

Warsaw, 15 July 2022

**OPINION OF THE HELSINKI FOUNDATION FOR HUMAN RIGHTS
ON INCOMPLIANCE OF CERTAIN NATIONAL REGULATIONS CONCERNING
TEMPORARY PROTECTION WITH RELEVANT PROVISIONS OF THE EUROPEAN
UNION LAW**

I. Summary

In connection with the invasion of Russian troops, several million persons, including both citizens of Ukraine and foreigners living there, arrived from the war-torn country to Poland.

In Poland, there are two parallel legal systems that regulate the rights of persons enjoying temporary protection, who fled Ukraine: one of them covers Ukrainian citizens and their spouses, while the other one covers nationals of third countries who lived in Ukraine. The treatment granted to these persons may not be less favourable than that set out in EU legal regulations on temporary protection.

While both systems in principle ensure the right to residence and a number of rights related thereto, there are several solutions that are incompliant with the EU legal regulations and require changes at the national legislative level:

- residence documents are not issued to persons who enjoy temporary protection in Poland, and, therefore, no right to travel within the Union is ensured for such persons,

- administrative decisions refusing Ukrainian citizens and their spouses to enjoy rights resulting from temporary protection (refusal to assign a national registration PESEL number) are not issued – besides enumerated situations; lack of the PESEL number results in lack of access to benefits provided in the national law; therefore there is also lack of appeal procedure against PESEL number assignment refusal,

- solutions concerning family reunification and transferral of the residence of persons enjoying temporary protection have not been introduced into the national regulations concerning Ukrainian citizens and their spouses,
- there are no provisions to ensure access to suitable accommodation and other assistance in terms of social welfare and means of subsistence for Ukrainian citizens,
- social welfare security benefits which Ukrainian citizens and their spouses are entitled to differ from those vested in other categories of persons covered by temporary protection.

II. Introduction

In connection with the Russian invasion of Ukraine on 24th February 2022, several million Ukrainian citizens and foreigners residing in the country entered the territory of Poland and other UE Member States in search of protection.

In response to this situation, on 4th March 2022, the Council of the European Union adopted an implementing decision establishing the existence of a mass influx of displaced persons from Ukraine and having the effect of introducing temporary protection.¹ The decision covers Ukrainian citizens and their family members, nationals of third countries who enjoyed international protection in Ukraine as well as their families, and citizens of other countries who stayed in Ukraine on the basis of a permanent residence permit and who are unable to return in safe and durable conditions to their country or region of origin. The minimum rights of persons covered by temporary protection are provided in Directive 2001/55/EC on temporary protection². On 21st March 2022, the European Commission issued operational guidelines for the implementation of the Council implementing decision.³

Within the Polish national law, however, there are two parallel systems that regulate the rights of persons who left Ukraine in connection with the armed conflict and who are enjoying temporary protection. The act of 12th March 2022 on aid to citizens of Ukraine in connection with the armed conflict within the territory of this country (hereinafter referred to as the act of 12th March 2022) is the most significant one in this context. The act covers Ukrainian citizens and their spouses, as well as

¹ EU Council Implementing Decision 2022/382 of 4th 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.

² 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.

³ 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.

members of the close family of Ukrainian citizens who hold a Pole's Card (who constitute the vast majority of persons who enjoy temporary protection in Poland). The persons covered by this are considered to be covered by temporary protection.⁴

The rights of other persons who enjoy temporary protection within the territory of Poland are regulated by the provisions of the act on granting protection to foreigners within the territory of the Republic of Poland (hereinafter referred to as the act on granting protection).⁵ These regulations constitute the basic form of implementation of the directive on temporary protection within the Polish legal system. However, in connection with the act of 12th March 2022 coming into effect, the regulations of the act on granting protection are in fact applicable only to nationals of third countries covered by the scope of the Council decision of 4th March 2022.

