sup> Immediate family members include a spouse or civil partner, an unmarried partner (who you have been living with in a relationship for at least 2 years), a child who is under 18, a parent (if you are under 18) or a fiancé(e) or proposed civil partner. This scheme allows successful applicants to live, work and study in the United Kingdom and also access public funds.

## **2.3. *Ukraine Extension Scheme***

The third scheme has a more specific personal scope than the aforementioned schemes and is available only to Ukrainians and their immediate family members who had permission to be in the UK on the basis of a temporary visa on or between the

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11 Home Office, ‘Ukraine Scheme Guidance 4.0,’ (11 March 2022). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1060447/ukraine-scheme-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060447/ukraine-scheme-guidance.pdf).

12 Home Office, ‘Immigration information for Ukrainians, British nationals and their family members,’ GOV.UK (22 February 2023). Available at: <https://www.gov.uk/government/publications/immigration-information-for-ukrainians-in-the-uk-british-nationals-and-their-family-members/immigration-information-for-ukrainians-in-the-uk-british-nationals-and-their-family-members> [accessed 16/03/2023].

13 Home Office, ‘Apply for a visa under the Ukraine Sponsorship Scheme,’ GOV.UK (31 January 2023). Available at: <https://www.gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme> [accessed 16/03/2023].

14 UK Government, ‘Homes for Ukraine: Register to host people already living in the UK (rematching),’ GOV.UK. Available at: <https://apply-to-offer-homes-for-ukraine.service.gov.ukhttps://apply-to-offer-homes-for-ukraine.service.gov.uk> [accessed 16/03/2023].

15 Home Office (n.13).

period starting 18th March 2022 and 16 May 2023.<sup>16</sup> Immediate family members can be of any nationality and include a spouse or civil partner, an unmarried partner (if living together in a relationship for at least 2 years), a child aged under 18 or a parent (if you are under 18).<sup>17</sup> Additionally, those who previously held permission to be in the UK that expired on or after 1st January 2022 are also eligible to apply through this framework, which allows successful applicants to extend their stay for three years.<sup>18</sup> Like the other two schemes, this avenue permits access to work, education and social benefits and it is free to apply, with no requirement for applicants to pay an immigration health surcharge.<sup>19</sup>

### 3. IMPLEMENTATION AND ACCESS

#### 3.1. *Housing*

The relevant UK government policy which relates to housing offered to refugees from Ukraine is the Ukrainian Sponsorship Scheme. This scheme is reliant on sponsors to provide accommodation for successful applicants to the visa scheme and has resulted in little governmental intervention with regards to housing. Fortunately, more than 100,000 potential sponsors signed up to the scheme in the initial 24 hours of the scheme.<sup>20</sup> Despite this display of mass generosity from the British public, this statistic does not shed light on the number of matches made nor the number of Ukrainian households settled in appropriate accommodation.

As previously stated, a separate application is required for each individual wishing to enter the UK. Hence, for families wishing to apply, there must be an individual application for each family member. This has been met with much criticism as there have been many cases whereby one member of the family has been denied their visa, resulting in the entire family not travelling to the UK.<sup>21</sup> In April 2022, it was reported that a whistleblower working on the Homes for Ukraine scheme disclosed that in many cases where one member of the family is denied a visa, most frequently a child, that this was an intentional splitting of the family.<sup>22</sup> The whistleblower claimed that the scheme has been “designed to fail”, allowing the UK government to report a significant number of visas granted, when in reality, families are frequently left unable

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16 UK Government, ‘Apply to stay in the UK under the Ukraine Extension Scheme,’ GOV.UK (22 February 2023) Available at: <https://www.gov.uk/guidance/apply-to-stay-in-the-uk-under-the-ukraine-extension-scheme> [accessed 16/03/2023].

17 Ibid.

18 Ibid.

19 Ibid.

20 Dathan, M. ‘Rush to take in Ukrainian refugees as 100,000 offer up homes within 24 hours’, *The Times* (15 March 2022) Available at: <https://www.thetimes.co.uk/article/grant-shapps-will-host-ukrainian-refugees-but-sajid-javid-wont-have-the-time-fp6lj5fq> [accessed 16/03/2023].

21 Townsend, M. ‘Homes For Ukraine whistleblower says UK refugee scheme is ‘designed to fail’’, *The Guardian* (23 April 2022) Available at: <https://www.theguardian.com/world/2022/apr/23/homes-for-ukraine-whistleblower-says-uk-refugee-scheme-is-designed-to-fail> [accessed 16/03/2023].

22 Ibid.

to activate their visas due to some members of the family being denied a visa.<sup>23</sup> Hence, there is heavy criticism that by introducing this scheme, the UK government is continuing its restrictive policy towards immigration under the guise of these seemingly beneficial schemes. Instead of providing adequate protection, it may be argued that the UK government is merely paying lip service to the plight of those fleeing the conflict in Ukraine.

For those who do successfully obtain a visa and enter the UK under this scheme, they are met with a lack of protection, an issue that has been raised by many refugee and anti-trafficking NGO's. Sixteen refugee and anti-trafficking organisations wrote a letter to Secretary of State for Levelling Up, Housing and Communities, Michael Gove MP, expressing their concerns and detailing the risks that the Homes for Ukraine scheme presents to already vulnerable groups.<sup>24</sup> It is well-founded that conflict can 'create and compound opportunities for crime, including human trafficking and exploitation',<sup>25</sup> and the NGO's that produced the letter argued that the UK government's 'hands-off approach' to matching refugees with prospective sponsors was further amplifying this risk.<sup>26</sup> The organisations argued that refugees were reliant on social media pages and posts independent of the government, alongside non-verified matching sites which gives rise to a high risk of 'traffickers, criminals and unscrupulous landlords' who would have ulterior motives for matching with and hosting refugees.<sup>27</sup> Other, more general, concerns were raised regarding the 'power imbalance' between sponsor and guest that, due to the nature of the scheme, is unavoidable.<sup>28</sup> The letter also noted that, despite the government's limited efforts, pre-arrival checks on the volunteer sponsors or the accommodation itself were being sidestepped and hence argued that further action is required to ensure the appropriate pre-arrival safeguarding checks and accommodation inspections were carried out.<sup>29</sup>

Furthermore, in Ukraine, the majority of men aged 18 to 60 are not permitted to leave the country while martial law is in place.<sup>30</sup> As a result, the demographic of externally displaced persons fleeing Ukraine is predominantly women, with UN Women reporting that 90 per cent of those who have left Ukraine are women and

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23 Ibid.

24 'Letter to Rt Hon Michael Gove MP,' Refugee Action (26 March 2022) Available at: <https://www.refugee-action.org.uk/wp-content/uploads/2022/03/Letter-To-The-Rt-Hon-Mr-Michael-Gove-MP-Homes-For-Ukraine.pdf> [accessed 16/03/2023].

25 Cockbain, E. & Sidebottom, A. 'War, Displacement, and Human Trafficking and Exploitation: Findings from an evidence-gathering Roundtable in Response to the War in Ukraine', (2022) *Journal of Human Trafficking*, DOI: 10.1080/23322705.2022.2128242.

26 Refugee Action (n.24).

27 Ibid.

28 Taylor, R. 'Ukrainian refugees in the UK: Access to public services and employment,' UK Parliament (4 July 2022) Available at: <https://lordslibrary.parliament.uk/ukrainian-refugees-in-the-uk-access-to-public-services-and-employment/> [accessed 16/03/2023].

29 Refugee Action (n.24).

30 Decree of the President of Ukraine of 24.02.2022 № 64/2022 "On the imposition of martial law in Ukraine" Available at <https://rm.coe.int/1680a5b041> [accessed 16/03/2023].

children.<sup>31</sup> This statistic highlights that women and their underage dependents are more at risk of exploitation from potential abusers in the host country. Furthermore, with many pre-arrival checks not being carried out, the risk of harm is further heightened for already vulnerable groups. Thus many facets of the Homes for Ukraine scheme raise questions surrounding effective protection of vulnerable groups and may serve to undermine the attempts to provide protection for Ukrainian refugees.

The sustainability of each of the visa schemes regarding housing causes concern. Despite the UK government's promise of housing for those who obtain a visa, data shows that from 24th February 2022 until 27th January 2023, 4,630 Ukrainian visa-holding households have been made homeless or are at risk of homelessness within England.<sup>32</sup> Furthermore, 69% of households have dependent children.<sup>33</sup> The UK government cites accommodation or arrangement break down, unsuitable accommodation upon arrival or the visa-holding household's rejection of the sponsor's offer as being the main reasons for homelessness or the risk thereof.<sup>34</sup> In reality, statistics that show a true representation of the severity of this issue may be far greater as 97 local authorities have not submitted data for this report. More specifically, with regards to the Homes for Ukraine scheme, 2,910 households that hold this visa have been made homeless or are at risk of homelessness, with 90.5% of cases being attributed to accommodation or arrangement breaking down.<sup>35</sup> A further 8.9% of cases are attributed to accommodation being unavailable or unsuitable on arrival.<sup>36</sup> This reaffirms the stance that the Homes for Ukraine scheme provides unstable living arrangements for refugees and that there are a lack of safeguards in place to ensure this scheme provides adequate protection for those it targets. Furthermore, homelessness places further pressure and strain on affected

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31 UN Women and Care International, 'Rapid Gender Analysis of Ukraine,' UN Women (4 May 2022). Available at <https://www.unwomen.org/en/digital-library/publications/2022/05/rapid-gender-analysis-of-ukraine> [accessed 16/03/2023].

32 United Kingdom Government, Monitoring Ukrainian Homelessness Pressures Data (24 February 2022 - 24 February 2023) Available at: [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment\\_data%2Ffile%2F1141192%2FUkraine\\_Homelessness\\_Pressures\\_09032023.ods&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F1141192%2FUkraine_Homelessness_Pressures_09032023.ods&wdOrigin=BROWSELINK) [accessed 16/03/2023].

33 United Kingdom Government, Monitoring Ukrainian Homelessness Pressures Data (24 February 2022 – 24 February 2023) Available at: [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment\\_data%2Ffile%2F1141192%2FUkraine\\_Homelessness\\_Pressures\\_09032023.ods&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F1141192%2FUkraine_Homelessness_Pressures_09032023.ods&wdOrigin=BROWSELINK) [accessed 16/03/2023].

34 Ibid.

35 Ibid.

36 Ibid.

households and increases vulnerability and risks of abuse from organised crime rings promising accommodation before subjecting victims to modern slavery.<sup>37</sup>

### *3.1.1. Scotland*

The Scottish government announced on 18 March 2022 that it would act as a “super-sponsor” for the Homes for Ukraine Scheme introduced by the Westminster government.<sup>38</sup> With the Scottish government acting as a sponsor, Ukrainian refugees would not be reliant on individual members of the public in order to obtain a visa to enter the country, thus, this initiative gives those fleeing Ukraine a greater chance of being granted a visa. Data released by the UK government shows that 38,314 visa applications cited the Scottish government as a sponsor of a total of 183,015 applications to the UK visa schemes.<sup>39</sup> 32,559 successful visa applications cited the Scottish government as a sponsor, compared to only 5,606 successful visa applications citing an individual sponsor.<sup>40</sup> This “super-sponsor” policy from the Scottish government thus opened doors for many Ukrainian refugees.

Upon arrival, the Scottish government provides displaced Ukrainians with accommodation on a temporary basis until they are matched with a host. The Scottish government, in an innovative fashion, contracted the use of two cruise ships in order to provide accommodation for Ukrainian refugees before more stable arrangements could be made. As with the Homes for Ukraine scheme, the Scottish Super Sponsor scheme requires local authorities to undertake disclosure checks, a safeguarding check and a property visit to ensure the safety and quality of the accommodation to be provided for by the host.<sup>41</sup> Hosts and offers of property “should not be put forward for matching under the Super Sponsor scheme where they do not meet the required standard in any of the” checks.<sup>42</sup> This scheme was temporarily paused on 13 July 2022.

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37 ‘Targeted for sex and made homeless: Homes for Ukraine failing refugees,’ CARE (19 May 2022) Available at: <https://care.org.uk/news/2022/05/targeted-for-sex-and-made-homeless-homes-for-ukraine-scheme-failing-refugees> [accessed 16/03/2023].

38 Scottish Government, ‘Scotland’s support for displaced people from Ukraine,’ GOV.SCOT (11 July 2022) Available at: <https://www.gov.scot/publications/scotlands-support-displaced-people-ukraine/> [accessed 16/03/2023].

39 Department for Levelling Up, Housing and Communities, ‘Ukraine Sponsorship Scheme: Visa data by country, upper and lower tier local authority,’ GOV.UK (16 March 2023). Available at: <https://www.gov.uk/guidance/ukraine-sponsorship-scheme-visa-data-by-country-upper-and-lower-tier-local-authority> [accessed 16/03/2023].

