


Limiting Social Assistance under the EU Temporary Protection Directive to Displaced Persons Working Remotely for the Public Administration of Their Country of Origin

Piotr Sadowski

PhD, Assistant Professor, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń, correspondence address: Władysława Bojarskiego 3, 87-100 Toruń, Poland, e-mail: psadowski@umk.pl

 <https://orcid.org/0000-0002-7013-3410>

Keywords:

mass influx
of displaced persons,
temporary
protection,
refugees,
remote work,
social assistance

Abstract: This research focuses on the legal situation of displaced persons who benefit from Directive 2001/55/EC regulating the EU temporary protection mechanism. This law can be activated in the case of mass influx of persons in need of international protection. A displaced person (unlike a refugee) can work remotely for the authorities of their country of origin, although this should be verified individually. Thanks to this, the financial benefits from this type of work can be taken into account by the country of residence of the displaced person when determining the level of social assistance granted to that person under Directive 2001/55/EC.

1. Introduction

The Refugee Convention¹ (RC) forms foundations of the EU's Common European Asylum System (the CEAS). Although EU asylum law has been

This work was supported by a project “Is Polish law addressing mass arrivals of Ukrainians in line with EU law?”, financed from “Inicjatywa Doskonałości – Uczelnia Badawcza na Uniwersytecie Mikołaja Kopernika w Toruniu” under the call “Debiuty 3”.

¹ United Nations General Assembly, The 1951 Refugee Convention (United Nations General Assembly Resolution 429(V) of 14 December 1950) and its 1967 Protocol (Attached to United Nations General Assembly Resolution 2198(XXI) of 16 December 1967).

amended, Directive 2001/55/EC (Directive)² – the only international law which establishes binding minimum standards for granting temporary protection in the event of a mass influx of displaced persons (DPs)³ – has remained unchanged. The Directive does not define terms “suitable accommodation” and “necessary assistance in terms of social welfare and means of subsistence”. Still, it promotes a balance of efforts between the EU Member States (the EUMSs) in receiving and bearing consequences of receiving DPs.

The Directive has been activated only once – to address displacement from Ukraine (the CID).⁴ Its beneficiaries have been called using “a new term ‘war refugees from Ukraine’”⁵ popular amongst Poles⁶ but also the UNHCR, OECD and WHO.⁷ This term is based on the date of crossing an EUMS’s border.⁸ Still, it seems that it could also be used with respect to these persons even if they have left Ukraine before February 24, 2022, if the European Commission’s views were implemented by the EUMS.⁹ Thus,

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 (O.J.E.C. L212, 7 August 2001), 12–23.

³ Meltem Ineli-Ciger, “The Missing Piece in the European Agenda on Migration: The Temporary Protection Directive,” *EU Law Analysis*, July 8, 2019, accessed June 29, 2023, <https://eulawanalysis.blogspot.com/2015/07/the-missing-piece-in-european-agenda-on.html>; Piotr Sadowski, “Czy zakres podmiotowy prawa polskiego jest zgodny z decyzją wykonawczą Rady (UE) 2022/382 w sprawie masowego napływu wysiedleńców z Ukrainy?,” *Studia Iuridica* 94 (2022): 338, <https://doi.org/10.31338/2544-3135.si.2022-94.20>.

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 (O.J.E.C. L71, 4 March 2022), 1–6.

⁵ Anna Szachon-Pszenny, “Szczyt kryzysu migracyjnego w 2015 r. a szczyt kryzysu uchodźczego w 2022 r. – próba analizy porównawczej wpływu na ‘obszar bez granic’ UE,” *Studia Politologiczne* 68 (2023): 58–9, <https://doi.org/10.33896/SPolit.2023.68.3>.

⁶ Robert Miron Staniszewski, “Uchodźcy czy migranci? – społeczna percepcja pojęć na podstawie wyników badań opinii publicznej,” *Studia Politologiczne* 68 (2023): 9–37, <https://doi.org/10.33896/SPolit.2023.68.1>.

⁷ Szachon-Pszenny, “Szczyt kryzysu,” 61.

⁸ Staniszewski, “Uchodźcy,” 35–6.

⁹ European Commission, 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

the term “war refugees from Ukraine” is more geographically specific than the words “displaced people”. Relationship between the terms “refugee” and “displacement” is more complicated.¹⁰ Both refer to persons who have left their country of origin or residence (hereinafter: CoO). Still, not every displaced person may obtain refugee status. Under the RC, these two forms of protection should complement each other.

The first activation of Directive 2001/55/EC exemplifies a new form of forced migration, because “many displaced Ukrainians are highly educated with previous work experience in sectors such as sales, management, education, and healthcare, and can speak, beside Ukrainian and Russian, English, and to a lesser extent several other languages,”¹¹ and a substantial number of persons work remotely in Ukraine.¹²

The research aims to answer a question of whether the country of residence (CoR) of a DP can take into account financial benefits from work performed in the CoO when granting social assistance to that person. The analysis has been limited to remote work for public authorities of the CoO. This is because although refugee status is denied to persons who cooperate with the authorities of their CoO, it is unclear whether this reasoning also applies to DPs or whether the law regulating subsidiary protection¹³ should apply in their cases. Ukraine has not asked persons performing work for public authorities to seek protection outside that state and to

Directive 2001/55/EC, and having the effect of introducing temporary protection (2022/C 126 I/01), (O.J.E.C. CI 126/1, 21 March 2022), 1–16, hereinafter: the Guidelines.

¹⁰ Identifying the differences between these terms would be even more complicated if the term “migrant” was added to the list of terms referring to persons who have left Ukraine; Stanisławski, “Uchodźcy,” 34.

¹¹ European Union Agency for Asylum, International Organization for Migration, and Organisation for Economic Cooperation and Development, *Forced Displacement from and within Ukraine: Profiles, Experiences, and Aspirations of Affected Populations* (Luxembourg: Publications Office, 2022), 3, <https://data.europa.eu/doi/10.2847/739455>.