At present, Polish society, local self-government, as well as state authorities, get engaged in providing aid to persons who left Ukraine in connection with the armed conflict. It should be noted, however, that it is the state authorities who are primarily responsible for ensuring appropriate rights to persons who enjoy temporary protection. According to Art. 8.2 of directive 2001/55, the treatment granted by the Member States to persons enjoying temporary protection may not be less favourable than that set out in this directive. According to the Helsinki Foundation For Human Rights, there are a number of questions, where EU legal regulations have not been implemented in the national legal system in an appropriate manner, and the level of rights vested in persons enjoying temporary protection is less favourable than that specified in this directive. It requires the national authorities to introduce appropriate amendments.

Non-governmental organizations and the National Bar of Attorneys-at-Law have been pointing out the potential incompliance of the national provision with the EU law to the government and the Parliament, however their comments have not been taken into consideration so far⁶.

III. Description of particular solutions that are incompliant with the EU legislation

1. Residence documents are not issued to persons who enjoy temporary protection in Poland, and, therefore, the right to move freely within the Union is not ensured for such persons

Article 8.1 of directive 2001/55 provides that residence documents valid through the entire period of temporary protection should be provided to persons enjoying temporary protection. Under EU law, such a document not only allows to reside on the territory of a Member State (Article 2(g) of Directive

⁴ Art. 1, clauses 1 and 2, and Art. 2, clauses 6 through 8, of the act of 12th March 2022.

⁵ Chapter III, Section 3, of the act on granting protection .

⁶ See: Helsinki Foundation for Human Rights, "Proponujemy kolejne zmiany w specustawie o pomocy osobom z Ukrainy" [We propose further amendments to the special act on aid for persons from Ukraine], <https://www.hfhr.pl/proponujemy-kolejne-zmiany-w-specustawie-o-pomocy-osobom-z-ukrainy/>

2001/55). Also, persons who hold valid residence permit may, on the basis of that permit and a valid travel document, move freely within the territories of the Member States (Article 21 of the Convention Implementing the Schengen Agreement).

Meanwhile, national legal regulations do not provide for appropriate solutions in this respect. Residence of persons covered by the act of 12th March 2022 within the territory of the Republic of Poland is legalized on the basis of the virtue of law (art. 2 of this act) and no residence-related decision or document is issued. In such circumstances, a certificate that a given person has received the national identification number (PESEL), pursuant to art. 4.1, of the act of 12th March 2022, is the only confirmation of legal residence of a given person (yet, the certificate does not constitute a residence document as understood in the law of the Union).

Art. 110.5 of the act on granting protection provides, in turn, that a person enjoying temporary protection is issued a certificate confirming that such person enjoys temporary protection. However, this document is not a photo ID, nor is it a residence document as understood in the EU law. In addition, it is worth pointing out that the original regulations of the act on granting protection (art. 110.2) provided that a person enjoying temporary protection is granted a temporary residence permit and issued a residence card (that constitutes a residence document as understood in the law of the Union). However, this provision was deleted by the act of 12th March 2022.

It follows from the above that, contrary to the provisions of directive 2001/55, none of the national legal acts provide for issuing residence documents to persons who enjoy temporary protection in Poland.

Due to this situation, Ukrainian citizens enjoying temporary protection in Poland (except for the persons who hold a biometric passport and have the right to move freely within the Schengen area after being admitted into the territory for a 90-day period within a 180-day period) are also deprived of the right to move freely across the EU territory in mentioned period. It should be pointed out that the right is mentioned in motive (16) of the EU Council Implementing Decision of 4th March 2022 and in the Communication of the European Commission issued on 21st March 2022. Information about this right is also published on the website of the Commission.⁷ This, in turn, results in a sense of misinformation among Ukrainian citizens who enjoy temporary protection in Poland and who wish to temporarily move to another Member State. It seems that, in this respect, apart from implementing appropriate regulations, there is a need for the authorities to carry out an information campaign and to explain the rules applicable to persons who enjoy temporary protection in Poland and wish to cross external and internal EU borders.

⁷ European Commission, Information for people fleeing the war in Ukraine, https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/eu-solidarity-ukraine/eu-assistance-ukraine/information-people-fleeing-war-ukraine_en#j

It follows from information available to the HFHR that the government plans to introduce a special residence document for Ukrainian citizens covered by the regulations of the act of 12th March 2022. However, the details of this solution are yet to be known.