40 Ibid.

41 Scottish Government, ‘Super Sponsor Scheme and Homes for Ukraine: guidance for local authorities,’ GOV.SCOT (7 March 2023). Available at <https://www.gov.scot/publications/super-sponsor-scheme-and-homes-for-ukraine-guidance-for-local-authorities/pages/data-flow-and-checks/> [accessed 16/03/2023].

42 Ibid.

### 3.1.2. *Wales*

The Welsh Assembly introduced a similar super sponsor scheme to Scotland, launched on 18 March and paused on 10 June. The scheme saw 4,204 visas issued that cited individuals as sponsors and 4,614 visas issued that cited the Welsh Government.<sup>43</sup>

### 3.1.3. *Northern Ireland*

Unlike the Scottish and Welsh governments, the Northern Irish government did not opt to implement a “super sponsor” scheme whereby the government would act as sponsor for incoming Ukrainian refugees. Hence, only 2,087 visas were issued for Northern Ireland, all of which were sponsored by individuals.<sup>44</sup> This lack of regional policy is due to the fact that the Northern Ireland Assembly has been suspended since 4 February 2022.<sup>45</sup>

## 3.2. *Work*

Those whose visa applications are successful are eligible to work in the UK.<sup>46</sup> Employers will request proof of the right to work, which can be evidenced by a Biometric Residence Permit and National Insurance Number.<sup>47</sup> Holders of a valid visa are entitled to a minimum wage, employment protection and other rights. In November 2022, the Office for National Statistics released data on the experience of visa holders who had entered the United Kingdom under the Ukraine Humanitarian Schemes.<sup>48</sup> It found that, with regards to the labour market, 56% of respondents were currently employed in the UK, almost triple that of the June 2022 statistic.<sup>49</sup> However, this statistic shows that many are still without employment and may be without regular and sufficient income.

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43 Department for Levelling Up, Housing and Communities (n.43).

44 Department for Levelling Up, Housing and Communities (n.43).

45 Rees Jones I. & Chaney, P. ‘*Examining the Scottish and Northern Irish responses to the Ukrainian refugee crisis*’, Wales Institute of Social and Economic Research and Data (25 March 2022). Available at: <https://wiserd.ac.uk/blog/examining-the-scottish-and-northern-irish-responses-to-the-ukrainian-refugee-crisis/> [accessed 16/03/2023].

46 Home Office, ‘Moving to the UK if you’re coming from Ukraine,’ GOV.UK (22 February 2023) Available at: <https://www.gov.uk/guidance/move-to-the-uk-if-youre-from-ukraine#working-in-the-uk> [accessed 16/03/2023].

47 ‘Right to Work,’ United for Ukraine (2023) Available at: <https://www.unitedforukraine.org.uk/right-to-work/#:~:text=Yes,work%20in%20the%20United%20Kingdom> [accessed 16/03/2023].

48 Office for National Statistics, ‘Visa holders entering the UK under the Ukraine Humanitarian Schemes,’ ONS (22 November 2022). Available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/visaholdersenteringtheukundertheukrainehumanitarianschemes/17octoberto7november2022> [accessed 16/03/2023].

49 Ibid.

Despite an increase in employment rates, 65% of survey respondents were unable to find employment in the professional field they worked in in Ukraine.<sup>50</sup> Half of the respondents reported experiencing barriers to gaining employment in the UK. Of those who reported difficulties in gaining employment, 56% cited their English language skills as inhibiting their job prospects and 33% reported that their qualifications were not accredited in the UK.<sup>51</sup> Hence, despite being granted the right to work in the UK through the bespoke humanitarian visa schemes, the realisation of this right is limited by the practical barriers mentioned.

Many Ukrainian women reported concerns over balancing employment and affording/providing childcare for their children.<sup>52</sup> With women being the predominant demographic of displaced people from Ukraine, the UK government noted that teaching roles are “particularly suitable for mothers with young children” due to the hours worked, thus relieving pressures of finding childcare.<sup>53</sup> However, a report from the BBC highlighted that many faced issues with obtaining safeguarding checks for certain positions, such as teaching roles.<sup>54</sup> Hence, with the majority of men being required to stay behind in Ukraine under martial law, many women have become solely responsible for their household income and face the struggle of balancing work and childcare without partners, friends and family to help alleviate the burden.

Where individuals hold a visa and are unable to work, are in search of work or are employed but receiving a low income, they are entitled to claim Universal Credit.<sup>55</sup> Universal credit is a social welfare payment to assist with living costs and thus can help relieve financial burdens associated with both short and long-term unemployment and low income. Universal Credit is notoriously difficult to claim, with many citing the many ‘hoops to jump through’.<sup>56</sup> Individuals can also apply for carer’s allowance and child benefit where eligible. However, despite having access to the UK social welfare system, it does not appear to be sufficient, with many Ukrainian refugees, much like many UK citizens, resorting to the use of foodbanks.<sup>57</sup>

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50 Ibid.

51 Ibid.

52 Bryant, M. ‘Ukrainian women fear childcare issues will affect their ability to work in the UK’, *The Guardian* (22 May 2022). Available at: <https://www.theguardian.com/world/2022/may/22/ukrainian-women-fear-childcare-issues-will-affect-their-ability-to-work-in-uk> [accessed 16/03/2023].

53 Taylor (n.33).

54 Adams, C. ‘Ukrainian refugees are now living in the UK - so how is it going?’, *BBC* (28 May 2022). Available at: <https://www.bbc.com/news/uk-61548979> [accessed 16/03/2023].

55 United for Ukraine (n.51).

56 Spice, S. ‘Universal Credit makes you jump through so many hoops, you just want to give up’, *The Guardian* (13 July 2022). Available at: <https://amp.theguardian.com/commentisfree/2022/jul/13/universal-credit-jump-through-hoops-give-up> [accessed 16/03/2023].

57 Bryant, M. ‘Ukrainian refugees turn to food banks as UK hosts struggle with costs’, *The Guardian* (28 May 2022). Available at: <https://www.theguardian.com/society/2022/may/28/ukrainian-refugees-food-banks-uk-hosts-costs-families-war-charity> [accessed 16/03/2023].



### 3.3. Education

The right to primary and secondary education is provided for under each of the three visa schemes. Councils are obligated to provide places for all children of school age and received additional funding for each child, varying across three phases of education.<sup>58</sup> In the UK Humanitarian Response Insight Follow-up survey, the Office for National Statistics found that out of the 45% of adults who live in the UK with a dependent child who arrived alongside them from Ukraine, 54% said their children attend primary school, and 39% said they attend secondary school.<sup>59</sup> Official statistics state that at the start of the 2022/2023 school year, around 92% of all applications for school places had been fulfilled.<sup>60</sup>

Taking into account practical considerations and reasons such as remote continued education from Ukraine, it is difficult to determine the exact proportion of eligible school-age children residing in the UK that are successfully enrolled in education. Yet these numbers do indicate to some extent that education at primary and secondary levels is readily accessible. The results of the follow-up survey nevertheless found that 20% of visa holders experienced difficulties registering their children in the school system, the majority of whom stated uncertainty over whether their children were entitled to education and whether they could begin mid-academic year.<sup>61</sup> On its website, the UK Government has published guidance on support for children and young people arriving from Ukraine, intended for use as a reference to help schools and colleges.<sup>62</sup> This handbook includes specific considerations that should be taken into account, such as mental health support and advice on avoiding misinformation about the conflict, as well as a range of resources for learning English as an additional language. 60% of follow-up survey respondents with children in school stated that they were receiving necessary English language support, while 21% reported that there was no support available to their children, despite needing it.<sup>63</sup>

Firstly, these concerns allude to a lack of awareness on the exact rights of Ukrainian visa-holders in relation to education for their dependent children and the UK education system more generally. The UK Government's website contains guidance detailing the right to education for those who have arrived in the UK

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58 UNESCO, 'United Kingdom's education responses to the influx of Ukrainian students,' (21 April 2022). Available at: <https://www.unesco.org/en/articles/united-kingdoms-education-responses-influx-ukrainian-students> [accessed 16/03/2023].

59 Office for National Statistics (n.52).

60 Department for Education, 'How many pupils from Ukraine have been given school places in England?' GOV.UK (9 June 2022). Available at: <https://educationhub.blog.gov.uk/2022/06/09/how-many-pupils-from-ukraine-have-been-given-school-places-in-england/> [accessed 16/03/2023].

61 Office for National Statistics (n.52).

62 Department for Education, 'Resources to help support children and young people arriving from Ukraine,' GOV.UK (28 September 2022). Available at: <https://www.gov.uk/government/publications/helping-ukrainian-students-in-schools/resources-to-help-support-children-and-young-people-arriving-from-ukraine> [accessed 16/03/2023].

63 Office for National Statistics (n.52).

through the Ukrainian visa-schemes - available in English, Ukrainian and Russian.<sup>64</sup> The Department for Education also produced specific advice on applying for school places and childcare.<sup>65</sup> However, it is unclear to what extent this information has been disseminated to new arrivals or is generally available in a non-digital format, meaning that technological barriers may act as an obstacle to accessing education. Moreover, while the official government guidance demonstrates understanding of the importance of English language support, this has not transpired into the necessary resources within education institutions nationwide, arguably stemming from wider funding issues amid cuts to public spending.<sup>66</sup>

Ukraine is a member of the Bologna process meaning that qualifications achieved there should be recognised by other universities in the European Higher Education Area, of which the UK is part.<sup>67</sup> Higher education bodies in the UK act autonomously in relation to their admissions procedures and consequently there are no uniform standards for accepting Ukrainian qualifications. However, the Department for Education has advised institutions to be “as flexible as possible” when assessing applications from Ukrainian students.<sup>68</sup> Individuals residing in the UK under the Ukrainian visa-schemes have the right to study in higher education institutions under home fee status and are eligible for a range of financial support on the same basis as nationals.<sup>69</sup> Available student support varies across the UK and may be based on individual circumstances. For example, Ukrainian-visa-holders who settle in Scotland are eligible for free tuition and living cost support.<sup>70</sup> Granting home fee status is undeniably significant, as financial considerations constitute one of the largest barriers forced migrants face in pursuit of higher education.<sup>71</sup>

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64 Department for Levelling Up, Housing and Communities, ‘Childcare and education up to 16 years old: Homes for Ukraine,’ GOV.UK (16 January 2023). Available at: <https://www.gov.uk/guidance/childcare-and-education-up-to-16-years-old-homes-for-ukraine> [accessed 16/03/2023].

65 Department for Education, ‘How do families arriving from Ukraine apply for a school place and childcare?’ GOV.UK (11 April 2022). Available at: <https://educationhub.blog.gov.uk/2022/04/11/how-do-families-arriving-from-ukraine-apply-for-a-school-place-and-childcare-як-родинам-що-приїжджа/> [accessed 16/03/2023].

66 Drayton, E. et al. ‘Annual report on education spending in England: 2022,’ IFS (12 December 2022). Available at: <https://ifs.org.uk/publications/annual-report-education-spending-england-2022> [accessed 16/03/2023].

67 Morrice, L. ‘Will the war in Ukraine be a pivotal moment for refugee education in Europe?’ (2022) *International Journal of Lifelong Education* 41(3): 251-256, DOI: 10.1080/02601370.2022.2079260.

68 Jenkyns, A. ‘Question for Department for Education,’ UK Parliament (21 July 2022). Available at: <https://questions-statements.parliament.uk/written-questions/detail/2022-07-21/42041> [accessed 16/03/2023].

69 ‘Support for students from Ukraine in higher education,’ UK Parliament (20 December 2022). Available at <https://commonslibrary.parliament.uk/support-for-students-from-ukraine-in-uk-higher-education/> [accessed 16/03/2023].

70 ‘Support for Ukrainian Students,’ SAAS (2023). Available at: <https://www.saas.gov.uk/guides/residence-outside-uk-eu-eea-switzerland> [accessed 16/03/2023].

71 Murray, M. ‘UK University Initiatives Supporting Forced Migrants: Acts of Resistance or the Reproduction of Structural Inequalities?’ (2022) *Migration and Society: Advances in Research* 5: 99–114.

At the time of the invasion, there were approximately 1.67 million students in tertiary education in Ukraine, many of whom were displaced with uncertainty over whether they could continue their studies.<sup>72</sup> At present, there is no system in place for ensuring continuation of studies where students have already begun their studies at a Ukrainian institution. The Higher education sector has mobilised in this respect, albeit on an ad hoc basis, utilising existing mechanisms such as Sanctuary scholarship programmes and dialogue through the Council for At Risk Academics to enable displaced students and academics to come to the UK.<sup>73</sup> King's College London pioneered the 'King's Sanctuary Programme', becoming the first University to be accredited as a Community Sponsor under the UK Refugee Community Sponsorship Scheme, allowing the institution to act as a host for a displaced refugee student.<sup>74</sup> Responding to the large population of students displaced from Ukraine, in a collaborative effort Kings created the University Sponsorship Model which enables higher education bodies to assist in matching displaced students and academics to host sponsors in their community through the Homes for Ukraine Scheme.<sup>75</sup> It is hoped that this initiative can provide a blueprint for education-led pathways to resettlement in the future.<sup>76</sup>

As only Ukrainian nationals or their close family members are eligible for the visa schemes, this leaves the question of the approximately 80,470 international students who were studying abroad in Ukraine at the time of Russia's invasion.<sup>77</sup> These individuals have to go through the standard asylum procedure if they wish to enter the UK.

