

Warsaw, 30th November 2022

Ylva Johansson
Home Affairs Commissioner
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels
Belgium

Dear Commissioner Johansson,

Association for Legal Intervention (Stowarzyszenie Interwencji Prawnej, SIP) is a national human rights civil society organization based in Warsaw, Poland. Its mission is to ensure social cohesion by promoting equality of all people before the law, with particular focus on the rights of migrants, refugees and asylum seekers. Since 24th February 2022, we have been assisting persons displaced from Ukraine, including temporary protection beneficiaries.

With regard to the ongoing European Commission's assessment of the implementation of the Temporary Protection Directive¹ in the Member States, we would like to share our view on a situation of Ukrainian nationals and other persons displaced from Ukraine that are staying in Poland. Many of their problems are intertwined with a faulty or insufficient implementation of the EU law in Poland.

Insufficient and incorrect eligibility rules

In Poland, two temporary protection mechanisms are in force. First one, based on the law adopted on 12th March 2022² (the 2022 Special Law), applies only to Ukrainian nationals and their spouses. Second one, based on the legal framework concerning temporary protection existing before the war in Ukraine (the 2003 Act on Protection³), is applicable to all other persons mentioned in Article 2 of the Council Implementing Decision (EU) 2022/382⁴; thus:

¹ The 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.

² *Ustawa z dnia 12 marca 2022 r. o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa*, available here: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220000583>.

³ *Ustawa z dnia 13 czerwca 2003 r. o udzieleniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*, available here: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu20031281176>.

⁴ The Council Implementing Decision (EU) 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.

1. international protection or equivalent national protection beneficiaries in Ukraine with their family members, and
2. holders of a valid permanent residence permit in Ukraine who are unable to return in safe and durable conditions to their country or region of origin.

Rights and obligations of the beneficiaries of those two temporary protection mechanisms differ what might be considered as a discriminatory treatment.

As regards eligibility, the Association for Legal Intervention identified three main problems.

First, as a rule, only spouses of Ukrainian nationals are eligible for temporary protection under the 2022 Special Law.⁵ Minor unmarried children of Ukrainian nationals and close relatives who lived together and who were dependent on a Ukrainian national, are not enjoying this protection. There are two exceptions to this rule. One is that children born in Poland whose mother enjoys temporary protection here are entitled to legal stay as long as the mother has this right⁶. Second exception applies to the ‘closest family’ of Ukrainian nationals who have been granted a special document confirming that they belong to the Polish nation (*Karta Polaka*).⁷ Even taking those exceptions into account, it must be concluded that not all family members of Ukrainian nationals are eligible for temporary protection in Poland under the 2022 Special Law. As a rule, persons listed in Article 2(4)(b-c) of the Council Implementing Decision (EU) 2022/382 as family members have been excluded from the scope of this protection. Admittedly, they may be eligible for the temporary protection offered by the second mechanism – based on the 2003 Act on Protection. However, then, members of one close family who all escaped the war in Ukraine will have different temporary protection statuses entailing dissimilar rights and obligations.

Second, the temporary protection under the 2022 Special Law is offered in full only if a person concerned entered Poland in a regular manner.⁸ It is a condition that is neither mentioned in the Council Implementing Decision (EU) 2022/382 nor in the Temporary Protection Directive. Taking into account the high number of the decisions on a refusal of entry issued at the Polish-Ukrainian border (see below), we presume that some Ukrainian nationals have already attempted and will attempt crossing this border irregularly. Despite the fact that they qualify for temporary protection under the EU law, in accordance with the 2022 Special Law they are excluded from this protection in Poland.

Third, in spite of the apparent encouragement on the EU part, Poland did not extend the personal scope of temporary protection. In consequence, many persons needing protection, like persons who came to the EU before 24th February 2022, are left without support.

⁵ Article 1(2) of the 2022 Special Law.

⁶ Article 2(1) of the 2022 Special Law.

⁷ Article 1(1) of the 2022 Special Law.

⁸ Article 2(1) of the 2022 Special Law.

Lack of remedies

A person that is considered not eligible for temporary protection – under both mechanism – has no access to an effective remedy. Most often, a person who has been denied temporary protection is not even given a written decision in this regard; he or she is just sent away from the respective office with the oral information that he or she is not recognized as a temporary protection beneficiary. Procedural rules as regards non-recognition are lacking, leaving the persons concerned without a possibility to ‘mount a legal challenge’. It is clearly against Article 29 of the Temporary Protection Directive in conjunction with Article 47 of the Charter of Fundamental Rights of the EU.