It should also be pointed out that art. 11.2 of the act of 12th March 2022 provides that a Ukrainian citizen who leaves the territory of Poland for a period exceeding 1 month loses the right to legal residence and to enjoy the rights provided for in this act. The regulation is in contradiction with the law of the Union, as it results in unjustified limitation of the right to free travel on EU territory. It should be reminded that temporary leave of the territory of a member state, according to directive 2001/55, does not constitute a basis for depriving a person of the possibility of enjoying temporary protection (what's more, as pointed out above, is that these regulations indicate the possibility of travelling for 90 days in 180-day period once the residence permit is issued). Only in the case of transferral of residence of persons enjoying temporary from one Member State to another Member State (within the family reunification mechanism as well), the residence permit issued by the first Member State expires (art. 26.4 of directive 2001/55). It should be pointed out that the act on granting protection does not provide for such a limitation concerning persons covered by temporary protection.

2. No decision and no appeal procedure in case of refusal of rights provided by the act of 12th March 2022 and in the case of withdrawing the rights provided by this act

Art. 29 of directive 2001/55 provides for the right of persons excluded from the possibility of enjoying temporary protection to mount a legal challenge against such exclusion. As far as this mechanism applies to persons excluded from the possibility of enjoying temporary protection pursuant to art. 28 of the directive (i.e. when he or she has committed a serious crime or there are reasonable grounds for regarding him or her as a danger to the security), and from the possibility of taking advantage of the family reunification mechanism, this appeal mechanism should be available in any other case of refusal of rights provided by the temporary protection provisions. This is indicated by motive 16 of directive 2001/55, referring to the principle of non-discrimination. It must be noted that art. 47 of the Charter of Fundamental Rights of the European Union provides for a right to an effective remedy in the case of violation of the rights guaranteed by the law of the Union. This provision does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such⁸. Case law of the Court of Justice of the European Union concerning the right to good administration and the rights of defence indicates that the Member States authorities are obliged to state reasons for decisions adopted by them⁹. The right to challenge administrative decisions is also

⁸ CJEU judgement of 29th June 2019, Torubarov, C-556/17, paragraph 56.

⁹ See, among others, the judgement of 11th December 2014, Boudjlida, C-249/13, paragraphs 36-40, the judgement of 7th September 2021, „Klaipėdos regiono atliekų tvarkymo centras” UAB, C-927/19, paragraph 120, the judgement of 8th May 2019, PI, C-230/18, PI, paragraphs 84 and 85.

indicated in art. 78 of the Constitution of the Republic of Poland.

As indicated above, pursuant to provisions of the act of 12th March 2022, residence of Ukrainian residents and their spouses covered by this act was legalised by virtue of the law (no relevant separate decision is issued). The only form – provided for by this act – of confirming legal residence of a person on the basis of this act consists in registration of and acquisition by such person of a certificate that they are granted with a PESEL identification number.

Art. 4.16 of the act of 12th March 2022 provides that a decision refusing to grant a PESEL identification number is issued only in the case of deficiencies of a purely formal nature (e.g., no appropriate photo is provided). Art. 4.17 of this act provides that there is no right to appeal against such a decision. Therefore, it must be concluded that such decision may be challenged in the administrative court. However, no decision is issued when the national authorities conclude that a given Ukrainian citizen fails to meet the substantive requirements to be granted the PESEL identification number (i.e. he/she fails to fulfil the conditions allowing him/her to be covered by the provisions of the act of 12th March 2022, described in art. 1.1, therein). It can be assumed that the person is simply informed of this orally. Therefore there is also no possibility of appealing against such a refusal. It seems to be contrary to the EU law.

It should be pointed out that a refusal to grant a PESEL number results in serious consequences for a Ukrainian citizen that include lack of possibility to benefit from rights provided in the act (e.g., it is impossible to enjoy social security benefits, to carry out business activities, etc.), while access to such rights shall be guaranteed pursuant to directive 2001/55.