### 3.4. *Healthcare*

Each of the three visa schemes entitles beneficiaries to free NHS healthcare, including GP services and emergency care.<sup>78</sup> Individuals are not required to show proof of identity or address to register with a GP practice and registration should not

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<sup>72</sup> Morrice (n.71).

<sup>73</sup> Parry, B. & Ansems de Vries, L. 'Homes for Ukraine - laying the foundations for university refugee sponsorship', WONKHE (6 April 2022). Available at: <https://wonkhe.com/blogs/homes-for-ukraine-laying-the-foundations-for-university-refugee-sponsorship/> [accessed 16/03/2023].

<sup>74</sup> Ibid.

<sup>75</sup> Ansems de Vries, L. & Mennell, N. 'University Sponsorship: Providing sanctuary for Ukrainian students and academics', King's College London (21 February 2023). Available at: <https://www.kcl.ac.uk/university-sponsorship> [accessed 16/03/2023].

<sup>76</sup> Ibid.

<sup>77</sup> 'Ukraine International Student Statistics,' Erudera (2022). Available at: <https://erudera.com/statistics/ukraine/ukraine-international-student-statistics/> [accessed 16/03/2023].

<sup>78</sup> Department for Health and Social Care, 'Ukrainians fleeing war granted free access to NHS healthcare,' GOV.UK (17 March 2022). Available at: <https://www.gov.uk/government/news/ukrainians-fleeing-war-granted-free-access-to-nhs-healthcare> [accessed 16/03/2023].

be denied for this reason.<sup>79</sup> The Government has published detailed guidance for primary care professionals on the specific health needs of patients ordinarily resident in Ukraine.<sup>80</sup> This advice emphasises the importance of a trauma-informed approach, and outlines special considerations to be taken in relation to language, safeguarding and mental health. The Office of National Statistics reported that 26% of adults from Ukraine surveyed described feeling anxious, nervous or on edge and 19% felt depressed.<sup>81</sup> Given the nexus between conflict, forced displacement and psychological trauma, health professionals are encouraged to take time to assess the mental health needs of new patients, taking a culturally sensitive approach with regard to potential mental health stigma.<sup>82</sup> The Department for Levelling Up, Housing and Communities has put together guidance on NHS services available to adults and children under the visa schemes, published on the GOV.UK website in English, Ukrainian and Russian.<sup>83</sup>

Despite calls for Ukrainian refugees to be integrated into the healthcare system in an organised manner,<sup>84</sup> this was not the case and instead it falls to the individuals themselves registering with health services as and when needed. Research shows that many people who were receiving regular healthcare in Ukraine have not continued to do so after arrival to the UK, suggesting that they have not been “empowered to seek support”.<sup>85</sup> A Health Needs Survey for Ukrainian displaced persons and refugees found that in the UK, less than half of respondents currently had both access to healthcare facilities and knew where to find them in their community.<sup>86</sup> This again highlights issues regarding the circulation of information to all individuals arriving in the UK about exactly what services they are entitled to and how to access them. While this guidance is clearly out there, it arguably demands a more proactive approach on the part of local councils in ensuring refugee communities are properly informed.

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79 UK Health Security Agency, ‘Arrivals from Ukraine: advice for primary care,’ GOV.UK (12 December 2022). Available at: <https://www.gov.uk/government/publications/arrivals-from-ukraine-advice-for-primary-care/arrivals-from-ukraine-advice-for-primary-care> [accessed 16/03/2023].

80 Ibid.

81 Office for National Statistics (n.52).

82 UK Health Security Agency (n.83).

83 Department for Levelling Up, Housing and Communities, ‘Adult Health: Homes for Ukraine,’ GOV.UK (16 January 2023). Available at: <https://www.gov.uk/guidance/adult-health-homes-for-ukraine> [accessed 16/03/2023].

84 McCall, B. ‘Ukrainian Refugee Health Needs to be Central to UK Home Office Response to Crisis, Say Doctors’, Medscape UK (5 April 2022). Available at: <https://www.medscape.co.uk/viewarticle/ukrainian-refugee-health-needs-be-central-uk-home-office-2022a1000view> [accessed 16/03/2023].

85 Kirton, H. et al., ‘Ukraine refugees not accessing NHS despite need’, HSJ (1 June 2022). Available at: <https://www.hsj.co.uk/health-inequalities/ukraine-refugees-not-accessing-nhs-despite-need/7032520.article> [accessed 16/03/2023].

86 University of Southampton et al., ‘Health Needs Survey for Ukrainian displaced persons and refugees’, Clinical Informatics Research Unit (22 June 2022). Available at: <https://www.the-ciru.com/resin-ukraine> [accessed 16/03/2023].

The issue of access to healthcare services is unfortunately not specific to Ukrainian refugees, with the NHS in crisis after more than a decade of cuts to funding.<sup>87</sup> Despite having the right to healthcare on paper, many individuals have reported serious difficulties in obtaining appointments for health issues, with some even stating that they had returned to Ukraine to access healthcare there as the system is still far more efficient.<sup>88</sup>

#### 4. CONCLUSION

Accounts from Ukrainian refugees have been overwhelmingly positive with regard to the welcome they have received from the UK general public.<sup>89</sup> Nevertheless, this heartening reception somewhat diverts attention from the Government's response to persons displaced due to the conflict, which has been described as 'fragmented and confusing' and possessing a 'lack of clarity, transparency, accountability and resourcing'.<sup>90</sup> This critique relates to policy differences across the devolved nations as well as varying levels of implementation between local councils. The politically diverse landscapes of the devolved nations which comprise the United Kingdom, as evidenced by divisive General Election results, divergence on Brexit vote and attitudes towards immigration more generally, result in differing governmental opinions on how to best assist Ukrainian refugees. However, due to immigration being a power reserved to the Westminster government, the devolved nations are limited in what they can do and as such, must think creatively in order to attempt to mitigate restrictive Westminster policies. Similar disparities have been observed across the EU Member States regarding rights given to Ukrainian refugees and their means of accessing these rights.<sup>91</sup>

In terms of the success of the implementation of the three visa schemes regarding access to individual rights, there are several key concerns. Potential safeguarding issues relating to Homes for Ukraine cannot be downplayed, as well as the long-term viability of the scheme which has seen support dwindle over the year despite an increase in the monthly payment provided to hosts and many people still living in

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87 'NHS leaders facing real-terms cut in funding and 'impossible choices' over which areas of patient care to cut back,' NHS Confederation (21 July 2022). Available at: <https://www.nhsconfed.org/news/nhs-leaders-facing-real-terms-cut-funding-and-impossible-choices-over-which-areas-patient-care> [accessed 16/03/2023].

88 Lyons, E. 'UK National Health Service delays drive some Ukrainian refugees to return to war zone for quick care', CBS News (20 February 2023). Available at: <https://www.cbsnews.com/news/ukraine-refugees-go-home-medical-care-uk-nhs-crisis-national-health-service-delays/> [accessed 16/03/2023].

89 Martin, D. & Harby, J. 'How Ukrainian refugees found their second home in the UK', BBC (23 February 2023). Available at: <https://www.bbc.com/news/uk-england-derbyshire-64676216> [accessed 17/03/2023].

90 Cockbain & Sidebottom (n.25).

91 FRA, 'National legislation implementing the EU Temporary Protection Directive in selected EU Member States,' European Union Agency for Fundamental Rights (3 August 2022). Available at: <http://fra.europa.eu/en/publication/2022/national-legislation-implementing-eu-temporary-protection-directive-selected-eu> [accessed 17/03/2023].

temporary accommodation such as cruise ships. The main obstacles to full realisation of the right to work - particularly finding work in their desired field - appear to be related to difficulties over acceptance of Ukrainian qualifications, language barriers and access to childcare. Being that the majority of Ukrainian refugees in the UK are women and children, this latter barrier is of paramount concern, raising questions about wider nationwide resource issues. Cuts to public spending and its knock on effects have also had repercussions for access to healthcare and education for Ukrainian visa holders residing in the UK. Taken in combination with an apparent lack of easily available guidance, this means that many are going without the services they are entitled to.

More broadly, the decision not to waive visas for those fleeing Ukraine, as done by the EU, created an overly bureaucratised system, characterised by long wait times and inconsistent decision making.<sup>92</sup> Justified in reference to security concerns, this approach instead leaves vulnerable groups even more at risk by preventing quick access to safety and necessary services, as well as increasing the likelihood of individuals travelling through irregular routes, and consequent exposure to trafficking and exploitation.<sup>93</sup> In fact, research done as part of the SEREDA project in the UK, although not relating specifically to those fleeing Ukraine, finds that the visa system provides no additional protection against the risk of trafficking.<sup>94</sup> Responding to the House of Lords Debate on the Ukraine Sponsorship Scheme, lead researcher on the project Professor Jenny Phillimore instead asserts the importance of allocating extra resources to cut waiting times and ensuring the implementation of robust safeguarding procedures as protective mechanisms.<sup>95</sup> It must be asked whether such security concerns can be legitimately justified when weighed against the safety and wellbeing of already vulnerable individuals.

Arguably a major limitation of the UK approach is its limited scope in relation to non-Ukrainian nationals who were living in Ukraine at the time of Russia's invasion, who must go through the regular asylum process if they wish to reside in the UK. As none of the visa schemes provide a route to permanent settlement, it is unclear what will happen at the end of the three year period for those who wish to stay; this doubt however is undeniably not specific to the UK.<sup>96</sup>

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<sup>92</sup> House of Lords, 'Ukraine: Refugees Debate,' UK Parliament (6 April 2022). Available at: <https://hansard.parliament.uk/Lords/2022-04-06/debates/8D81AC06-3AA2-47E2-B145-98F1B87CA4D7/UkraineRefugees> [accessed 17/03/2023].

<sup>93</sup> Cockbain & Sidebottom (n.25).

<sup>94</sup> University of Birmingham, 'SEREDA Policy Briefing 2021,' Available at: <https://www.birmingham.ac.uk/documents/college-social-sciences/social-policy/iris/2021/sereda-asylum-immigration-system-brief.pdf> [accessed 17/03/2023].

<sup>95</sup> Ankiilu, M. 'University of Birmingham expert Responds to Lords Debate on Visas for Ukrainian Refugees', *African Eye* (5 April 2022). Available at: <https://africaneyereport.com/university-of-birmingham-expert-responds-to-lords-debate-on-visas-for-ukrainian-refugees/> [accessed 17/03/2023].

<sup>96</sup> Walsh & Sumption (n.1).



# Temporary Protection and the Future of Ukrainians in the EU

*Elsbeth Guild and Kees Groenendijk\**

## 1. INTRODUCTION

At the time of writing, we are already in the second year of the EU's Temporary Protection Scheme (Ukraine) opened on 4 March 2022 and providing extensive rights (including intra-EU mobility) to those fleeing the full-scale Russian invasion which took place on 24 February 2022. Under the Temporary Protection Directive<sup>1</sup> the Scheme was extended until March 2024 and may be extended one further year. Thereafter it must end. Again, at the time of writing, it is not clear how or when the war in Ukraine will end. What is clear is that there will be long lasting consequences to the war including as a result of damage to infrastructure which will take years to reconstruct and resolve.

According to UNHCR, almost 6 million refugees from Ukraine have been recorded in Europe (wider than the EU).<sup>2</sup> According to EUROSTAT the number of persons fleeing Ukraine benefiting under the Scheme was just under 4 million in April 2023.<sup>3</sup> The EU Member States which received the highest number of these non-EU citizens were Germany (28% of the total), Poland (25%) and Czechia (8%). Member States have, in general, made substantial efforts to fulfil their obligations according to the Scheme. Refugees benefiting from it have in many cases made remarkable progress in integrating into their host Member State.<sup>4</sup>

With just over 18 months left under the Directive, increasingly scholars and institutions are examining options for the future. The general view, expressed also by

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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 (OJ L 212, 7.8.2001, p. 12–23).

2 <https://data2.unhcr.org/en/situations/ukraine> [accessed 6 July 2023].

3 [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary\\_protection\\_for\\_persons\\_fleeing\\_Ukraine\\_-\\_monthly\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Temporary_protection_for_persons_fleeing_Ukraine_-_monthly_statistics) [accessed 6 July 2023].