¹² 28% of DPs in Poland work remotely in Ukraine; Piotr Długosz, Ludmyła Kryvachuk, and Dominika Izdebska-Długosz, “Problemy ukraińskich uchodźców przebywających w Polsce,” PsyArXiv. May 19, 2022, <https://doi.org/10.13140/RG.2.2.14921.01125>.

¹³ 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) (O.J.E.C. L337, 20 December 2011), 248–65.

continue their work remotely. Therefore, the above-mentioned peculiarity of the displacement which began in 2022 has only served as an inspiration for this analysis.

Firstly, based on an analysis of previous research, which has shown that Directive 2001/55/EC does not generally prohibit performing remote work for the CoO,¹⁴ it has been established that these persons should be able to benefit from the international protection initiated in a mass influx situation, if this does not conflict with refugee law, which has to be verified for each individual case. Secondly, a linguistic interpretation of Directive 2001/55/EC and the CID, which takes into account a systemic¹⁵ and a comparative¹⁶ interpretation of that secondary legislation, has led to the conclusion that the CoR can limit social assistance to DPs if they receive financial benefits in the CoO. Decisions on these limits must be taken on a case-by-case basis. Nevertheless, the Directive does not clearly set a minimum level of the support.

In view of the increasing popularity of remote work, the findings of this article can contribute to building new theoretical knowledge by identifying loopholes in the Directive. The results of this analysis may also have an impact on the practice of limiting social assistance to DPs and, consequently, on public finances of the CoR.

The dominant research method used in this study was a dogmatic-legal method. The selection of legal texts was based on the importance of the RC to the UN human rights protection system (the Convention is one of the most widely ratified international treaties) and to the CEAS. Having in mind the thematic scope of this analysis, the UN's human rights treaty on social policy (ICESCR) has also been used. Analysis of regional

¹⁴ This theme is analyzed in Piotr Sadowski, "Remote Work for the Public Administration of a Country of Origin under the EU Temporary Protection Directive," *Studia Iuridica Toruniensia* (34) 2024, in print.

¹⁵ By analyzing the aims of the Directive, Consolidated version (2016) of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) and Charter of Fundamental Rights of the European Union, (O.J.E.C. C202, 7 June 2016), 1–405.

¹⁶ By referring to the UN General Assembly International Covenant on Economic, Social and Cultural Rights of 16 December 1966; United Nations Treaty Series, vol. 993, p. 3 (hereinafter: ICESCR) and the Council of Europe European Social Charter, Turin; European Treaty Series No. 035 (1961) (hereinafter: ESC).

legislation has been narrowed to standards clarifying the importance of the RC to the EU's laws (TEU, TFEU, the Charter). Based on that, relevant secondary EU law on asylum has been identified and considered. Given the importance of the Council of Europe norms to the EU, reference was also made to the Council's treaties. Particular attention was paid to standards on the procedural aspects of granting protection and ensuring efficient access to adequate social assistance. Their interpretation took into account previous research findings. Finally, a historical method was used to underline the need to analyze the RC in terms of the aims of this treaty.

The first part of this article highlights the particularities of the EU asylum law, in particular the Directive on the mass influx of DPs. The next part of this text refers to the findings of previous research. They prove that a DP may work remotely for the CoO in the CoR if an individually concluded verification does not show that that work conflicts with refugee protection objectives. Finally, the article examines whether (and if so, to what extent) the benefits from that work may limit social assistance granted to that person in the CoR. The text ends with a brief summary and conclusions.

2. Common European Asylum System

Under Article 52 of the UN Charter all regional organizations have to respect the UN principles. Still, they can develop them.¹⁷ In this way, the interested countries can increase the effectiveness of the implementation of international law by taking into account e.g. regional social and economic particularities. The development of the Common European Asylum System illustrates this view.

The CEAS is based on: the RC, which “in Article 33, contains the principle of non-refoulement, according to which a country may not expel or return refugees to territories where their lives or freedoms would be threatened,”¹⁸ Article 78 of the TFEU, the EU Charter, and the secondary EU

¹⁷ 1 United Nations Treaty Series, vol. XVI; Krzysztof Orzeszyna, “Universalism of Human Rights: Notion of Global Consensus or Regional Idea,” *Review of European and Comparative Law* 46, no. 3 (2021): 165, <https://doi.org/10.31743/recl.12428>; Piotr Sadowski, “The EU's Approach to the Extraterritorial Processing of Asylum Claims and Its Compliance with International Law,” *Revista General De Derecho Europeo*, no. 53 (2021): 40–2.

¹⁸ Mieczysława Zdanowicz, “The Migration Crisis on the Polish–Belarusian Border,” *Białostockie Studia Prawnicze* 28, no. 1 (2023): 108, <https://doi.org/10.15290/bsp.2023.28.01.06>.

standards.¹⁹ The need to respect the fundamental rights of protection seekers can also be derived from Article 2 of the TEU and the 1950 European Convention on Human Rights and Fundamental Freedoms²⁰ (the ECHR) which indirectly (as the EU has not yet acceded to the ECtHR) sets a minimum common standard for the EU law (Article 52(3) of the EU Charter). Unlike Article 18 of the EU Charter, the text of the ECHR does not explicitly refer to the protection from refoulement. Nevertheless, thanks to a progressive interpretation of that Convention, it also applies to persons who cannot be returned because their lives would be endangered or because they would be exposed to torture, inhuman or degrading treatment upon return.²¹ This is because the rights and freedoms should not be an illusion, but should be protected in practice.²²

The CEAS was created in two stages.²³ It began with the adoption of minimum harmonization. This left the establishment of more detailed standards to the EUMSs. Later, when the Area of Freedom, Security and Justice has been regulated under the ordinary legislative procedure by the Treaty of Lisbon,²⁴ that decision-making margin was reduced. As a result, full harmonization was achieved in:

- 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 (currently: Directive 2011/95/EU),

¹⁹ Elżbieta Karska et al., *Human Rights in the European Paradigm of the Protection of Aliens* (Warsaw: Cardinal Stefan Wyszyński University in Warsaw, 2023), 151, <https://doi.org/10.13166/hr/QHLC7301>.

