

## **POLICY NOTE: Refugees from Ukraine: access to temporary protection in Poland after moving from another MS**



**12 December 2022**

### **Introduction:**

#### **About HNLAC:**

HNLAC is a non-governmental organization registered in Poland, operating since 2002. HNLAC's main objective is to protect human rights by providing free legal council to persons at risk of social exclusion and discrimination, including foreigners, asylum seekers, refugees and stateless persons. HNLAC is acting as UNHCR implementing partner in Poland. Since the beginning of the war in Ukraine HNLAC is a part of the Open Kraków Coalition working to promote the rights of Ukrainian refugees in Poland.

#### **HNLAC's work for Ukrainian refugees:**

Since the beginning of the war, HNLAC provides free legal aid for refugees coming from Ukraine, including stateless persons, via 13 legal info points in Kraków, Rybnik, Wrocław, Poznań and Lublin. The HNLAC also operates a dedicated helpline for refugees from Ukraine and a special program of legal assistance for unaccompanied minors.

#### **Registration for PESEL UKR – confirmation of obtaining temporary protection in Poland and access to rights**

#### **Points of concern:**

Recently more and more refugees from Ukraine approach HNLAC lawyers and report problems with registration as beneficiaries of temporary protection in Poland (PESEL UKR registration), in case they were previously living in other EU Member States.

People who were beneficiaries of temporary protection in other EU MS are currently being denied registration in Poland, irrespective of whether they already formally resigned from temporary protection in other MS or never formally acquired such protection but stayed in other MS for some period of time.

People who were refused registration do not receive any written decision and have no right to appeal.

#### **Analysis:**

Citizens of Ukraine fleeing the war in their country may benefit from temporary protection in Poland based on special law on assistance to Ukraine nationals.

Beneficiaries of the special law may register themselves in Poland with the PESEL database and acquire a special PESEL UKR status confirming that they are beneficiaries of temporary protection.<sup>1</sup>

There is no obligation to register and officially obtain a PESEL UKR status. However, the PESEL UKR confirms that a person is a beneficiary of temporary protection and exercising certain rights and entitlements that beneficiaries of temporary protection in Poland have is dependent upon registering the PESEL UKR status (these rights and entitlements include: social aid, digital residence permit document, access to labor market).

In practice, in case a person is denied registration for PESEL UKR they are informed about it orally, no administrative decision is delivered, therefore there is no right to appeal.

In November 2022 Ministry of Internal Affairs and Administration issued internal guidelines intended for administrative offices responsible for PESEL UKR registration. According to the guidelines the special law should apply to those who can demonstrate a “functional relationship” between arriving to Poland and fleeing Ukraine and therefore those that resided in other state should not benefit from the said law. Guidelines list exemplary categories of persons who may not benefit with temporary protection:

- citizen of Ukraine who after 24<sup>th</sup> February 2022 stays for several weeks or months on the territory of other countries (both EU MS and other) and after arrives in Poland with intention to stay,
- citizen of Ukraine who – while staying after 24<sup>th</sup> February 2022 in other EU MS received in the said EU MS a Canadian visa valid until 2025 and arrives in Poland in August 2022 with intention to stay,
- citizen of Ukraine whom – after leaving Ukraine after 24<sup>th</sup> February 2022 entered another EU MS, where they were staying for several weeks or months and received a residence permit there or applied for temporary protection there and later arrives in Poland with intention to stay,
- citizen of Ukraine who entered Poland after 24<sup>th</sup> February 2022 and after several days, without applying for PESEL UKR in Poland left for another EU MS and stayed there for several months; later they crossed the internal border with the intention of stay, some of them registered for temporary protection in another EU MS.

According to Polish Constitution, Internal Guidelines are not a source of law and therefore should not create new rights or obligations.

According to the Council Implementing Decision (EU) 2022/382<sup>2</sup> Member States have agreed in a joint statement that they will not apply Article 11 of Directive 2001/55/EC<sup>3</sup>.