4 de Sousa, Constança Urbano. "The Protection of Displaced Persons from Ukraine in Portugal." *European Journal of Migration and Law* 24.3 (2022): 313-329.



the EU's Special Adviser on Ukraine, Lodewijk Asscher, in his May 2023 report<sup>5</sup> is that there must be an EU-wide single approach to the residence and rights of these persons after the end of the Scheme. He has recommended the adoption of a Reconstruction Permit valid for up to ten years which could be launched by a joint statement between the EU and Ukraine. Key to a smooth transition at the end of the TP Scheme is that all TP beneficiaries should transition automatically to another status. Any other situation would result in chaos in Member States' immigration departments where millions of applications would have to be treated individually. This far exceeds what these departments are normally capable of managing. According to Eurostat, annually these departments are issuing about 3 million first residence permits per year.<sup>6</sup> A sudden addition of 5 million applications would swamp them unless enormous resources were devoted to them.<sup>7</sup>

Among the other options which have been recommended are (1) an amendment to the Directive to allow for extensions of the existing TP Scheme; (2) the assimilation of TP beneficiaries into EU migration law with appropriate modifications; (3) the incorporation of TP beneficiaries into the Common European Asylum System (CEAS); (4) modified free movement using as a blueprint free movement of EU citizens. We will return to each of these in course. But for the moment, it is important to reflect on the implication of each option from the perspective of EU law. We will consider the various merits of the options below but for the big picture we would make the following observations.

The first option, amending the Directive to permit further extension of the Scheme fails to address the issue of the underlying status of these persons and has all the negative consequences of such a failure. It also perpetuates the problem of beneficiaries being covered by an instrument of the CEAS, but having superior rights than asylum seekers and, at some points, even refugees, under the CEAS, a matter of substantial (*sotto voce*) criticism in the international community.<sup>8</sup>

The second option, assimilating them to the status of resident third country nationals in the EU, means that these TP beneficiaries will no longer be considered to be a category of refugees but rather as migrants to the EU with associated rights. Again, there will be the problem that it will be very complicated to ensure that this solution does not result in a diminution of economic and social rights for the

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5 Lodewijk Asscher (Special Adviser for Ukraine). "Integration of People Fleeing Ukraine in the EU". Note to European Commission. May 2023.

<https://ec.europa.eu/social/BlobServlet?docId=26894&langId=en>. [accessed 6 July 2023].

6 <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220809-2> [accessed 7 July 2023].

7 Küçük, Esin. "Temporary Protection Directive: Testing New Frontiers?." *European Journal of Migration and Law* 25.1 (2023): 1-30.

8 Kienast, Julia, N. Feith Tan, and Jens Vedsted-Hansen. "Preferential, differential or discriminatory? EU protection arrangements for persons displaced from Ukraine." in Carrera, Sergio and Meltem Ineli-Ciger (eds) *EU Responses to the Large-Scale Refugee Displacement* (European University Institute, 2023), 383. doi:10.2870/579593; Costello, Cathryn, and Michelle Foster. "(Some) refugees welcome: When is differentiating between refugees unlawful discrimination?." *International Journal of Discrimination and the Law* 22.3 (2022): 244-280.

beneficiaries with the allocation of a firmer residence status, common with other third country nationals.<sup>9</sup>

The third option, incorporating them into the CEAS, means that the EU considers them to continue to be persons in need of international protection. This category would provide them with rights closest to those which they enjoy as TP beneficiaries but without one highly prized right – intra-EU mobility.<sup>10</sup>

The fourth option is Asscher's proposal to create a completely new status – a Reconstruction Permit - with a proposed validity of ten years. This would provide an opportunity to design a status specifically for former TP beneficiaries, selecting rights from other categories to come up with a satisfactory composite. The proposal is also that it evolves out of a joint statement with Ukraine (not a convention or otherwise legally binding instrument), reminiscent of the much-criticised EU Turkey Statement 2016 which the CJEU found was not an act of the EU.<sup>11</sup>

The fifth option, a modified form of free movement of persons modelled on the EU Treaty right for EU citizens, would go some way to ensuring continuity of residence and mobility rights but unless addressed could result in excluding those former TP beneficiaries unable to be economically active or without capital. Most importantly it would designate former TP beneficiaries as EU 'citizens in waiting'.<sup>12</sup> Such an option would definitely go in the direction of the EU's acceptance of EU candidature for Ukraine<sup>13</sup> but may of course have consequences for other states with a similar status whose nationals would also like to enjoy such a pre-EU citizenship status.<sup>14</sup>

In this chapter, we will examine the issues facing the EU institutions and temporary protection beneficiaries from the perspective of these options. Among the issues which we will examine regarding each option are:

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- 9 Groenendijk, Kees, and Elspeth Guild. "Converging criteria: Creating an area of security of residence for Europe's third country nationals." *European Journal of Migration and Law* 3 (2001): 37; Iglesias Sánchez, Sara. "Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the new Mobility Rights in the Area of Freedom, Security and Justice." *European Law Journal* 15.6 (2009): 791-805.
  - 10 Della Torre, Lucia, and Tesseltje de Lange. "The 'importance of staying put': third country nationals' limited intra-EU mobility rights." *Journal of Ethnic and Migration Studies* 44.9 (2018): 1409-1424; Della Puppa, Francesco, Nicola Montagna, and Eleonore Kofman. "Onward migration and intra-European mobilities: A critical and theoretical overview." *International Migration* 59.6 (2021): 16-28.
  - 11 Zoetewij, Margarite Helena, and Ozan Turhan. "Above the Law-Beneath Contempt: The End of the EU-Turkey Deal." *Swiss. Rev. Int'l & Eur. L.* 27 (2017): 151; Hillary, Lynn. "Down the Drain with General Principles of EU Law? The EU-Turkey Deal and 'Pseudo-Authorship'." *European Journal of Migration and Law* 23.2 (2021): 127-151.
  - 12 To borrow the term from Motomura: Motomura, Hiroshi. *Americans in waiting: The lost story of immigration and citizenship in the United States*. Oxford University Press, 2006.
  - 13 <https://www.consilium.europa.eu/en/policies/enlargement/ukraine/> [accessed 6 July 2023].
  - 14 Goldner Lang, Iris. "Transitional arrangements in the Enlarged European Union: How free is the free movement of workers?." *Croatian yearbook of European law & policy* 3.1 (2007): 241-271; Maas, Willem. "Trade, regional integration, and free movement of people." in Joaquín Roy (ed.), *A new Atlantic community : the European Union, the US and Latin America* (Miami: European Union Center of Excellence, Jean Monnet Chair, University of Miami, 2015), 111-121.

1. Durability of residence rights;
2. Whether the status is limited to those who were registered in the TP programme before its end;
3. Socio-economic rights including family life;
4. Mobility rights within the EU;
5. Mobility rights to return to the EU after a stay in Ukraine (or elsewhere).

## **2. ENDING TEMPORARY PROTECTION STATUS**

According to the Directive, temporary protection ends collectively for all protected persons from Ukraine at the same time, either automatically when the maximum duration of three years has been reached on 4 March 2025 or at any time earlier by a Decision of the Council on a proposal of the Commission (Article 6(1)(a) and (b)). The Council could make such a decision when the war in Ukraine would end before 4 March 2025.<sup>15</sup> Under EU law, all former beneficiaries would automatically no longer be lawfully resident in the Member States, unless they had previously filed an asylum application which is still pending<sup>16</sup> or national law would provide automatically for another residence status.<sup>17</sup>

Before the general TP Scheme has come to an end, temporary protection may end in individual cases on four different grounds. Firstly, because the protected person has exercised his or her right to voluntary return to Ukraine before the end of the Scheme other than for a short visit. In such a case, the host Member State should give favourable consideration to a request for a return to that Member State (Article 21(2)), especially when the person is still within the personal scope of the Scheme. According to data from the Dutch Statistical Agency, almost 20% of the 90,000 persons from Ukraine registered since March 2022 had left the Netherlands by November 2022, three quarters left the Netherlands within three months after the start of the war.<sup>18</sup> They either returned to Ukraine or moved elsewhere inside or outside the EU. If they have returned to Ukraine, the provision applies; should they have moved elsewhere in the EU, this would be an exercise of their right to secondary movement, thus remaining within the scope of the Scheme. Had they left for a third country outside the EU, they moved outside the scope of the Scheme.

Member States may exclude a person from temporary protection for having committed one of the very serious crimes listed in Article 28. Thirdly, an exclusion

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<sup>15</sup> Kerber, Karoline. "The temporary protection directive." *European journal of Migration and Law* 4.2 (2002): 193; Ineli-Ciger, Meltem. "Has the Temporary Protection Directive become obsolete? An examination of the directive and its lack of implementation in view of the recent asylum crisis in the Mediterranean." in Celine Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds) *Seeking asylum in the European Union* (Brill Nijhoff, 2015), 223-246.

<sup>16</sup> Art. 9 of the Asylum Procedures Directive 2013/32/EU.

<sup>17</sup> See commentary from the Meijers Committee, forthcoming: <https://www.commissie-meijers.nl/comments/>.

<sup>18</sup> CBS, Oekraïense vluchtelingen, 1 november 2022, Oekraïense vluchtelingen, 1 november 2022 (cbs.nl).

decision could be based on the ground that the person is not (or no longer) covered by Article 2(2) or 2(3) of the Council Implementing Decision due to being able to return in safe and durable conditions to his or her country or region of origin (this is relevant for non-Ukrainian TP beneficiaries). Finally, a Member State may exclude a person on the basis that false information was provided at the registration since Union law does not protect rights obtained by fraudulent behaviour.<sup>19</sup> In all such cases, the person excluded from protection is entitled to a reasoned written decision (Article 41 EU Charter), an effective judicial remedy under Article 29 of the directive and Article 47 EU Charter.

Chapter V of the directive, according to its title, deals with return and measures after temporary protection has ended. The chapter provides for rules on voluntary return (Article 21), forced return (Article 22) and prolonged residence and reception conditions in exceptional cases related to health conditions of formerly protected persons or in order to allow their children to complete the current school period (Article 23). All three alternatives are based on the assumption that the formerly protected persons will leave the host Member State. However, other rules in the directive foresee that at least part of the former TP beneficiaries could remain in the host Member State after the end of the temporary protection.

### **3. OPTION 1: AMENDING THE TP DIRECTIVE TO ALLOW FURTHER EXTENSIONS**

The limit set out in the Directive of a maximum of three years for temporary protection was the subject of much discussion during its negotiation at the time.<sup>20</sup> The majority of proposals at that time were for a shorter period (including the Commission's proposal) but some Member States succeeded in getting the extra one year included in the end. The principle is that temporary protection should be exactly what it claims to be: temporary. It should not be possible for it to turn into a semi-permanent status. This would be unfair to states which need clarity in their asylum and immigration systems regarding rights and residence and equally unfair to TP beneficiaries who would live in limbo while having to make difficult decisions about their lives and those of their families. Finally, it leaves the question of what will happen at the end of the Scheme to the limited and outdated answers of chapter V of the directive.

From the perspective of durability of residence, this is a very problematic option for the reasons set out above. As regards the group covered by this option, at the moment, there is no closing date for the TP Scheme, so anyone who comes within the personal scope of the Council Decision which opened it can benefit. In practice, this means that Ukrainians who are still leaving Ukraine on account of the war are still within the scope of the Scheme. Extending it would not necessarily change this

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<sup>19</sup> There is another ground for individual loss of the TP status, where a family member is moved from one Member State to another (Article 15(6) TPD). But this will only exceptionally happen with Ukraine TPs, since they can move freely in the EU and choose residence with their family.

<sup>20</sup> Kerber, Karoline. "The Temporary Protection Directive." *European Journal of Migration and Law* 4.2 (2002):193-214. See footnote 35.

characteristic of the Scheme – newly arriving Ukrainian nationals would be able to benefit from it.<sup>21</sup>

As regards socio-economic rights, these would remain the same as currently the case.<sup>22</sup> here is no provision in the Directive to limit or expand socio-economic rights at the time of extension. Were this to happen then further amendments would have to be made to the Directive to permit this. This is unlikely in that the socio-economic integration of TP beneficiaries into EU states appears to be taking place without difficulties.

The disapplication of Article 11 Directive which would have limited TP beneficiaries to the Member State where they first sought protection, means that TP beneficiaries are entitled to secondary movement. They are free to move from one Member State where they have enjoyed TP rights to another Member State where they seek to enjoy TP rights. The only requirement, (according to the Commission not the strict wording of the Directive) is that they need to deregister from the first Member State so that they do not simultaneously receive TP benefits in two states. Thus, TP beneficiaries have free movement rights (including residence rights) across the whole of EU territory. This could change with an amendment of the directive to provide for further extensions of the scheme, but it is unlikely in light of the low political salience of secondary movement of TP beneficiaries in practice. It is perhaps important to note that for the moment, there is very little statistical information or literature on secondary movement of TP beneficiaries. While there is some evidence that TP beneficiaries are moving from their first host State, it is unclear where they are going.