Worrying refusals of entry

According to the Border Guard’s data, in the period of March-September 2022, 8.840 decisions on a refusal of entry were issued at the Polish-Ukrainian border. 7.966 Ukrainian nationals received those decisions at this border. A total number of 8.822 Ukrainian nationals were denied entry to Poland in this period if one considers all external borders of Poland. The refusals were based mainly on the fact that the persons concerned exceeded a 90-day period of their free-visa stay in the EU or they had no visa or residence permit that would entitle them to enter Poland and EU.

Temporary protection beneficiaries have been denied entry to Poland as well. The reasons have been two-fold.

Firstly, the refusals initially resulted from the fact that Ukrainian nationals and their spouses, so persons eligible for a temporary protection under the 2022 Special Law, were not given any residence permits. Thus, the Polish Border Guard took a stand – at least in some cases – that those persons have a right to stay in Poland but not to enter the Polish territory.⁹ Thus, for couple months, temporary protection beneficiaries could re-enter Poland without difficulties only if they were still entitled to a visa-free movement or had a visa or another residence permit.

The lack of residence permits for persons enjoying temporary protection in Poland was in clear violation of Article 8 of the Temporary Protection Directive. It has been partly rectified in July 2022 by the introduction of the electronic document ‘Diia.pl’ and its notification to the European Commission.¹⁰ However, children are not allowed to obtain ‘Diia.pl’. Therefore, many temporary protection beneficiaries

⁹ Association for Legal Intervention, ‘People who fled from Ukraine should be allowed to re-enter Poland – SIP’s opinion’, 19 July 2022, available here: <https://interwencjaprawna.pl/en/people-who-fled-from-ukraine-should-be-allowed-to-re-enter-poland-sips-opinion/>

¹⁰ European Commission. Update of the list of residence permits referred to in Article 2(16) of Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code). 2022/C 304/05.

still have no access to a residence permit in Poland. Moreover, some adults also face difficulties in this regard due to their digital exclusion.

Secondly, Poland has not fully implemented Article 21 of the Temporary Protection Directive.

In the 2022 Special Law, there are no rules as regards voluntary return. Voluntary returns of Ukrainian nationals and their spouses are not supported by Poland in any way. The fact that temporary protection beneficiaries may want to travel to Ukraine (or elsewhere) is only recognized in the rule that the temporary protection status is lost if a person concerned stays outside Poland for a period longer than one month.¹¹ Hence, if a person, who has enjoyed temporary protection in Poland and has voluntarily returned to Ukraine, wants to re-enter Poland upon the one-month absence here, he or she may be denied entry due to the invalidity of the 'Diia.pl'. In those circumstances, in accordance with Article 21(2) of the Temporary Protection Directive, the Members States are obliged to give favorable consideration to requests for return. However, this provision has not been implemented into the 2022 Special Law and, as shown by the above-mentioned statistical data, the 'favorable consideration' is lacking at the Polish borders.

Article 21 of the Temporary Protection Directive has been partly implemented into the 2003 Act on Protection.¹² The respective rules on voluntary returns concern only a situation upon the end of temporary protection. Persons who are still enjoying temporary protection are not entitled to any support as regards voluntary return. Moreover, measures that are to be taken by the Polish authorities to enable voluntary returns are not specified, so it is uncertain what support will be offered in this regard to beneficiaries when the temporary protection ends. Furthermore, the requirement of the respect for a human dignity, mentioned in para. 1, has been omitted in the 2003 Act on Protection, and para. 2 has not been implemented at all.

Insufficient accommodation support

The Association for Legal Intervention observes an increasing problem with the provision of accommodation to persons enjoying temporary protection in Poland, in particular to Ukrainian nationals and their spouses. It is a consequence of, *inter alia*, the faulty national legislation which limits access to accommodation for temporary protection beneficiaries and violates Article 13 of the Temporary Protection Directive.

¹¹ Article 11(2) of the 2022 Special Law.

¹² Article 118(1-2) of the 2003 Act on Protection.