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<sup>1</sup> Other categories of persons fleeing conflict in Ukraine (third country nationals and stateless) who qualify under temporary protection need to apply for a „certificate” that confirms that they benefit from this protection.

<sup>2</sup> Council implementing Decision 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

<sup>3</sup> 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, Art. 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.*

Art. 15 of the 2001/55/EC Directive provides for a family reunification procedure, while art. 26 introduces a rule of cooperation between MS as to the transfer of the residence of persons enjoying temporary protection from one MS to another.

European Commission published a FAQ document to *clarify the Commission services' understanding of the Temporary Protection Directive and relevant EU law*, where it is mentioned that person enjoying temporary protection based on the Directive has the right to choose a MS, where they enjoy protection and that *A Member State has an obligation to provide for the rights in the TPD for as long as the person falls under the scope, regardless of whether the person was previously registered in another Member State.*<sup>4</sup>

The above mentioned provisions and official interpretation provided by the European Commission in the FAQ document are in contrast with the Polish guidelines and related practice. Where the EU interpretation indicates that the temporary protection status should follow the protection beneficiary without obstacles even if they decide to relocate, Polish practice is more strict and leads to effective cessation of protection in relation to those who relocated from Poland only to later return. This difference in interpretation of the scope of the 2001/55/EC Directive creates a considerable protection gap.

#### Recommendations:

- Ukrainian citizens that do not benefit from temporary protection in other EU MS should have the possibility to benefit from temporary protection in Poland, which also includes situations where someone was staying in other EU MS, otherwise, persons that resign from temporary protection in other EU MS and arrive in Poland are left in a legal limbo
- Refusal to register a person for temporary protection in Poland should have a form of a written decision, with justification and right to appeal

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<sup>4</sup> 5. *What follow-up should Member States give to such instances where they find out the person is registered in another country (hit) or where they find out the person who they have registered subsequently registers in another Member State (notification).* Temporary protection is to be enjoyed in only one Member State. In the Member State in which the person does not reside anymore the residence permit should be withdrawn and the ensuing rights expire. As mentioned in the operational guidelines issued by the Commission on 21 March 2022, a person covered by Council Implementing Decision (EU) 2022/382 has the right to choose the Member State in which they want to enjoy the rights attached to temporary protection as Member States decided to waive the use of Article 11 of the TPD. A Member State has an obligation to provide for the rights in the TPD for as long as the person falls under the scope, regardless of whether the person was previously registered in another Member State; in fact, a Member State cannot refuse the registration of a person falling under the scope, thus possibly limiting the access to rights to the person in the MS concerned, on the grounds that the person is registered in another MS. At the same time, a person can benefit from the rights attached only in one Member State at a time. This means that if a person is registered in one Member State (for example MS1) and subsequently moves to another MS (MS2), the Member State where s/he moves to (MS2) has to provide the person with all the rights foreseen in the TPD, including registering the person concerned and subsequently providing him/her with a residence permit. The person will benefit from the rights in the second Member State (MS2). The residence permit issued in the first Member State (MS1) and the ensuing rights must expire and be withdrawn in the first Member State, in accordance with the spirit of Articles 15(6) and 26(4) of the TPD. Member States may only refuse temporary protection (and hence refuse to register or refuse the residence permit) to persons who are not covered by the scope of Directive 2001/55/EC and the Council Implementing Decision [https://home-affairs.ec.europa.eu/system/files/2022-07/Frequently%20asked%20questions%20received%20on%20the%20interpretation%20of%20the%20Temporary%20Protection%20Directive%20and%20Council%20Implementing%20Decision%202022-382\\_en.pdf](https://home-affairs.ec.europa.eu/system/files/2022-07/Frequently%20asked%20questions%20received%20on%20the%20interpretation%20of%20the%20Temporary%20Protection%20Directive%20and%20Council%20Implementing%20Decision%202022-382_en.pdf)

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