There is no provision in the Directive regarding return to Ukraine for short or longer periods, except for Article 21(1) stating that Member States may provide for “exploratory visits”. In practice, there is a lot of cross border movement between EU Member States and Ukraine which presumably includes persons with TP status in Member States.<sup>23</sup> There has been substantial discussion about the extent to which TP beneficiaries should have specific entitlements to go back to Ukraine for extended periods and re-enter the EU thereafter should they choose to do so and re-activate their TP status. There is no express problem with this in the Directive.<sup>24</sup>

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<sup>21</sup> Trauner, Florian, and Gabriele Valodskaitė. "The EU's Temporary Protection Regime for Ukrainians: Understanding the Legal and Political Background and Its Implications." *CESifo Forum* 23.4. (2022):17-20.

<sup>22</sup> Motte-Baumvol, Julia, Tarin Cristino Frota Mont'Alverne, and Gabriel Guimarães Braga. "Extending social protection for migrants under the European Union's temporary protection directive: lessons from the war in Ukraine." Available at SSRN 4096325 (2022).

<sup>23</sup> UNHCR in its statistics shows the numbers of border crossings:  
<https://data2.unhcr.org/en/situations/ukraine> [accessed 7 July 2023].

<sup>24</sup> For further discussion on the issue see: Bird, Nicolò, and David Amaglobeli. "Policies to Address the Refugee Crisis in Europe Related to Russia's Invasion of Ukraine" IMF Notes No 2022/003; van Selm, Joanne. "Temporary Protection for Ukrainians: Learning the Lessons of the 1990s?." in Carrera, Sergio and Meltem Ineli-Ciger (eds) *EU Responses to the Large-Scale Refugee Displacement* (European University Institute, 2023), 366.

#### **4. OPTION 2: ASSIMILATION INTO EXISTING EU LAW ON THIRD COUNTRY NATIONALS**

The organising principles of EU law on access to the territory, socio-economic rights, studies etc for third country nationals are: (1) the third country national must have stable and regular resources which are sufficient to maintain themselves and the members of their family, without recourse to the social assistance system; (2) they must have sickness insurance in respect of all risks normally covered for own nationals in the Member State; (3) Member States may require that they comply with integration conditions and (4) no serious criminal record. In some EU migration legislation such as the Blue Card Directive<sup>25</sup> integration conditions are not applied but the income requirements are higher. This also applies to admission of researchers and students.<sup>26</sup> In one measure, the Family Reunification Directive, the requirements of stable and regular resources and sickness insurance are disapplied for family reunification of refugees but this is exceptional.<sup>27</sup> This option assumes that former TP beneficiaries are migrants like any others coming to the EU and should be treated in the same way as any other migrants with some modifications to allow for group recognition. It would resolve one of the thorny issues which the Ukraine TP Scheme has thrown up of differential and advantageous treatment for one (relatively) small group of third country nationals which is only available on the basis of former residence in Ukraine and the very stringent, exclusionary rules continuing to apply to anyone else.<sup>28</sup>

While it would be fully possible to integrate former TP beneficiaries into EU law on third country national migration this might require much amendment to ensure that they do not lose rights which they currently enjoy as TP beneficiaries. Granting the best status for third country nationals in EU law, the EU long-term resident status under the directive of that name without amending that directive would result in reducing the current intra-EU mobility right.<sup>29</sup> We have examined elsewhere what

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<sup>25</sup> 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 L 155, 18.6.2009, p. 17–29.

<sup>26</sup> Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (OJ L 132, 21.5.2016, p. 21–57).

<sup>27</sup> Articles 9–12 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251, 3.10.2003, p. 12–18).

<sup>28</sup> Costello, Cathryn, and Michelle Foster. "(Some) refugees welcome: When is differentiating between refugees unlawful discrimination?." *International Journal of Discrimination and the Law* 22.3 (2022): 244–280; Kienast, Julia, N. Feith Tan, and Jens Vedsted-Hansen. "Preferential, differential or discriminatory? EU protection arrangements for persons displaced from Ukraine." *EU Responses to the Large-Scale Refugee Displacement* (European University Institute, 2023), 383.

<sup>29</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44–53).

steps and amendments could be taken to widen the scope of this directive to include former TP beneficiaries.<sup>30</sup>

As regards our criteria, long-term residence would fulfil our requirement of durability. The status can only be lost on the grounds of public policy or public security, or more than a year's absence from the territory of the host state. But this status normally can only be acquired after five years residence, fulfilling the requirements of stable resources, sickness insurance and integration conditions. Unless substantially modified, TP beneficiaries would not be eligible. The current Long-Term Residents Directive explicitly excludes TP beneficiaries from its personal scope. Among commentators it is disputed whether lawful residence under the TP Scheme counts for the five years residence requirement or not.<sup>31</sup> In June 2023 the Swedish Presidency stated that "periods of residence outside the scope of the Directive should be taken into account by responsible authorities when third-country nationals apply for LTR status". This only does not apply to residence explicitly excluded in Article 4(2) of the LTR Directive, i.e. residence as a diplomat or on the temporary grounds of Article 3(2)(e) of that Directive.<sup>32</sup> We support this reading of Article 4(2) that the exception of that clause to the general rule of Article 4(1) should be interpreted restrictively and not be extended to other categories than the two explicitly excluded in Article 4(2). Residence on the basis of the TP Directive counts as lawful residence for the LTR status, but only after the (former) TP beneficiary has acquired a new residence permit for another purpose, such as employment or family reunification, bringing him or her within the personal scope of the LTR Directive. This will require individual decisions by immigration authorities and provide an additional hurdle for the acquisition of the LTR status. Moreover, it is less clear whether the incorporation of former TP beneficiaries could include persons newly arriving from Ukraine after the ending of the TP Scheme but as a result of continued hostilities. Unless such persons would be first degree family members of someone with the status already, they would need to qualify on the basis of the conditions in the directives. These are not simple to fulfil.

The socio-economic rights of persons within the scope of the EU's third country nationals measures varies substantially. Once a third country national obtains long term resident status, he or she has a wide range of socio-economic rights, generally equivalent to those available under the TP Scheme and also fairly similar to nationals of the state. But before acquisition of this status, fulfilment of stable resources, sickness insurance and integration conditions apply. Regarding family reunification, the conditions are more stringent than those currently applicable to TP beneficiaries which includes close family members who lived together as part of the family unit at the time (Article 15(a) and (b)). The class of family members is generally limited to

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<sup>30</sup> Guild, Elspeth, and Kees Groenendijk. "The impact of war in Ukraine on EU migration." *Frontiers in Human Dynamics* 5 (2023): 1189625.

<sup>31</sup> Steve Peers takes this view: <https://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html> [accessed 9 July 2023]. Daniel Thym who takes the opposing view: <https://eumigrationlawblog.eu/temporary-protection-for-ukrainians-the-unexpected-renaissance-of-free-choice/> [accessed 9 July 2023].

<sup>32</sup> Discussion paper of 20 June 2023, Council document 10522/23.

spouses and minor children for third country national migrants and they must also fulfil the conditions.

Third country nationals even those with long term residence status have limited access to intra-EU mobility for any purpose other than short stays under the Schengen regime (90 days out of every 180). Thus former TP beneficiaries would lose their current right to secondary movement across the whole of the territory of the EU with the right to live, work receive benefits anywhere.

As regards return to Ukraine, third country nationals are not limited in their rights to go back to their country of origin, nor, in most cases, would doing so extinguish their right to live in their host Member State. As mentioned above, long term residents can leave their state for up to a year without losing their status.

## **5. OPTION 3: INCORPORATION INTO THE CEAS**

The first problem with this option is that the CEAS requires each asylum application to be considered individually. There would need to be an amendment to exempt Ukraine TP beneficiaries for this individual assessment if the overburdening of the refugee departments of interior ministries referred to above is to be avoided. Also, this option assumes that former TP beneficiaries are persons who need international protection, in short refugees. It is a principle of international refugee law that states are required to provide protection only so long as the situation in the country of origin is such that the individual cannot return there without a real risk of persecution, torture, inhuman or degrading treatment or arbitrary disappearance. Thus as regards durability of residence, in EU law those accepted to be beneficiaries of international protection are entitled to residence so long as the situation in their country of origin is such that they cannot go back there. In the context of the Ukraine war, it is unclear when or how it will end. Thus it is not possible to imagine exactly how and when former TP beneficiaries might be able to go back. However, where Member States consider that the situation in a country of origin has stabilised, they may well seek to require former refugees to return there.<sup>33</sup>

As regards the situation of persons leaving Ukraine after the end of the TP Scheme, this category would only be appropriate if those leaving fulfil the definition in the EU Qualification Directive<sup>34</sup> as a refugee or person entitled to international protection.<sup>35</sup> This would depend entirely on the situation in Ukraine and the individual circumstances of the applicant.

The socio-economic rights of beneficiaries of temporary protection and international protection are broadly similar though beneficiaries of subsidiary protection (a lower level of protection than for refugees) are only entitled to social

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33 Black, Richard, and Saskia Gent. "Sustainable return in post-conflict contexts." *International Migration* 44.3 (2006): 15-38.

34 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 (recast) (OJ L 337, 20.12.2011, p. 9–26).

35 Article 2 Qualification Directive.



benefits which constitute core benefits under the directive. For family reunification, again the class of family members with whom a principal can be reunited is more limited than for TP beneficiaries and the conditions more onerous. There is a further problem, the exemption from income and housing requirements applies only to refugees not to beneficiaries of subsidiary protection, which means that to continue to benefit from these rights all former TP beneficiaries will need to be recognised as refugees.<sup>36</sup>

Regarding intra-EU mobility, the CEAS allows no intra-EU mobility either for those seeking international protection or for those who have already received it in one Member State. For those with a protection status, there is the possibility of short stay intra-Schengen mobility but nothing further. As regards returning to Ukraine, the CEAS reflects international law that where a refugee avails him or herself of the protection of his or her state of origin, he or she loses the status of refugee.<sup>37</sup> Thus at least in principle, return to Ukraine even for a short period could result in loss of status.

## 6. OPTION 4: THE ASSCHER RECONSTRUCTION PERMIT

As no such status currently exists in EU law, the content of such a Reconstruction Permit is entirely open to the institutions to determine (and negotiate). The only indication regarding the content which we have at the moment is that the permits might be valid for ten years. This is certainly a substantial period of time and provides any holder with a certain durability of residence. However, to provide the highest level of durability of residence available for third country nationals in the EU, residence under this Permit would need to be included within the scope of the long-term residents' directive. It is unclear whether the permit would automatically be acquired after three years of temporary protection.

It remains somewhat unclear what sort of legal status [or: basis?] this Permit is intended to have. As there is a reference in the proposal to a joint announcement of EU and Ukrainian authorities to kick start this Permit, there is the possibility that it might have some sort of status in EU law as an international agreement (or not as suggested above by reference to the EU-Turkey Deal 2016). Or it could be an agreement with a third country under Article 79(3) TFEU. In theory, at least, it might come within the scope of the existing EU-Ukraine Association Agreement 201738 either as an implementing decision of the Association Council (similar for instance to Decision 1/80 EEC Turkey Association Agreement).<sup>39</sup> Alternatively, the Permit

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<sup>36</sup> For a full comparison of the level of socio-economic rights among TP beneficiaries and protection seekers/refugees see Guild, Elspeth, and Kees Groenendijk. "The impact of war in Ukraine on EU migration." *Frontiers in Human Dynamics* 5 (2023): 1189625.

<sup>37</sup> Grahl-Madsen, Atle. "Protection of refugees by their country of origin." *Yale J. Int'l L.* 11 (1985): 362 and Articles 11(1)(a) and 16(1) Qualification Directive.

<sup>38</sup> For a discussion of the scope of this agreement see Guild, Elspeth, and Kees Groenendijk. "The impact of war in Ukraine on EU migration." *Frontiers in Human Dynamics* 5 (2023): 1189625.

<sup>39</sup> Groenendijk, Kees. "The Court of Justice and the development of EEC-Turkey association law." *Rights of Third-Country Nationals under EU Association Agreements* (Brill Nijhoff, 2015), 39-61.

could be a proposal by the Commission for a directive or regulation under Article 79 TFEU. Presumably, the content of rights under the Permit should be the same as those enjoyed by TP beneficiaries at the moment, both as regards socio-economic rights and free movement within the EU. The right to return to the EU after a period of residence would also probably be facilitated depending on the length of the absence from the EU.

## **7. OPTION 5: MODIFIED FREE MOVEMENT OF PERSONS**

A number of commentators have recommended that the best solution regarding ending the TP Scheme and resolving, collectively the status of TP beneficiaries would be to assimilate them into a free movement status parallel to that of free movement of EU citizens.<sup>40</sup> Analogous application of Directive 2004/38, granting them the same rights as nationals of EFTA-countries, would place Ukraine TP beneficiaries in a position of being citizens in waiting, persons in respect of whom it is anticipated that they will become EU citizens in the future. As such, it requires a comparison with the rights of EU citizens. This resolves a number of the contradictions regarding the better treatment of TP beneficiaries in comparison with other third country nationals (including asylum seekers and refugees). While the numbers of third country nationals TP beneficiaries seems to be fairly limited (in both Germany and the Netherlands around 5% of the war refugees from Ukraine<sup>41</sup>) they have encountered substantial problems in accessing their TP rights in some Member States.