²⁰ European Treaty Series No. 005.

²¹ Agnès G. Hurwitz, *The Collective Responsibility of States to Protect Refugees*, Oxford Monographs in International Law (Oxford-New York: Oxford University Press, 2009), 190.

²² ECtHR Judgment of 9 October 1979, *Airey v. Ireland*, App. No. 6289/73.

²³ More on the CEAS's developments in Piotr Sadowski, *Wspólny Europejski System Azylowy – Historia, Stan Obecny i Perspektywy Rozwoju* (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2019), passim; Elżbieta Borawska-Kędzierska and Katarzyna Strąk, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej, Część 2: Polityka Wizowa, Azylowa i Imigracyjna*, 2nd ed. (Warsaw: EuroPrawo, 2009), passim.

²⁴ Karska et al., *Human Rights*, 15:336.

- common procedures for granting and withdrawing international protection,²⁵
- standards for the reception of applicants for international protection,²⁶ and
- the criteria and mechanisms for determining the EUMS responsible for examining an application for international protection.²⁷

Moreover, the Treaty of Lisbon has given the CJEU the right to decide on the EU's asylum policy. That court refers to the decisions of the ECtHR, and the ECtHR refers to the decisions of the CJEU. This judicial dialogue strengthens the coherence of European interpretation of refugee law, although some divergences remain.²⁸

Directive 2001/55/EC is the only part of the CEAS which has not been amended. Article 12 of Directive which stipulates that “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” confirms that this secondary EU legislation has established only minimum standards for giving temporary protection in the event of a mass influx of DPs from third countries. The accuracy of this view is reinforced by the fact that the Directive does not provide more detailed rules on how the above-mentioned engagement should be achieved.

²⁵ Currently: Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (O.J.E.C. L180, 29 June 2013), 60–95.

²⁶ Currently: 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 (O.J.E.C. L180, 29 June 2013), 96–116.

²⁷ Currently: 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 (O.J.E.C. L180, 29 June 2013), 31–59.

²⁸ Confront e.g. ECtHR Judgment of 21 November 2019, *Ilias and Ahmed v. Hungary*, App. No. 47287/15 with CJEU Judgment of 14 May 2020, *FMS, FNZ (C-924/19 PPU)*. *SA, SA junior (C-925/19 PPU) v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367.

Examples from other EU standards²⁹ show that, although labor market access is not an exclusive competence of the EU,³⁰ other policy areas can (at least indirectly) determine certain issues at the EU level.

Finally, given the thematic focus of this article, it should be emphasized that all the EUMSs have ratified the ICESCR and the ESC. Still, the EU, which has legal capacity (Article 47 of TEU), is not a party to these treaties and is therefore not legally bound by them. Nevertheless, an interpretation of EU law which would not take into account the ICESCR and the ESC may lead to a breach of the international obligations of the EUMSs.

3. Denying Protection to Persons Exercising State Powers of a Country of Origin

Undoubtedly, there is no reference to health and safety working conditions in the CoO in the narrow catalogue of conditions that must be met in order to receive a positive decision in refugee cases. However, refugee status may be granted to persons belonging to a particular social group. The term “social group” is not defined in international law, but it refers to “a combination of matters of choice [e.g. economic activity] with other matters over which members of the group have no control [e.g. ethnic origin].”³¹ The aforesaid economic activity includes work, which “should be understood as any gainful activity for another entity, leading to economic dependence between them.”³² This dependence (the execution of the state’s powers) is the reason

²⁹ Cf. Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (O.J.E.C. L343, 23 December 2011), 1–9.

³⁰ Luc Leboeuf, “The Quest for Equilibrium Between Security and Humanitarian Considerations in a Fast-Evolving Legal Environment: The Case of Belgium,” in *Law and Migration in a Changing World*, eds. Marie-Claire Foblets and Jean-Yves Carlier, *Ius Comparatum* 31 (Cham: Springer, 2022), 149–50.

³¹ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford–New York: Oxford University Press, 2007), 75.

³² Adam Krzywoń, “Rozdział 13. Wybrane Prawa Gospodarcze, Społeczne i Kulturalne. Prawa Pracownicze,” in *Prawa Człowieka*, eds. Wojciech Brzozowski, Adam Krzywoń, and Marcin Wiącek, 2nd ed. (Warsaw: Wolters Kluwer, 2019), 306.

why working for the authorities of the CoO is an obstacle to obtaining refugee status.

The analysis of a situation of persons in need of protection gets complicated when a state is unable to offer protection e.g. owing to its lack of military resources to ensure safety on a certain territory. Persons working for the authorities of the CoO may be asked to move to another part of the country and work remotely. If security were to deteriorate further, the state could recommend that some employees, e.g. civil servants, emigrate and continue their work remotely using modern communications technology. In this case (contrary to a situation when the CoO is a “source” of threat to life or freedom from torture), the employee would not sever ties with the CoO. Nevertheless, in order to reflect current social and economic realities (e.g. popularization of remote work after the COVID-19 pandemic), the interpretation of the RC should be changed and the asylum caseworkers should focus on “considering the consequences of the execution of powers attributed to a state by the applicants (...) [and thus on a] verification of whether the subordination of an employee to an employer involves direct or indirect participation in the exercise of powers [using coercion] conferred by public law.”³³ This is because a nature of activities performed by e.g. soldiers and teachers differs substantially.

However, even members of one group of workers may have different types of contracts concluded with the state actors. This may be a consequence of a “strong fragmentation of the national public sectors: there are different levels of government (...); different functions ascribed to the public administration and public enterprise; bodies which are formally separate from the State or the government, the so-called regulatory agencies; independent administrative authorities and executive agencies.”³⁴ The level of subordination of different members of one group to their supervisors (e.g. a local authority), the way in which the person is remunerated, and the type of contract which the person has concluded may also vary.³⁵ If such

³³ Sadowski, “Remote Work.” This issue is analyzed in details in that article.