No appeal procedure is also provided in the case of withdrawal of the rights to enjoy the rights resulting from the act of 12th March 2022, which also means deprivation of the possibility of enjoying the rights enshrined in temporary protection legislation. In such circumstances, under EU law, there should exist a remedy against such a decision as well.

The act on granting protection, in turn, provides for the possibility of refusing to grant temporary protection in the situations specified in art. 109.1 of this act (that reflect the bases provided in art. 28 of directive 2005/11). In the case of refusal to grant temporary protection, the Head of the Office for Foreigners issues a decision that is final (art. 109.2 of the act on granting protection). Therefore, there is a possibility to challenge such decisions in the administrative court. Moreover, this act provides for a situation where a foreigner ceases to enjoy temporary protection in Poland only when he/she leaves the territory of the Republic of Poland through a transfer of his/her place of residence to another member state where he/she will enjoy temporary protection (art. 117 – 117b).

3. The act of 12th March 2022 does not provide the right to family reunification and transferral of the residence of persons enjoying temporary protection

Art. 15 of directive 2001/55 provides for an obligation of state authorities to reunite families of persons enjoying temporary protection. This is applicable both to family members who stay within the territories of different Member States and to family members who have not arrived in any of the Member States yet.

Art. 26 of directive 2001/55 provides, in turn, for the possibility of transferring the place of residence of persons enjoying temporary protection from one Member State to another.

The act of 12th March 2022, however, does not contain regulations providing for any of the above-indicated mechanisms. So they are not available to Ukrainian citizens and their spouses covered by the act of 12th March 2022. On the other hand, the relevant regulations are provided in the act on granting protection (art. 117-117b). It means that only foreigners who resided in Ukraine and left it due to an armed conflict enjoy the possibility of taking advantage of the mentioned provisions.

4. Certain benefits are not guaranteed to Ukrainian citizens covered by the act of 12th March 2022.

Art. 13.1 of directive 2001/55 provides that persons enjoying temporary protection have access to suitable accommodation. Art. 13.4 of directive 2001/55 provides that Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or victims of violence.

The act of 12th March 2022, however, provides that national authorities may ensure accommodation (art. 12.1, paragraph 3 of the act) and may ensure psychological aid (art. 32.1 of the act) to a Ukrainian citizen, and thus, such aid is not ensured in an obligatory manner to such citizens, which includes persons who have special needs. It should be indicated that both forms of aid are exceptionally important for persons who have fled from an armed conflict and may have had difficult experiences.

It should also be pointed out that accommodation for persons covered by the provisions of the act of 12th March 2022 is at present ensured to a great extent by private entities. Pursuant to art. 13 of the act of 12th March 2022, they are entitled to a cash consideration on this account, yet for a period that does not exceed 120 days since the date a Ukrainian citizen arrived in Poland, which in most cases is less than the period of temporary protection (1 year, counted from 4 March 2022) or the period of legal residence of Ukrainian citizens (18 months, counted from 24th February 2022). Therefore, there are fears that it will actually not be possible to accommodate Ukrainian citizens in private apartments for longer periods (accommodation in such apartments may eventually be onerous both for hosts and for Ukrainian citizens). This raises doubts concerning capability of state authorities, in the long run, to fulfil the obligation to ensure accommodation to all persons who enjoy temporary protection in Poland.

It must be stated that accommodation in refugee centres operated by the Office for Foreigners are ensured to persons enjoying temporary protection pursuant to the act on granting protection (art. 112 of this act).

5. Difference in the scope of benefits vested in Ukrainian citizens covered by the act of 12th March 2022 and in persons covered by temporary protection pursuant to the act on granting protection.

Art. 13 of directive 2001/55 provides that persons enjoying temporary protection are entitled to accommodation, social security benefits, and health care. While both national acts provide for a series of benefits, both for Ukrainian citizens and their spouses and for foreigners residing in Ukraine before 24th February 2022, their rights are different. At the same time, directive 2001/55 in its motive (16) prohibits discrimination of persons enjoying temporary protection in terms of their treatment.