As regards durability, this is by far the most durable EU law residence status which could be provided. Like EU citizens and citizens of the EFTA countries, they could be expelled from a Member State on the same limited grounds allowing for the expulsion of EU citizens from one Member State to another.<sup>42</sup>

The personal scope of such a modified free movement approach would be the subject of negotiation. One can imagine that such a status being limited only to Ukrainian TP beneficiaries with three years of residence in the EU might be acceptable to the Ukrainian authorities. This would in effect privilege those who fled the country with a durable status in the EU while those who did not leave, including those who were unable to leave (for instance young men), would be excluded from this status. On the other hand, extending free movement rights to all Ukraine citizens would create the risk of further loss of population. Ukraine's population already reduced from 52 to 42 million between 1990 and 2021. The EU has voted that

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40 See Dzhuliia Lypalo (Hart/College of Europe forthcoming). See also Guild, Elspeth, and Kees Groenendijk. "The impact of war in Ukraine on EU migration." *Frontiers in Human Dynamics* 5 (2023): 1189625.

41 Ukrainische Flüchtlinge | Flucht & Asyl | Zahlen und Fakten | MEDIENDIENST INTEGRATION (mediendienst-integration.de) and a letter of the Dutch Minister for Justice and Security to the Parliament of 9 June 2023, Tweede Kamer 19637, no. 3121.

42 Mantu, Sandra. "Expulsion and EU citizenship". *Nijmegen Migration Law Working Papers Series*, no 2017/02. Nijmegen: Radboud University Nijmegen; Maslowski, Solange. "The expulsion of European Union citizens from the host member state: Legal grounds and practice." *Central and Eastern European Migration Review* 4.2 (2015): 61-85.

Ukraine is a candidate state for membership of the EU.<sup>43</sup> This decision means that in the future the EU envisages that Ukrainian nationals will become EU citizens. Addressing the quandary of Ukraine TP beneficiaries after the end of the TP Scheme, this promise of a new status, eventually, might be a more effective and permanent resolution to the problem. Allowing Ukrainian TP beneficiaries with three years of residence in the EU a status of modified free movement of persons parallel with EU law would be consistent with the move towards membership. For those TP beneficiaries with less than three years residence at the critical time, special arrangements would have to be made.

Looking at the issue of socio-economic rights, this solution is likely to raise concerns in some Member States of excessive numbers of Ukrainians arriving and unsettling their labour market (notwithstanding the fact that during a period of strong push factors from Ukraine this has not happened). A continuing right to work for former TP beneficiaries could fit with a delay in access to the labour market for other Ukrainians coming to the EU after the closure of the Scheme. Access to social benefits is an issue for this model as EU citizens do not have an immediate right to access to social benefits in a host Member State. It only becomes an uncontested right after the EU citizen has fulfilled the conditions of lawful residence in the host state for five years, thus acquiring permanent residence as a matter of right. TP beneficiaries who have not been able to work or be self-employed and have been exclusively reliant on social benefits in the host Member State would need to be protected specifically. Similarly specific provision would need to be made for students.

Family reunion, if built on the basis of the rights of EU citizens, would continue to be consistent with the rights under the TP Scheme. The personal scope of family reunion for EU citizens is substantially larger than for third country nationals.

As regards intra-EU mobility, EU citizens have a right of free movement divided into five stages, an initial period of three months, between three months and five years, after five years of lawful residence permanent status and after ten years heightened protection against expulsion. A modified form of free movement would allow former TP beneficiaries to continue to move freely across the EU and to gradually acquire permanent residence and enhanced protection from expulsion like EU citizens exercising their free movement rights.

EU citizens are entitled to live outside the EU for whatever period they wish and to return and resume or recommence their free movement rights. Once acquired, the right of permanent residence is lost only through absence from the host Member State for a period exceeding two consecutive years.

In general, option 5 has some important benefits over the others not just for persons who will be former TP beneficiaries but also for the Union in justifying the particular treatment of this class of persons in relation to others. Like all four other options, option 5 can be realised on the basis of Article 79(2)(a) and (b) TFEU requiring only a qualified majority in the EU Council of Ministers.

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<sup>43</sup> <https://www.consilium.europa.eu/en/policies/enlargement/ukraine/> [accessed 7 July 2023].

## Annex 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**

*Official Journal L 212 , 07/08/2001 P. 0012 - 0023*

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular point 2(a) and (b) of Article 63 thereof,

Having regard to the proposal from the Commission(1)

Having regard to the opinion of the European Parliament(2),

Having regard to the opinion of the Economic and Social Committee(3),

Having regard to the opinion of the Committee of the Regions(4),

Whereas:

(1) The preparation of a common policy on asylum, including common European arrangements for asylum, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the European Union.

(2) Cases of mass influx of displaced persons who cannot return to their country of origin have become more substantial in Europe in recent years. In these cases it may be necessary to set up exceptional schemes to offer them immediate temporary protection.

(3) In the conclusions relating to persons displaced by the conflict in the former Yugoslavia adopted by the Ministers responsible for immigration at their meetings in London on 30 November and 1 December 1992 and Copenhagen on 1 and 2 June 1993, the Member States and the Community institutions expressed their concern at the situation of displaced persons.

(4) On 25 September 1995 the Council adopted a Resolution on burden-sharing with regard to the admission and residence of displaced persons on a temporary basis<sup>(5)</sup>, and, on 4 March 1996, adopted Decision 96/198/JHA on an alert and emergency procedure for burden-sharing with regard to the admission and residence of displaced persons on a temporary basis<sup>(6)</sup>.

(5) The Action Plan of the Council and the Commission of 3 December 1998<sup>(7)</sup> provides for the rapid adoption, in accordance with the Treaty of Amsterdam, of minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and of measures promoting a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons.

(6) On 27 May 1999 the Council adopted conclusions on displaced persons from Kosovo. These conclusions call on the Commission and the Member States to learn the lessons of their response to the Kosovo crisis in order to establish the measures in accordance with the Treaty.

(7) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, acknowledged the need to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.

(8) It is therefore necessary to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and to take measures to promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons.

(9) Those standards and measures are linked and interdependent for reasons of effectiveness, coherence and solidarity and in order, in particular, to avert the risk of secondary movements. They should therefore be enacted in a single legal instrument.

(10) This temporary protection should be compatible with the Member States' international obligations as regards refugees. In particular, it must not prejudice the recognition of refugee status pursuant to the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967, ratified by all the Member States.

(11) The mandate of the United Nations High Commissioner for Refugees regarding refugees and other persons in need of international protection should be respected, and effect should be given to Declaration No 17, annexed to the Final Act to the Treaty of Amsterdam, on Article 63 of the Treaty establishing the European Community which provides that consultations are to be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy.

(12) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for persons enjoying temporary protection in the event of a mass influx of displaced persons.

(13) Given the exceptional character of the provisions established by this Directive in order to deal with a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, the protection offered should be of limited duration.

(14) The existence of a mass influx of displaced persons should be established by a Council Decision, which should be binding in all Member States in relation to the displaced persons to whom the Decision applies. The conditions for the expiry of the Decision should also be established.

(15) The Member States' obligations as to the conditions of reception and residence of persons enjoying temporary protection in the event of a mass influx of displaced persons should be determined. These obligations should be fair and offer an adequate level of protection to those concerned.

(16) With respect to the treatment of persons enjoying temporary protection under this Directive, the Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(17) Member States should, in concert with the Commission, enforce adequate measures so that the processing of personal data respects the standard of protection of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>(8)</sup>.

(18) Rules should be laid down to govern access to the asylum procedure in the context of temporary protection in the event of a mass influx of displaced persons, in conformity with the Member States' international obligations and with the Treaty.

(19) Provision should be made for principles and measures governing the return to the country of origin and the measures to be taken by Member States in respect of persons whose temporary protection has ended.

(20) Provision should be made for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx. The mechanism should consist of two components. The first is financial and the second concerns the actual reception of persons in the Member States.

(21) The implementation of temporary protection should be accompanied by administrative cooperation between the Member States in liaison with the Commission.

(22) It is necessary to determine criteria for the exclusion of certain persons from temporary protection in the event of a mass influx of displaced persons.

(23) Since the objectives of the proposed action, namely to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons, cannot be sufficiently attained by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(24) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom gave notice, by letter of 27 September 2000, of its wish to take part in the adoption and application of this Directive.

(25) Pursuant to Article 1 of the said Protocol, Ireland is not participating in the adoption of this Directive. Consequently and without prejudice to Article 4 of the aforementioned Protocol, the provisions of this Directive do not apply to Ireland.

(26) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not participating in the adoption of this Directive, and is therefore not bound by it nor subject to its application,

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

### General provisions

#### Article 1

The purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons.

#### Article 2

For the purposes of this Directive:

(a) "temporary protection" means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection;

(b) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967;

(c) "displaced persons" means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:



- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;
- (d) "mass influx" means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme;
- (e) "refugees" means third-country nationals or stateless persons within the meaning of Article 1A of the Geneva Convention;
- (f) "unaccompanied minors" means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States;
- (g) "residence permit" means any permit or authorisation issued by the authorities of a Member State and taking the form provided for in that State's legislation, allowing a third country national or a stateless person to reside on its territory;
- (h) "sponsor" means a third-country national enjoying temporary protection in a Member State in accordance with a decision taken under Article 5 and who wants to be joined by members of his or her family.

### Article 3

1. Temporary protection shall not prejudice recognition of refugee status under the Geneva Convention.
2. Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement.
3. The establishment, implementation and termination of temporary protection shall be the subject of regular consultations with the Office of the United Nations High Commissioner for Refugees (UNHCR) and other relevant international organisations.
4. This Directive shall not apply to persons who have been accepted under temporary protection schemes prior to its entry into force.

5. This Directive shall not affect the prerogative of the Member States to adopt or retain more favourable conditions for persons covered by temporary protection.

## CHAPTER II

### Duration and implementation of temporary protection

#### Article 4

1. Without prejudice to Article 6, the duration of temporary protection shall be one year. Unless terminated under the terms of Article 6(1)(b), it may be extended automatically by six monthly periods for a maximum of one year.

2. Where reasons for temporary protection persist, the Council may decide by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, to extend that temporary protection by up to one year.

#### Article 5

1. The existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

2. The Commission proposal shall include at least:

- (a) a description of the specific groups of persons to whom the temporary protection will apply;
- (b) the date on which the temporary protection will take effect;
- (c) an estimation of the scale of the movements of displaced persons.

3. The Council Decision shall have the effect of introducing temporary protection for the displaced persons to which it refers, in all the Member States, in accordance with the provisions of this Directive. The Decision shall include at least:

- (a) a description of the specific groups of persons to whom the temporary protection applies;
- (b) the date on which the temporary protection will take effect;
- (c) information received from Member States on their reception capacity;
- (d) information from the Commission, UNHCR and other relevant international organisations.

4. The Council Decision shall be based on:

- (a) an examination of the situation and the scale of the movements of displaced persons;
- (b) an assessment of the advisability of establishing temporary protection, taking into account the potential for emergency aid and action on the ground or the inadequacy of such measures;
- (c) information received from the Member States, the Commission, UNHCR and other relevant international organisations.

5. The European Parliament shall be informed of the Council Decision.

## Article 6

1. Temporary protection shall come to an end:

- (a) when the maximum duration has been reached; or
- (b) at any time, by Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council.

2. The Council Decision shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement. The European Parliament shall be informed of the Council Decision.

## Article 7

1. Member States may extend temporary protection as provided for in this Directive to additional categories of displaced persons over and above those to whom the Council Decision provided for in Article 5 applies, where they are displaced for the same reasons and from the same country or region of origin. They shall notify the Council and the Commission immediately.

2. The provisions of Articles 24, 25 and 26 shall not apply to the use of the possibility referred to in paragraph 1, with the exception of the structural support included in the European Refugee Fund set up by Decision 2000/596/EC(9), under the conditions laid down in that Decision.

## CHAPTER III

### Obligations of the Member States towards persons enjoying temporary protection

## Article 8

1. The Member States shall adopt the necessary measures to provide persons enjoying temporary protection with residence permits for the entire duration of the protection. Documents or other equivalent evidence shall be issued for that purpose.

2. Whatever the period of validity of the residence permits referred to in paragraph 1, the treatment granted by the Member States to persons enjoying temporary protection may not be less favourable than that set out in Articles 9 to 16.

3. The Member States shall, if necessary, provide persons to be admitted to their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.

## Article 9

The Member States shall provide persons enjoying temporary protection with a document, in a language likely to be understood by them, in which the provisions relating to temporary protection and which are relevant to them are clearly set out.

#### Article 10

To enable the effective application of the Council Decision referred to in Article 5, Member States shall register the personal data referred to in Annex II, point (a), with respect to the persons enjoying temporary protection on their territory.