³⁴ European Commission, “Commission Staff Working Document – Free Movement of Workers in the Public Sector,” The Official Journal of the EU SEC(2010) 1609 final.

³⁵ Cf. examples from case-law provided at: European Commission, “Employment, Social Affairs & Inclusion: Case Law – Employment in the Public Sector,” accessed February 16, 2024, <https://ec.europa.eu/social/main.jsp?catId=953&langId=en&intPageId=1218>.

divergences have been noted in the European Communities (now: the EU), and thus among states which are expected (under Article 145 of TFEU) to “work towards developing a coordinated strategy for employment,” then they are even more likely to occur when the person is employed outside the EU. This means that the CoR’s law should be used to determine the existence of an employment relationship in individual cases. Consequently, if it is established that there is a link between the applicant and the CoO, a caseworker should verify whether the employees are directly or indirectly engaged in the exercise of public authority and duties designed to safeguard the general interest of the state. Under the RC, such engagement of the person applying for protection would be an obstacle to obtaining refugee status, even if the work is performed remotely.

The refugee recognition procedure is based on an individual assessment of a case. Such a procedure is not envisaged in mass influx situations. Nevertheless, the EUMS can exclude a person from temporary protection. Reasons which can justify making such a decision are enumerated in Article 28 of Directive 2001/55/EC. They refer to war crimes and considering the person as a danger to the EUMS’s security, among others. However, the enumeration does not include cooperation with the CoO. Hence, the states cannot deny protection on this ground as long as the work does not conflict with the aims of the refugee protection system. Links to the CoO are also irrelevant in EU-harmonized subsidiary protection cases. Therefore, the interpretation that opts for an individual assessment of the nature of the activities carried out by the applicants contributes to a more coherent interpretation of EU law and favors an interpretation of the RC in line with the RC’s objectives.

4. The Right to Necessary Assistance

The UN considers protection seekers as vulnerable persons from a socially disadvantaged group.³⁶ This vulnerability can also be noticed when they attempt to access the labor market.³⁷ Consequently, promoting their full

³⁶ Krzysztof Orzeszyna et al., eds., “Chapter I. Conceptual Framework and General Principles of Human Rights,” in *International Human Rights Law*, Legal status as of 1 January 2023 (Warsaw: Wydawnictwo C.H. Beck, 2023), Legalis, 20.

³⁷ Cf. the UN General Assembly, “Resolution Adopted by the General Assembly on 25 September 2015 on Seventieth Session (Agenda Items 15 and 116) – Transforming Our World: The 2030 Agenda for Sustainable Development,” A/RES/70/1 (2015), accessed February 17,

rational employment is particularly valuable. Such an employment should be understood as the highest level of the most efficient employment.³⁸ Nevertheless, the obligation stemming from e.g. Article 9 of the TFEU (which is the so-called horizontal social clause, so it extends to the Area of Freedom, Security and Justice), Article 6 of the ICESCR, and §2 of the ESC “does not mean the assurance of work for every individual, but it entails the requirement to guarantee that every individual will have a real, open opportunity for employment.”³⁹

The reluctance to grant access to the national labor market to persons seeking international protection has resulted in leaving these issues at the discretion of the EUMSs. Under Directive 2013/32/EU, the states decide whether to grant the right to work in the first six months of an asylum procedure. This duration of suspending access to employment was supported by the UNHCR.⁴⁰ This is because it was assumed that most applicants would receive their decisions within this period.

In contrast, Article 12 of the Directive provides for the need to ensure a facilitated and effective access to national labor markets.⁴¹ Individuals should also be able to run a business and participate in educational opportunities. Detailed regulations on how to achieve these aims differ between countries (Polish law on self-establishment⁴² and gaining employment in

2024, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (hereinafter: the 2030 Agenda).

³⁸ Stanisław Kamiński, “Koncepcje Modeli Polityki Społecznej,” in *Wymiary Polityki Społecznej*, eds. Olga Kowalczyk et al., 3rd ed., updated (Wrocław: Wydawnictwo Uniwersytetu Ekonomicznego we Wrocławiu, 2021), 180.

³⁹ Karska et al., *Human Rights*, 15:346; Tadeusz Zieliński, “Rozdział I. Problemy części ogólnej prawa pracy,” in *Prawo pracy RP w obliczu przemian*, eds. Maria Matey-Tyrowicz and Tadeusz Zieliński (Warsaw: C.H. Beck, 2006), 45–6.

⁴⁰ UNHCR, “UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council Laying down Standards for the Reception of Applicants for International Protection (Recast) COM (2016) 465 (UNHCR Comments EU RCD (Recast))” (UNHCR, August 2017), 14, accessed November 17, 2023, www.refworld.org/docid/59a6d6094.html.

⁴¹ Karol Karski, “Migration,” in *Legal Studies on Central Europe*, ed. Anikó Raisz, vol. 9 (Budapest: Central European Academic Publishing, 2022), 228, https://doi.org/10.54171/2022.arilfcec_10.