As indicated above with reference to accommodation, the act on granting protection guarantees such accommodation, while the act of 12th March 2022 provides that the authorities may ensure accommodation, that is they are not obliged to ensure it to Ukrainian citizens and their spouses. As regards the right to work in Poland, in the case of persons covered by temporary protection under the Act on granting protection - they have an unconditional right to perform work (article 87.1 point 6 of the Act of 20 April 2004 on employment promotion and labour market institutions). On the other hand, the condition for the legal performance of work by persons covered by the Act of 12 March 2022 is the notification of the labour office by the employer (art. 22.1 and art. 22.2 of this Act). While there seems to be little difference, many employers are not aware of the notification obligation, and the lack of such notification makes the performance of work illegal. It may result in further consequences, such as a fine for the foreigner, under Article 120(2) of the Employment Promotion and Labour Market Institutions Act.

There are also differences in terms of other social welfare benefits. The persons covered by temporary protection pursuant to the act on granting protection have the right to be provided with food in kind or financial allowances and other benefits (such as, for instance, financial allowances for hygienic products) similarly as applicants for international protection. In the case of a family consisting of two adults and two children that decided to live outside a refugee centre, the benefit for the entire family amounts to about 1500 PLN (approx. 312 EUR) per month. The family is supposed to cover accommodation, alimentation, and other expenses (apart from health care) from these means. Moreover, the level of aid provided to persons enjoying temporary protection pursuant to the act on granting protection may be lowered in case the family acquires an income that exceeds the amount that entitles one to receive benefits from the general social security system. In turn, the persons covered by the act of 12th March 2022, in turn, are entitled to the so-called 500+ benefit, general family benefits (art. 26), a one-time allowance of 300 PLN (approx. 63 EUR) (art. 31), and they may also be granted other benefits provided for in the general social security system (art. 29.1). In such situations, a family of four

(two adults and two minor children) will be entitled to receive benefits amounting to 1000 PLN (approx. 208 EUR), while having the possibility to take advantage of free-of-charge accommodation and, potentially, other social security benefits.

Due to these circumstances, the level of benefits a foreigner is entitled to may differ, depending on his/her status (i.e., whether he/she is covered by the regulations of the act of 12th March 2022 or the act on granting protection).

Member States are obliged – when applying the law of the Union – to observe the provisions of the Charter. Art. 20 of the Charter provides that everyone is equal before the law, while art. 21 of the Charter prohibits any discrimination on any ground, such as race, colour, ethnic origin, or membership of a national minority, among others. It should be mentioned, the general rules of the law of the Union, such as the principle of equal treatment and that of non-discrimination that constitute constraints for the Member States in their implementation of regulations of the law of the Union in their national legal systems.¹⁰ The Court of Justice of the European Union, referring to art. 20 and 21 of the Charter, defined the principle of equal treatment as the principle requiring that "comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified." The CJEU indicated that a difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.¹¹

In this context, it is difficult to find an objective and reasonable explanation for different treatment of persons covered by temporary protection pursuant to different legal acts in terms of their entitlement to benefits within national regulations. It should be pointed out that all such persons find themselves in analogous and comparable situations. They are covered by temporary protection pursuant to the same EU Council decision that does not differentiate between the situation of Ukrainian citizens and foreigners residing in Ukraine before the war. Therefore, their situation in terms of entitlement to benefits should also be comparable.

Opinion prepared by HFHR lawyer Jacek Bialas, attorney-at-law, in cooperation with Jarosław Jagura, advocate, HFHR lawyer

¹⁰ CJEU judgements: of 20th June 2002, Mulligan et al., C-313/99, paragraph 46; of 16th July 2009, Horvath, C-428/07, paragraph 56; as well as the order of the Court of 16th January 2014, Dél-Zempléni Nektár Leader Nonprofit, C-24/13, paragraph 17; of 9th March 2017, Petya Milkova, C-406/15, paragraph 52-53.

¹¹ CJEU judgements: of 22nd May 2014, Glatzel, C 356/12, EU:C:2014:350, item 43; of 9th March 2017, Petya Milkova, C-406/15, EU:C:2017:198, item 55.