#### Article 11

A Member State shall take back a person enjoying temporary protection on its territory, if the said person remains on, or, seeks to enter without authorisation onto, the territory of another Member State during the period covered by the Council Decision referred to in Article 5. Member States may, on the basis of a bilateral agreement, decide that this Article should not apply.

#### Article 12

The Member States shall authorise, for a period not exceeding that of temporary protection, persons enjoying temporary protection to engage in employed or self-employed activities, subject to rules applicable to the profession, as well as in activities such as educational opportunities for adults, vocational training and practical workplace experience. For reasons of labour market policies, Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third-country nationals who receive unemployment benefit. The general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

#### Article 13

1. The Member States shall ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain housing.
2. The Member States shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care. Without prejudice to paragraph 4, the assistance necessary for medical care shall include at least emergency care and essential treatment of illness.

3. Where persons enjoying temporary protection are engaged in employed or self-employed activities, account shall be taken, when fixing the proposed level of aid, of their ability to meet their own needs.

4. The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.

#### Article 14

1. The Member States shall grant to persons under 18 years of age enjoying temporary protection access to the education system under the same conditions as nationals of the host Member State. The Member States may stipulate that such access must be confined to the state education system.

2. The Member States may allow adults enjoying temporary protection access to the general education system.

#### Article 15

1. For the purpose of this Article, in cases where families already existed in the country of origin and were separated due to circumstances surrounding the mass influx, the following persons shall be considered to be part of a family:

(a) the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted;

(b) other close relatives who lived together as part of the family unit at the time of the events leading to the mass influx, and who were wholly or mainly dependent on the sponsor at the time.

2. In cases where the separate family members enjoy temporary protection in different Member States, Member States shall reunite family members where they are satisfied that the family members fall under the description of paragraph 1(a), taking into account the wish of the said family members. Member States may reunite family members where they are satisfied that the family members fall under the description

of paragraph 1(b), taking into account on a case by case basis the extreme hardship they would face if the reunification did not take place.

3. Where the sponsor enjoys temporary protection in one Member State and one or some family members are not yet in a Member State, the Member State where the sponsor enjoys temporary protection shall reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(a). The Member State may reunite family members, who are in need of protection, with the sponsor in the case of family members where it is satisfied that they fall under the description of paragraph 1(b), taking into account on a case by case basis the extreme hardship which they would face if the reunification did not take place.

4. When applying this Article, the Member States shall taken into consideration the best interests of the child.

5. The Member States concerned shall decide, taking account of Articles 25 and 26, in which Member State the reunification shall take place.

6. Reunited family members shall be granted residence permits under temporary protection. Documents or other equivalent evidence shall be issued for that purpose. Transfers of family members onto the territory of another Member State for the purposes of reunification under paragraph 2, shall result in the withdrawal of the residence permits issued, and the termination of the obligations towards the persons concerned relating to temporary protection, in the Member State of departure.

7. The practical implementation of this Article may involve cooperation with the international organisations concerned.

8. A Member State shall, at the request of another Member State, provide information, as set out in Annex II, on a person receiving temporary protection which is needed to process a matter under this Article.

## Article 16

1. The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.

2. During the period of temporary protection Member States shall provide for unaccompanied minors to be placed:

- (a) with adult relatives;
- (b) with a foster-family;
- (c) in reception centres with special provisions for minors, or in other accommodation suitable for minors;
- (d) with the person who looked after the child when fleeing.

The Member States shall take the necessary steps to enable the placement. Agreement by the adult person or persons concerned shall be established by the Member States. The views of the child shall be taken into account in accordance with the age and maturity of the child.

## CHAPTER IV

### Access to the asylum procedure in the context of temporary protection

#### Article 17

1. Persons enjoying temporary protection must be able to lodge an application for asylum at any time.
2. The examination of any asylum application not processed before the end of the period of temporary protection shall be completed after the end of that period.

#### Article 18

The criteria and mechanisms for deciding which Member State is responsible for considering an asylum application shall apply. In particular, the Member State responsible for examining an asylum application submitted by a person enjoying temporary protection pursuant to this Directive, shall be the Member State which has accepted his transfer onto its territory.



## Article 19

1. The Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker while applications are under consideration.
2. Where, after an asylum application has been examined, refugee status or, where applicable, other kind of protection is not granted to a person eligible for or enjoying temporary protection, the Member States shall, without prejudice to Article 28, provide for that person to enjoy or to continue to enjoy temporary protection for the remainder of the period of protection.

## CHAPTER V

### Return and measures after temporary protection has ended

## Article 20

When the temporary protection ends, the general laws on protection and on aliens in the Member States shall apply, without prejudice to Articles 21, 22 and 23.

## Article 21

1. The Member States shall take the measures necessary to make possible the voluntary return of persons enjoying temporary protection or whose temporary protection has ended. The Member States shall ensure that the provisions governing voluntary return of persons enjoying temporary protection facilitate their return with respect for human dignity.

The Member State shall ensure that the decision of those persons to return is taken in full knowledge of the facts. The Member States may provide for exploratory visits.

2. For such time as the temporary protection has not ended, the Member States shall, on the basis of the circumstances prevailing in the country of origin, give favourable consideration to requests for return to the host Member State from persons who have enjoyed temporary protection and exercised their right to a voluntary return.
3. At the end of the temporary protection, the Member States may provide for the obligations laid down in CHAPTER III to be extended individually to persons who have been covered by temporary protection and are benefiting from a voluntary return programme. The extension shall have effect until the date of return.

## Article 22

1. The Member States shall take the measures necessary to ensure that the enforced return of persons whose temporary protection has ended and who are not eligible for admission is conducted with due respect for human dignity.
2. In cases of enforced return, Member States shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.

## Article 23

1. The Member States shall take the necessary measures concerning the conditions of residence of persons who have enjoyed temporary protection and who cannot, in view of their state of health, reasonably be expected to travel; where for example they would suffer serious negative effects if their treatment was interrupted. They shall not be expelled so long as that situation continues.
2. The Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period.

## CHAPTER VI

### Solidarity

## Article 24

The measures provided for in this Directive shall benefit from the European Refugee Fund set up by Decision 2000/596/EC, under the terms laid down in that Decision.

## Article 25

1. The Member States shall receive persons who are eligible for temporary protection in a spirit of Community solidarity. They shall indicate - in figures or in general terms - their capacity to receive such persons. This information shall be set out in the Council Decision referred to in Article 5. After that Decision has been adopted, the Member States may indicate additional reception capacity by notifying the Council and the Commission. This information shall be passed on swiftly to UNHCR.

2. The Member States concerned, acting in cooperation with the competent international organisations, shall ensure that the eligible persons defined in the Council Decision referred to in Article 5, who have not yet arrived in the Community have expressed their will to be received onto their territory.

3. When the number of those who are eligible for temporary protection following a sudden and massive influx exceeds the reception capacity referred to in paragraph 1, the Council shall, as a matter of urgency, examine the situation and take appropriate action, including recommending additional support for Member States affected.

## Article 26

1. For the duration of the temporary protection, the Member States shall cooperate with each other with regard to transferral of the residence of persons enjoying temporary protection from one Member State to another, subject to the consent of the persons concerned to such transferral.

2. A Member State shall communicate requests for transfers to the other Member States and notify the Commission and UNHCR. The Member States shall inform the requesting Member State of their capacity for receiving transferees.

3. A Member State shall, at the request of another Member State, provide information, as set out in Annex II, on a person enjoying temporary protection which is needed to process a matter under this Article.

4. Where a transfer is made from one Member State to another, the residence permit in the Member State of departure shall expire and the obligations towards the persons concerned relating to temporary protection in the Member State of departure shall come to an end. The new host Member State shall grant temporary protection to the persons concerned.

5. The Member States shall use the model pass set out in Annex I for transfers between Member States of persons enjoying temporary protection.

## CHAPTER VII

### Administrative cooperation

## Article 27

1. For the purposes of the administrative cooperation required to implement temporary protection, the Member States shall each appoint a national contact point, whose address they shall communicate to each other and to the Commission. The Member States shall, in liaison with the Commission, take all the appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

2. The Member States shall, regularly and as quickly as possible, communicate data concerning the number of persons enjoying temporary protection and full information on the national laws, regulations and administrative provisions relating to the implementation of temporary protection.

## CHAPTER VIII

### Special provisions

#### Article 28

1. The Member States may exclude a person from temporary protection if:

(a) there are serious reasons for considering that:

(i) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(ii) he or she has committed a serious non-political crime outside the Member State of reception prior to his or her admission to that Member State as a person enjoying temporary protection. The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators;

(iii) he or she has been guilty of acts contrary to the purposes and principles of the United Nations;

(b) there are reasonable grounds for regarding him or her as a danger to the security of the host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State.

2. The grounds for exclusion referred to in paragraph 1 shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality.

## CHAPTER IX

### Final provisions

#### Article 29

Persons who have been excluded from the benefit of temporary protection or family reunification by a Member State shall be entitled to mount a legal challenge in the Member State concerned.

#### Article 30

The Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

#### Article 31

1. Not later than two years after the date specified in Article 32, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. The Member States shall send the Commission all the information that is appropriate for drawing up this report.

2. After presenting the report referred to at paragraph 1, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every five years.

#### Article 32

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2002 at the latest. They shall forthwith inform the Commission thereof.

2. When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their

official publication. The methods of making such a reference shall be laid down by the Member States.

#### Article 33

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

#### Article 34

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 20 July 2001.

For the Council

The President

J. Vande Lanotte

(1) OJ C 311 E, 31.10.2000, p. 251.

(2) Opinion delivered on 13 March 2001 (not yet published in the Official Journal).

(3) OJ C 155, 29.5.2001, p. 21.

(4) Opinion delivered on 13 June 2001 (not yet published in the Official Journal).

(5) OJ C 262, 7.10.1995, p. 1.

(6) OJ L 63, 13.3.1996, p. 10.

(7) OJ C 19, 20.1.1999, p. 1.

(8) OJ L 281, 23.11.1995, p. 31.

(9) OJ L 252, 6.10.2000, p. 12.

#### ANNEX I

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## ANNEX II

The information referred to in Articles 10, 15 and 26 of the Directive includes to the extent necessary one or more of the following documents or data:

- (a) personal data on the person concerned (name, nationality, date and place of birth, marital status, family relationship);
- (b) identity documents and travel documents of the person concerned;
- (c) documents concerning evidence of family ties (marriage certificate, birth certificate, certificate of adoption);
- (d) other information essential to establish the person's identity or family relationship;
- (e) residence permits, visas or residence permit refusal decisions issued to the person concerned by the Member State, and documents forming the basis of decisions;
- (f) residence permit and visa applications lodged by the person concerned and pending in the Member State, and the stage reached in the processing of these.

The providing Member State shall notify any corrected information to the requesting Member State.

## **Annex 2**

### **COUNCIL IMPLEMENTING DECISION (EU) 2022/382**

**of 4 March 2022**

**establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 (1), and in particular Article 5 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 24 February 2022, Russian armed forces launched a large-scale invasion of Ukraine at multiple locations from the Russian Federation, from Belarus and from non-government-controlled areas of Ukraine.
- (2) As a result, substantial areas of Ukrainian territory now constitute areas of armed conflict from which thousands of persons have fled or are fleeing.
- (3) Following the invasion, which seeks to undermine European and global security and stability, the European Council, in its conclusions of 24 February 2022, condemned Russia's unprovoked and unjustified military aggression against Ukraine in the strongest possible terms, underlining the gross violation of international law and the principles of the United Nations Charter. The European Council demanded Russia's full respect for Ukraine's territorial integrity, sovereignty and independence within its internationally recognised borders, which includes Ukraine's right to choose its own destiny. The European Council also confirmed that the Russian government bears full responsibility for its act of aggression, which is causing human suffering and loss of lives, and that it will be held accountable for its actions. In solidarity with Ukraine, the European Council agreed on further sanctions, called for work to be taken forward on preparedness at all levels, and invited the Commission to put forward contingency measures.