⁴² Paweł Widorski, “Taking up and Pursuit of Business Activity in the Republic of Poland by a Citizen of Ukraine as an Individual Entrepreneur on the Basis of the Act of March 12, 2022 on Assistance to Citizens of Ukraine in Connection with Armed Conflict on the Territory

Poland⁴³ have already been analyzed). The adoption of the CID has not changed this view, as the EU's competencies have not been expanded. Thus, the CID has not amended the rules established by the Directive. Nevertheless, EU law and Article 6 of the ICESCR provide some interpretation guidelines clarifying the aim which should be achieved by a successful employment policy. They confirm that access to the employment of one's choice is essential for realizing other human rights. These rights naturally include the second generation of human rights. Therefore, researchers correctly correlate the right to work with the possibility of supporting oneself.⁴⁴

The Directive did not establish a link between the above-mentioned self-sufficiency and a standard of living. This secondary EU law refers to "suitable accommodation" or "necessary assistance in terms of social welfare and means of subsistence," leaving it at the discretion of the EUMSs to define those imprecise terms. Still, it follows from the European Commission's Guidelines that "when implementing the Council's decisions, the Member States must respect the Charter [in particular Article 34] (...) and the spirit of Directive 2001/55/EC." The need to ensure the humane living conditions for beneficiaries of temporary protection was stressed during work on that secondary law.⁴⁵ The Directive also includes a reference to the need to respect the Charter in its recitals, so an interpretation of these regulations also stems from the need to consider the purpose of that Treaty. This is particularly important given that this treaty is one "in which social

of That Country," in *Закарпатські Правові Читання. Право Як Інструмент Стійкості Та Розвитку В Умовах Сучасних Цивілізаційних Викликів. Частина 1* (Liha-Pres, 2023), 215–19, <https://doi.org/10.36059/978-966-397-298-5-51>.

⁴³ Robert Miron Staniszewski and Tomasz Kownacki, "Diagnoza życia, postaw oraz planów obywateli Ukrainy, którzy przybyli do Polski w wyniku działań wojennych tj. od dnia 24 lutego 2022 roku. Raport z badania opinii publicznej," 2023, <https://doi.org/10.13140/RG.2.2.14330.88009>.

⁴⁴ Karska et al., *Human Rights*, 15:346.

⁴⁵ Economic and Social Committee, Opinion on the Proposal for a Council Directive 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 (O.J.E.C. C155, 29 May 2001), 21–5, para. 3.2.2.

values are recognized and expressed in the broader context of the objectives and priorities that shape the EU.”⁴⁶

If the “adequate social protection” which is referred to in Article 9 of the TFEU is to be ensured in all EU policies, then it is reasonable to conclude that the EUMS which provides temporary protection must follow “a dignified standard of living.” This standard is higher than an “ability to meet their own needs” which is referred to in Article 13(3) of the Directive. This view should be promoted because, firstly, *Lex posterior derogat legi priori*. Secondly, the EU Treaty is higher in the hierarchy of EU standards than EU secondary legislation. Thirdly, the CJEU has repeatedly favored a functional interpretation of EU law. Hence, this type of deduction should also be applied in the context of identifying the standard of living for displaced persons.

Nevertheless, the reference to “a dignified standard of living” does not conflict with the right of the EUMS to limit support to DPs. This is because the EUMS must ensure that they can effectively bear the financial consequences of providing protection. In a time of a large number of displaced persons, public spendings on social assistance would be high. Nevertheless – unlike in the case of, for example, family reunification – the EUMSs cannot deny access to their territory to protection seekers. Therefore, the only way in which the states can ensure that protection seekers are not an unbearable burden on the public welfare system is to support the persons in need rationally. This is clearly reflected in the aims of the Directive, which intends to promote solidarity (including financial solidarity) between the EUMSs affected by a mass influx.

Yet, the CID has not identified new financial sources to support the EUMSs receiving a large number of DPs. This is because the Directive has not delegated the power to establish new EU funding to the Council or the European Commission. Therefore, only previously established EU funds have been made available to support the needs of DPs. However, these resources are very limited, calling into question the EU’s fulfilment

⁴⁶ Maria Eugenia Bartoloni, “The Horizontal Social Clause in a Legal Dimension,” in *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, eds. Francesca Ippolito, Maria Eugenia Bartoloni, and Massimo Condinanzi, Routledge Research in EU Law (Abingdon–Oxon: Routledge, 2019), 83.

of the aims of the Directive which refer to solidarity among the EUMSs in bearing the burden of welcoming displaced persons. As Francisco Javier Durán Ruiz correctly states:

Member States will receive funding for temporary protection from the Asylum, Migration and Integration Fund (...) [to be] distributed as follows: a) 8 million euros for each Member State, except Cyprus, Malta, and Greece, which receive 28 million; b) the remaining resources are divided: 35% for asylum, 30% for legal migration and integration and 35% for the fight against irregular immigration, including returns; c) of the 35% allocated for asylum, 60% of the resources go to applicants for international protection and only 30% (...) is intended for refugees, stateless persons or beneficiaries of subsidiary protection and beneficiaries of temporary protection, all with already recognised status.⁴⁷

Most of the costs of supporting the DPs are covered by national resources. The EUMSs have obeyed these rules. Yet, unsurprisingly, having in mind e.g. raising inflation, some limitations have been introduced e.g. in Poland and the Czech Republic in 2023 (they require displaced persons to cover part of the accommodation costs).⁴⁸ It should therefore be explicitly declared that the EUMSs have a right to limit financing to the minimum standard in the case of persons who are able to support themselves. Such a limitation would make it possible to rationally manage public finances by providing support to persons with the most urgent needs.

Before the re-eruption of the war, Polish law regulated limitations on accessing some social rights. Some of these rules apply to all nationals e.g. when the amount of benefits which are granted depends on the financial resources of the applicant. These limitations apply the same restrictions to all persons. Hence, the nationality or legal status of the beneficiaries is

⁴⁷ Francisco Javier Durán Ruiz, “La Regulación de La Protección Temporal de Los Desplazados Por La Guerra de Ucrania y Su Compatibilidad Con Otras Formas de Protección Internacional En El Contexto de Una Nueva Política Migratoria de La UE,” *Revista de Derecho Comunitario Europeo*, no. 73 (2022): 969–70, <https://doi.org/10.18042/cepc/rdce.73.07>. Translation by the Author. See recital 22 of the CID.

⁴⁸ See: Marika Kosieli-Pająk and Piotr Sadowski, “British and Polish Temporary Protection Schemes Addressing Displaced Persons from Ukraine,” *Journal of Jurisprudence and Legal Practice*, no. 4 (2023): 887–912, <https://doi.org/10.5817/CPVP2023-4-5>.

irrelevant in deciding the amount of social support which will be granted. Therefore, there is no reverse discrimination in such cases.