- (4) The Union has shown, and will continue to show, its resolute support for Ukraine and its citizens, faced with an unprecedented act of aggression by the Russian Federation. This Decision forms part of the Union's response to the migratory pressure resulting from the Russian military invasion of Ukraine.
- (5) The conflict already has implications for the Union, including the likelihood of high migratory pressure on its Eastern borders as the conflict unfolds. As of 1 March 2022, more than 650 000 displaced persons had arrived in the Union from Ukraine through Poland, Slovakia, Hungary and Romania. Those numbers are expected to increase.
- (6) Ukraine is listed in Annex II to Regulation (EU) 2018/1806 (2), and nationals of Ukraine are exempt from the requirement to be in possession of a visa when crossing the external borders of Member States for stays of no more than 90 days in any 180-day period. Based on the experience gained from the aftermath of the 2014 Russian illegal annexation of the Autonomous Republic of Crimea and the city of Sevastopol, and from war in the east of Ukraine, the expectation is that half of the Ukrainians coming to the Union, benefitting from visa-free travel for short-stays, will join family members or seek employment in the Union, whilst the other half will request international protection. Depending on how the conflict evolves, based on current estimations, the Union is likely to be faced with a very large number of displaced persons, potentially between 2,5 million and 6,5 million as a consequence of the armed conflict, of whom it is anticipated that between 1,2 and 3,2 million would be persons seeking international protection. The United Nations (UN) High Commissioner for Refugees estimates that, under the worst-case scenario, up to 4 million people may potentially flee Ukraine.
- (7) Those figures show that the Union is likely to be faced with a situation that is characterised by a mass influx of displaced persons from Ukraine who are unable to return to their country or region of origin because of Russian military aggression. The scale of the influx would likely be such that there is also a clear risk that the Member States' asylum systems will be unable to process the arrivals without adverse effects on their efficient operation and on the interests of the persons concerned and on those of other persons requesting protection.
- (8) The UN has launched a Humanitarian Flash Appeal for protection and assistance needs in Ukraine, and a Regional Refugee Response Plan for Ukraine providing details on the numbers of people in need and those to be targeted by assistance.
- (9) The UN High Commissioner for Refugees welcomed the support expressed by many Member States for activating the temporary protection provided for by Directive 2001/55/EC in order to enable immediate and temporary refuge in the Union, and for facilitating the sharing of responsibility for people fleeing Ukraine among Member States.
- (10) To respond to this situation, it should be established that there is a mass influx of displaced persons within the meaning of Directive 2001/55/EC, in order to provide temporary protection for them.
- (11) The object of this Decision is to introduce temporary protection for Ukrainian nationals residing in Ukraine who have been displaced on or after 24 February 2022 as a result of the military invasion by Russian armed forces that

began on that date. Temporary protection should also be introduced for nationals of third countries other than Ukraine, who have been displaced from Ukraine on or after 24 February 2022, and who were benefiting in Ukraine from refugee status or equivalent protection before 24 February 2022. In addition, it is important to preserve the unity of families and to avoid diverging statuses among members of the same family. Therefore, it is necessary to also introduce temporary protection for family members of those persons, where their families were already in, and residing in, Ukraine at the time of the circumstances surrounding the mass influx of displaced persons.

- (12) It is also appropriate to provide for the protection of stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin. This protection should take the form of either applying this Decision to them, or of other adequate protection under national law, to be decided upon by each Member State. Those seeking to benefit from the protection should be able to prove that they fulfil these eligibility criteria by presenting the relevant documents to the competent authorities in the Member State concerned. If they are unable to present the relevant documents, Member States should redirect them to the appropriate procedure.
- (13) In accordance with Directive 2001/55/EC, Member States may extend temporary protection to all other stateless persons or nationals of third countries other than Ukraine residing legally in Ukraine who are unable to return in safe and durable conditions to their country or region of origin. Such persons could include third-country nationals who were studying or working in Ukraine on a short-term basis at the time of the events leading to the mass influx of displaced persons. Such persons should in any event be admitted into the Union on humanitarian grounds without requiring, in particular, possession of a valid visa or sufficient means of subsistence or valid travel documents, to ensure safe passage with a view to returning to their country or region of origin.
- (14) Member States may also extend temporary protection to additional categories of displaced persons above and beyond those to whom this Decision applies, where those persons are displaced for the same reasons and from the same country or region of origin as referred to in this Decision. In that case, the Member States should notify the Council and the Commission immediately. In this context, Member States should be encouraged to consider extending temporary protection to those persons who fled Ukraine not long before 24 February 2022 as tensions increased or who found themselves in the territory of the Union (e.g. on holidays or for work reasons) just before that date and who, as a result of the armed conflict, cannot return to Ukraine.
- (15) It is noted that Member States have agreed in a statement that they will not apply Article 11 of Directive 2001/55/EC.
- (16) Temporary protection is the most appropriate instrument in the current situation. Given the extraordinary and exceptional situation, including the military invasion

of Ukraine by the Russian Federation and the scale of the mass influx of displaced persons, temporary protection should allow them to enjoy harmonised rights across the Union that offer an adequate level of protection. Introducing temporary protection is also expected to benefit the Member States, as the rights accompanying temporary protection limit the need for displaced persons to immediately seek international protection and thus the risk of overwhelming their asylum systems, as they reduce formalities to a minimum because of the urgency of the situation. Furthermore, Ukrainian nationals, as visa-free travellers, have the right to move freely within the Union after being admitted into the territory for a 90-day period. On this basis, they are able to choose the Member State in which they want to enjoy the rights attached to temporary protection and to join their family and friends across the significant diaspora networks that currently exist across the Union. This will in practice facilitate a balance of efforts between Member States, thereby reducing the pressure on national reception systems. Once a Member State has issued a residence permit in accordance with Directive 2001/55/EC, the person enjoying temporary protection, whilst having the right to travel within the Union for 90 days within a 180-day period, should be able to avail of the rights derived from temporary protection only in the Member State that issued the residence permit. This should be without prejudice to the possibility for a Member State to decide to issue, at any time, a residence permit to persons enjoying temporary protection under this Decision.

- (17) This Decision is compatible with, and can be applied in complementarity with, national temporary protection schemes, which can be considered as implementing Directive 2001/55/EC. If the Member State has a national scheme that is more favourable than the arrangements set out in Directive 2001/55/EC, the Member State should be able to continue applying it, since that Directive provides that Member States may adopt or retain more favourable conditions for persons covered by temporary protection. However, should the national scheme be less favourable, the Member State should ensure the additional rights provided for in Directive 2001/55/EC.
- (18) Directive 2001/55/EC takes duly into account the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security, as it allows Member States to exclude a displaced person from temporary protection where there are serious reasons for considering that the person: has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; has committed a serious non-political crime outside the Member State of reception prior to admission to that Member State as a person enjoying temporary protection; or has been found guilty of acts contrary to the purposes and principles of the UN. The Directive also allows Member States to exclude a displaced person from temporary protection where there are reasonable grounds for regarding that person as a danger to the security of the host Member State or a danger to the community of the host Member State.

- (19) When providing temporary protection, Member States should ensure that the processing of personal data of the persons enjoying temporary protection respects the requirements laid down in the data protection acquis of the Union, in particular in Regulation (EU) 2016/679 of the European Parliament and the Council (3).
- (20) This Decision should allow the Union to coordinate and closely monitor the reception capacity in Member States so as to take action and provide additional support as needed. Directive 2001/55/EC requires Member States, in liaison with the Commission, to cooperate and exchange information to facilitate the implementation of temporary protection. That should be done through a 'Solidarity Platform' whereby Member States exchange information regarding their reception capacities and number of persons enjoying temporary protection in their territories. So far, based on the information reported by a few Member States in the context of the EU Migration Preparedness and Crisis Management Network, reception capacities, over and above the absorption capacity of the Ukrainian diaspora residing in the Union, exceed 310 000 places. For the purpose of that exchange of information, the Commission should take up a coordinating role. Furthermore, in recent years, various platforms have been established with the aim of ensuring cooperation between Member States, of which the EU Migration Preparedness and Crisis Management Network (in accordance with Commission Recommendation (EU) 2020/1366 (4)) is the most appropriate network for the administrative cooperation provided for in Directive 2001/55/EC. Member States should also contribute to a Union common situational awareness through sharing of relevant information through the integrated political crisis response (IPCR) arrangements (5). The European External Action Service should be consulted where relevant. In this context, Member States should also work closely with the UN High Commissioner for Refugees.
- (21) In accordance with Directive 2001/55/EC, the duration of temporary protection should be for an initial period of one year. Unless terminated under the terms of Article 6(1), point (b), of that Directive, that period should be extended automatically by six monthly periods for a maximum of one year. The Commission will keep the situation under constant monitoring and review. At any time, it may propose to the Council to end the temporary protection, based on the fact that the situation in Ukraine is such as to permit the safe and durable return of those granted temporary protection, or propose that the Council extend the temporary protection by up to one year.
- (22) For the purpose of Article 24 of Directive 2001/55/EC, the reference to the European Refugee Fund set up by Council Decision 2000/596/EC (6) should be read as a reference to the Asylum, Migration and Integration Fund set up by Regulation (EU) 2021/1147 of the European Parliament and of the Council (7). All the efforts of Member States to comply with the obligations deriving from this Decision will be supported financially by the Union Funds. Emergency and flexibility mechanisms within the Multiannual Financial Framework 2021-2027 may also mobilise funds to address specific emergency needs within Member

States. Furthermore, the Union Civil Protection Mechanism (8) has been activated (9). Through that Mechanism, Member States can request items crucial for attending to the needs of the displaced persons from Ukraine present in their territory and can benefit from co-financing for delivering such assistance.

- (23) Since the adoption of Directive 2001/55/EC, several Union agencies have been established, or the mandates of those established before then have been strengthened. In that context, the Commission should cooperate with the European Border and Coast Guard Agency (Frontex), the European Union Asylum Agency, and the European Union Agency for Law Enforcement Cooperation (Europol), with a view to keeping the situation under constant monitoring and review. In addition, Frontex, the European Asylum Agency (EUAA) and Europol should provide operational support to Member States that have requested assistance to help them cope with the situation, including for the purposes of applying this Decision.
- (24) This Decision respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union.
- (25) Ireland is bound by Directive 2001/55/EC and is therefore taking part in the adoption of this Decision.
- (26) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (27) In view of the urgency of the situation, this Decision should enter into force on the day of its publication in the Official Journal of the European Union,

HAS ADOPTED THIS DECISION:

#### Article 1

##### Subject matter

The existence of a mass influx into the Union of displaced persons who have had to leave Ukraine as a consequence of an armed conflict is hereby established.

#### Article 2

The persons to whom the temporary protection applies

1. This Decision applies to the following categories of persons displaced from Ukraine on or after 24 February 2022, as a result of the military invasion by Russian armed forces that began on that date:

- (a) Ukrainian nationals residing in Ukraine before 24 February 2022;

- (b) stateless persons, and nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022; and,
- (c) family members of the persons referred to in points (a) and (b).

2. Member States shall apply either this Decision or adequate protection under their national law, in respect of stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin.

3. In accordance with Article 7 of Directive 2001/55/EC, Member States may also apply this Decision to other persons, including to stateless persons and to nationals of third countries other than Ukraine, who were residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin.

4. For the purposes of paragraph 1, point (c), the following persons shall be considered to be part of a family, in so far as the family was already present and residing in Ukraine before 24 February 2022:

- (a) the spouse of a person referred to in paragraph 1, point (a) or (b), or the unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its national law relating to aliens;
- (b) the minor unmarried children of a person referred to in paragraph 1, point (a) or (b), or of his or her spouse, without distinction as to whether they were born in or out wedlock or adopted;
- (c) other close relatives who lived together as part of the family unit at the time of the circumstances surrounding the mass influx of displaced persons, and who were wholly or mainly dependent on a person referred to in paragraph 1, point (a) or (b) at the time.

### Article 3

#### Cooperation and monitoring

1. For the purposes of Article 27 of Directive 2001/55/EC, Member States shall use the EU Migration Preparedness and Crisis Management Network, in accordance with Recommendation (EU) 2020/1366. Member States should also contribute to a Union common situational awareness by sharing relevant information through the integrated political crisis response (IPCR) arrangements.

2. The Commission shall coordinate the cooperation and the exchange of information among Member States, in particular in relation to monitoring the reception capacities in each Member State and identifying any need for additional support.

For that purpose, the Commission, in cooperation with Member States, the European Border and Coast Guard Agency (Frontex), the European Union Asylum Agency (EUAA) and the European Union Agency for Law Enforcement Cooperation (Europol) shall keep the situation under constant monitoring and review, while making use of the EU Migration Preparedness and Crisis Management Network.

In addition, Frontex, the EUAA and Europol shall provide operational support to Member States requesting their assistance in coping with the situation, including for the purposes of applying this Decision.

#### Article 4

##### Entry into force

This Decision shall enter into force on the same day of its publication in the Official Journal of the European Union.

Done at Brussels, 4 March 2022

For the Council

The President

J. BORRELL FONTELLES

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(1) OJ L 212, 7.8.2001, p. 12.

(2) Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 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 L 303, 28.11.2018, p. 39).

(3) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

(4) Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration (OJ L 317, 1.10.2020, p. 26).

(5) Council Implementing Decision (EU) 2018/1993 of 11 December 2018 on the EU Integrated Political Crisis Response Arrangements (OJ L 320, 17.12.2018, p. 28).

(6) Council Decision 2000/596/EC of 28 September 2000 establishing a European Refugee Fund (OJ L 252, 6.10.2000, p. 12).

(7) Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund (OJ L 251, 15.7.2021, p. 1).

(8) Regulation (EU) 2021/836 of the European Parliament and of the Council of 20 May 2021 amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism (OJ L 185, 26.5.2021, p. 1).

(9) As of 28 February 2022 by Slovakia.