Under this type of limitations, a responsible institution “takes into account” performing work or running a business. This does not infringe Article 13(3) of the Directive, which explicitly states that “account shall be taken, when fixing the proposed level of aid, of their [(the beneficiaries)] ability to meet their own needs.” One cannot but agree that “early access to the labour market for persons applying for international protection results in a reduced demand for financial and social assistance from the host country.”⁴⁹ Consequently, limitations are possible, but they conflict with EU law (including Directive 2001/55/EC) if they do not ensure an adequate reception standard in practice.⁵⁰ Therefore, the EUMS must ensure that “core benefits” which cover “at least minimum income support” are provided to protection seekers, as specified in Directive 2011/95/EU. Thus, limitations can be applied on a case-by-case basis.

Directive 2001/55/EC does not specify a source of an income which can be “taken into account.” It seems reasonable to say that the authority which decides on granting social assistance can ask an applicant to disclose their remuneration (a salary and a wage), as well as financial resources received from e.g. self-employment or copyrights. However, international laws do not specify whether these sources of income include sources in the CoO. Interpretation guidelines can be deduced from the purpose for which the Directive has been adopted. Recital 15 of that law explicitly states that “The Member States’ obligations as to the conditions of reception and residence of persons enjoying temporary protection (...) should be fair and offer an adequate level of protection to those concerned.” The expression “adequate level” can be further clarified by referring to the Luxembourg court case in which (as Maria Eugenia Bartoloni correctly puts it) it was declared “that Art 9 [which] ‘require[s] it to ensure’ the objectives set down, appears to suggest that the EU is subject to an ‘obligation’ and

⁴⁹ Karska et al., *Human Rights*, 15:352.

⁵⁰ Małgorzata Cilak and Piotr Sadowski, “Polish National Financing of Support to Mass Arrivals of Persons Fleeing Ukraine After 24 February 2022,” *Krytyka Prawa* 15, no. 3 (2023): 71–85, <https://doi.org/10.7206/kp.2080-1084.621>.

that this amounts to an ‘obligation of result.’⁵¹ Therefore, the EUMS is not accountable for taking rational steps to achieve the Directive’s aims, but for effectively achieving these aims in practice. Once the Council implementing decision is adopted, the EUMS acts “within EU law” when it addresses the needs of displaced persons. Thus, the state cannot claim that another state (e.g. the CoO) bears responsibility for persons under the EUMS’ jurisdiction. This, again, confirms that the limitation of social assistance may enable rational management of public finances by providing support to persons with the most urgent needs.

Expenses on social protection of a large number of DPs can be so high that they may threaten the financial stability of the EUMS. If such a situation occurs, it seems rational to apply a limitation clause. This view is not in conflict with the fact identified by Tadeusz Jasudowicz, i.e. that the essential core of legitimate goals is limited to state security, public health, and public morality.⁵² He did not mention the state of public finances as a legitimate goal which allows for a narrow interpretation of human rights. Nevertheless, social assistance is not a first-generation of human right, so the states have more freedom in limiting these rights. Thus, the states can interpret the terms “necessary assistance in terms of social welfare and means of subsistence” narrowly and interpret the term “take into account” a foreigner’s financial resources broadly to limit the extent of social support, if national law provides for such a possibility, and if such a limitation is necessary in a democratic society. This must be decided individually, cannot be arbitrary, and cannot go beyond the minimum level which would guarantee a dignified existence. To confirm that the limitation was thoroughly analyzed, a state could claim that a DP can still support themselves by working remotely. This supports the view that the right to work should be effectively available to persons protected in mass influx situations.

A displaced person, due to the stress and trauma experienced in the CoO and the feeling of alienation in the CoR, may need to receive

⁵¹ Bartoloni, “The Horizontal,” 87. She refers to the CJEU Judgment of 4 May 2016, *Pillbox v. Secretary of State for Health*, Case C-477/14, ECLI:EU:C:2016:324.

⁵² Tadeusz Jasudowicz, “Test Celowości w Funkcjonowaniu Mechanizmu Limitacji Korzystania z Praw Człowieka w Systemie EKPC,” *Polski Rocznik Praw Człowieka i Prawa Humanitarne*, no. 3 (2012): 113.

specialized psychological treatment. Hence, all forms of assistance which increase their self-confidence should be supported. Performing remote work fits perfectly with this objective. It makes it possible to stay connected with persons from the same culture and to reduce the feeling of alienation. It can also increase a feeling of being needed. Finally, employment helps to develop new skills and benefit from life-long learning. Therefore, researchers properly stress that “The possibility of taking up gainful employment allows the refugees to get back on their feet more quickly, to get out of the difficult situation they find themselves in, and contributes to achieving self-sufficiency.”⁵³ Similar view can be deduced from the Pope’s message.⁵⁴

The positive impact of employment on the mental health of persons in need of international protection can also be seen from the perspective of public spendings. This is because a brain gain can increase the productivity of displaced persons. This, in turn, can increase their earnings and support their career advancement. Consequently, performing work remotely can reduce the expenses on social assistance, because a displaced person’s financial resources can be taken into account when making a decision on granting them financial support.

Finally, an increase in human capital can contribute to the development of the CoO when the person in need of protection is able to safely return to that state. Therefore, the promotion of fair employment should also be seen in the context of the migration and development nexus, which is promoted by the UN. Firstly, actions promoting the development of the CoO should be supported. This was accurately underlined by the IOM which linked these actions with migrants’ “ability to access services, integrate into society and stay connected with their communities of origin.”⁵⁵ Secondly, policies which restrict the efficient performance of work contradict Point 10.b of the UN Goal 10 of the 2030 Agenda which in para. 27 “Encourage[s] official development assistance and financial flows, including foreign

⁵³ Karska et al., *Human Rights*, 15:344.

⁵⁴ Pope Francis, “Message Of The Holy Father Pope Francis For The II Global Refugee Forum (Geneva, 13–15 December 2023),” accessed December 15, 2023, <https://www.vatican.va/content/francesco/en/messages/pont-messages/2023/documents/20231214-messaggio-refugee-forum.html>.

⁵⁵ IOM, “Migration, Sustainable Development and the 2030 Agenda,” 2023, accessed December 15, 2023, <https://www.iom.int/migration-sustainable-development-and-2030-agenda>.

direct investment, to States where the need is greatest.” That goal suggests that the implementation of policies addressing Goal 8 of the 2030 Agenda (“Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”) should be carried out by the CoR and the CoO. Thus, although the CoR may limit social assistance to displaced persons, it should let them continue their remote work for the CoO, as this supports the CoO’s development and productive employment in that country.

5. Conclusions

Unlike a refugee, a displaced person can perform remote work for their CoO if it does not conflict with aims of the refugee system. This interpretation respects the RC, as the states (and international organizations, including the EU) can extend the subjective scope of protection. Directive 2001/55/EC promotes this view.

Moreover, granting the right to continue performing remote work for the CoO is in line with the obligation to promote productive employment. Although international law does not explicitly state in which country such a promotion should take place, this can be inferred from the UN standards that address the interests of the CoR and the CoO.

Remote work also helps the DPs to stay connected with people with whom they share cultural and linguistic ties. This, in turn, supports their psychological recovery and reduces the feeling of alienation in the CoR. However, well-managed remote work can also support the integration of persons in need of international protection into the host society. This is because they can use their knowledge and skills by building links with local communities. They will also develop their human capital, which (if well managed) should increase their productivity and competitiveness in labor markets. As a result, their incomes should increase.

In this context, it should be emphasized that remuneration can be considered by the authorities of the EUMS as a factor that may limit the extent of assistance provided to displaced persons. This could be a particularly useful method of limiting expenditure on social protection when a large number of beneficiaries would place a significant burden on public finances, which could pose a threat to the financial stability of the EUMS. A limitation of social assistance, justified by reference to legitimate goals, would

be possible if national law provided for such a possibility and if such a limitation was necessary in a democratic society. In order to confirm that the need for such a restriction has been thoroughly analyzed, a state could claim that displaced persons can still support themselves by working remotely. This reasoning supports the view that the right to work for the CoO should be effectively available to protected persons in situations of mass influx.

Nevertheless, the authorities of the host state should be able to verify that such activities do not violate refugee law. Indeed, the doctrinal-legal analysis carried out in this article has shown that the answer to the research questions depends on the nature of the activities performed by a displaced person, but not on the type of contract that this beneficiary concludes with the authorities.

References

- Bartoloni, Maria Eugenia. “The Horizontal Social Clause in a Legal Dimension.” In *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, edited by Francesca Ippolito, Maria Eugenia Bartoloni, and Massimo Condinanzi, 83–104. Routledge Research in EU Law. Abingdon-Oxon: Routledge, 2019.
- Borawska-Kędzierska, Elżbieta, and Katarzyna Strąk. *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej, Część 2: Polityka Wizowa, Azylowa i Imigracyjna*. 2nd ed. Warsaw: EuroPrawo, 2009.
- Cilak, Małgorzata, and Piotr Sadowski. “Polish National Financing of Support to Mass Arrivals of Persons Fleeing Ukraine After 24 February 2022.” *Krytyka Prawa* 15, no. 3 (2023): 71–85. <https://doi.org/10.7206/kp.2080-1084.621>.
- Długosz, Piotr, Liudmyla Kryvachuk, and Dominika Izdebska-Długosz. “Problemy ukraińskich uchodźców przebywających w Polsce.” *PsyArXiv*. May 19, 2022. <https://doi.org/10.13140/RG.2.2.14921.01125>.
- Durán Ruiz, Francisco Javier. “La Regulación de La Protección Temporal de Los Desplazados Por La Guerra de Ucrania y Su Compatibilidad Con Otras Formas de Protección Internacional En El Contexto de Una Nueva Política Migratoria de La UE.” *Revista de Derecho Comunitario Europeo*, no. 73 (2022): 951–93. <https://doi.org/10.18042/cepc/rdce.73.07>.
- European Commission. “Employment, Social Affairs & Inclusion: Case Law – Employment in the Public Sector.” Accessed February 16, 2024. <https://ec.europa.eu/social/main.jsp?catId=953&langId=en&intPageId=1218>.

- European Union Agency for Asylum, International Organization for Migration, and Organisation for Economic Cooperation and Development. *Forced Displacement from and within Ukraine: Profiles, Experiences, and Aspirations of Affected Populations*. Luxembourg: Publications Office, 2022. <https://data.europa.eu/doi/10.2847/739455>.
- Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law*. 3rd ed. Oxford–New York: Oxford University Press, 2007.
- Hurwitz, Agnès G. *The Collective Responsibility of States to Protect Refugees*. Oxford Monographs in International Law. Oxford–New York: Oxford University Press, 2009.
- Ineli-Ciger, Meltem. “The Missing Piece in the European Agenda on Migration: The Temporary Protection Directive.” *EU Law Analysis*. July 8, 2019. Accessed June 29, 2023. <https://eulawanalysis.blogspot.com/2015/07/the-missing-piece-in-european-agenda-on.html>.
- IOM. “Migration, Sustainable Development and the 2030 Agenda,” 2023. Accessed December 15, 2023. <https://www.iom.int/migration-sustainable-development-and-2030-agenda>.
- Jasudowicz, Tadeusz. “Test Celowości w Funkcjonowaniu Mechanizmu Limitacji Korzystania z Praw Człowieka w Systemie EKPC.” *Polski Rocznik Praw Człowieka i Prawa Humanitarnego*, no. 3 (2012): 109–33.
- Kamiński, Stanisław. “Koncepcje Modeli Polityki Społecznej.” In *Wymiary Polityki Społecznej*, edited by Olga Kowalczyk et al., 3rd ed., updated, 15–27. Wrocław: Wydawnictwo Uniwersytetu Ekonomicznego we Wrocławiu, 2021.
- Karska, Elżbieta, Elżbieta Morawska, Jakub Czepek, Łukasz Dąbrowski, Bartłomiej Oręziak, and Katarzyna Gałka. *Human Rights in the European Paradigm of the Protection of Aliens*. Warsaw: Cardinal Stefan Wyszyński University in Warsaw, 2023. <https://doi.org/10.13166/hr/QHLC7301>.
- Karski, Karol. “Migration.” In *Legal Studies on Central Europe*, edited by Anikó Raisz, vol. 9, 219–38. Budapest: Central European Academic Publishing, 2022. https://doi.org/10.54171/2022.ar.ilfcec_10.
- Kosiel-Pająk, Marika, and Piotr Sadowski. “British and Polish Temporary Protection Schemes Addressing Displaced Persons from Ukraine.” *Journal of Jurisprudence and Legal Practice*, no. 4 (2023): 887–912. <https://doi.org/10.5817/CPVP2023-4-5>.
- Krzywoń, Adam. “Rozdział 13. Wybrane Prawa Gospodarcze, Społeczne i Kulturalne. Prawa Pracownicze.” In *Prawa Człowieka*, edited by Wojciech Brzozowski, Adam Krzywoń, and Marcin Wiącek, 2nd ed., 305–9. Warsaw: Wolters Kluwer, 2019.

- Leboeuf, Luc. "The Quest for Equilibrium Between Security and Humanitarian Considerations in a Fast-Evolving Legal Environment: The Case of Belgium." In *Law and Migration in a Changing World*, edited by Marie-Claire Foblets and Jean-Yves Carlier, *Ius Comparatum* 31, 181–207. Cham: Springer, 2022.
- Orzeszyna, Krzysztof. "Universalism of Human Rights: Notion of Global Consensus or Regional Idea." *Review of European and Comparative Law* 46, no. 3 (2021): 165–76. <https://doi.org/10.31743/recl.12428>.
- Orzeszyna, Krzysztof, Michał Skwarzyński, Robert K. Tabaszewski, and Piotr Gumola, eds. "Chapter I. Conceptual Framework and General Principles of Human Rights." In *International Human Rights Law*, Legal status as of 1 January 2023. Warsaw: Wydawnictwo C.H. Beck, 2023.
- Pope Francis. "Message Of The Holy Father Pope Francis For The II Global Refugee Forum (Geneva, 13–15 December 2023)." Accessed December 15, 2023. <https://www.vatican.va/content/francesco/en/messages/pont-messages/2023/documents/20231214-messaggio-refugee-forum.html>.
- Sadowski, Piotr. "Czy zakres podmiotowy prawa polskiego jest zgodny z decyzją wykonawczą Rady (UE) 2022/382 w sprawie masowego napływu wysiedleńców z Ukrainy?." *Studia Iuridica* 94 (2022): 338–477. <https://doi.org/10.31338/2544-3135.si.2022-94.20>.
- Sadowski, Piotr. "Remote Work for the Public Administration of a Country of Origin under the EU Temporary Protection Directive." *Studia Iuridica Toruniensia* 34 (2024), in print.
- Sadowski, Piotr. "The EU's Approach to the Extraterritorial Processing of Asylum Claims and Its Compliance with International Law." *Revista General De Derecho Europeo*, no. 53 (2021): 28–78.
- Sadowski, Piotr. *Wspólny Europejski System Azylowy – Historia, Stan Obecny i Perspektywy Rozwoju*. Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2019.
- Staniszewski, Robert Miron. "Uchodźcy czy migranci? – społeczna percepcja pojęć na podstawie wyników badań opinii publicznej." *Studia Politologiczne* 68 (2023): 9–37. <https://doi.org/10.33896/SPolit.2023.68.1>.
- Staniszewski, Robert Miron, and Tomasz Kownacki. "Diagnoza życia, postaw oraz planów obywateli Ukrainy, którzy przybyli do Polski w wyniku działań wojennych tj. od dnia 24 lutego 2022 roku. Raport z badania opinii publicznej." 2023. <https://doi.org/10.13140/RG.2.2.14330.88009>.
- Szachoń-Pszenny, Anna. "Szczyt kryzysu migracyjnego w 2015 r. a szczyt kryzysu uchodźczego w 2022 r. – próba analizy porównawczej wpływu na 'obszar bez granic' UE." *Studia Politologiczne* 68 (2023): 55–76. <https://doi.org/10.33896/SPolit.2023.68.3>.

- UNHCR. “UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council Laying down Standards for the Reception of Applicants for International Protection (Recast) COM (2016) 465 (UNHCR Comments EU RCD (Recast)).” August 2017. Accessed November 17, 2023. www.refworld.org/docid/59a6d6094.html.
- Widerski, Paweł. “Taking up and Pursuit of Business Activity in the Republic of Poland by a Citizen of Ukraine as an Individual Entrepreneur on the Basis of the Act of March 12, 2022 on Assistance to Citizens of Ukraine in Connection with Armed Conflict on the Territory of That Country.” In *Закарпатські Правові Читання. Право Як Інструмент Стійкості Та Розвитку В Умовах Сучасних Цивілізаційних Викликів. Частина 1*, 215–19. Liha-Pres, 2023. <https://doi.org/10.36059/978-966-397-298-5-51>.
- Zdanowicz, Mieczysława. “The Migration Crisis on the Polish–Belarusian Border.” *Białostockie Studia Prawnicze* 28, no. 1 (2023): 103–15. <https://doi.org/10.15290/bsp.2023.28.01.06>.
- Zieliński, Tadeusz. “Rozdział I. Problemy części ogólnej prawa pracy.” In *Prawo pracy RP w obliczu przemian*, edited by Maria Matey-Tyrowicz and Tadeusz Zieliński, 3–52. Warsaw: C.H. Beck, 2006.