Firstly, under both temporary protection mechanisms, accommodation is provided for a period of no less than two months (counted from the day of the first entry to Poland) as far as public funds allow. It *may* be provided for a longer period.¹³ Those limitations are not allowed under the Temporary Protection Directive. Under Article 13(1) of the directive, a ‘suitable accommodation’ must be provided as long as temporary protection lasts. Moreover, those limitations are not linked to the ability of an employed or self-employed person to meet his/her own needs, so Article 13(3) of the directive does not apply here.

Secondly, while the 2022 Special Law enables applying for a financial allowance to cover accommodation and food expenses, this allowance cannot be understood as ‘means to obtain housing’ referred to in Article 13(1) of the Temporary Protection Directive. It is limited in time (120 days) and it is not paid to persons enjoying temporary protection, but to their landlords.¹⁴

Thirdly, Polish authorities announced recently that another amendment of the 2022 Special Law is planned.¹⁵ It will worsen the access to accommodation for Ukrainian nationals and their spouses. The obligation to provide accommodation for at least two months has been removed; the respective authorities will now have a discretion in this regard. The accommodation may be provided free-of-charge only for 120 days, afterwards temporary protection beneficiaries will have to participate in its costs. The limitation in time and the obligatory participation in costs will not apply to vulnerable persons and beneficiaries in a difficult situation. The proposed changes are not in coherence with Article 13 of the Temporary Protection Directive.

Lastly, under the 2003 Act on Protection, persons enjoying temporary protection in Poland do not receive sufficient ‘means to obtain housing’. They are granted the same amount of money as asylum seekers; thus, max. PLN 25 per day per person.¹⁶ NGOs, including the Association for Legal Intervention, have been alarming for years that such a small financial allowance is insufficient to cover even the most basic costs of everyday life. The Association has submitted a complaint to the European Commission in this regard as well.¹⁷ The amount of assistance offered, depending on the number of family members, might be lower

¹³ Article 12 of the 2022 Special Law.

¹⁴ Article 13 of the 2022 Special Law.

¹⁵ Projekt ustawy o zmianie ustawy o pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym na terytorium tego państwa oraz niektórych innych ustaw, available here: <https://legislacja.gov.pl/projekt/12365505/katalog/12921540#12921540>. For critical comments, see Association for Legal Intervention, ‘The government is planning unfavorable changes for the citizens of Ukraine – SIP’s commentary’, available here: <https://interwencjaprawna.pl/en/the-government-is-planning-unfavorable-changes-for-the-citizens-of-ukraine-we-comment/>.

¹⁶ Article 112(1) of the 2003 Act on Protection.

¹⁷ Association for Legal Intervention, ‘Complaint to the European Commission: insufficient allowances for asylum seekers’, 13 July 2020, available here: <https://interwencjaprawna.pl/en/complaint-to-the-ec-extremely-low-amount-of-financial-allowances-for-asylum-seekers/>.

than the social or existential minimum. In spite of the persisting protests of civil society, the amount of financial allowance for asylum seekers – and now also for some temporary protection beneficiaries – has not been changed since 2003.

No family reunification

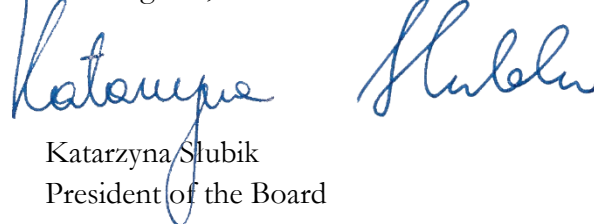
In violation of Article 15 of the Temporary Protection Directive, Ukrainian nationals and their spouses have no right to a family reunification. Under the 2022 Special Law, this right has not been provided for and no procedure exists in this regard.

The 2003 Act on Protection provides for some rules as regards a family reunification of temporary protection beneficiaries.¹⁸ They are mostly in accordance with the Temporary Protection Directive (albeit the guarantee of ‘best interests of the child’ is missing). However, those rules are difficult to enforce in practice due to the lack of procedural rules in this regard: it is unknown how to apply for reunification, how it is decided and how to challenge a family reunification denial. It makes the right to family reunification illusory, bringing in the violation of Article 15 of the Temporary Protection Directive. The lack of the explicit mention of an effective remedy against a family reunification denial may also breach Article 29 of the directive.

The Association for Legal Intervention hopes that the above-mentioned analysis will be useful for the European Commission as regards its activities concerning the implementation of the Temporary Protection Directive in the Member States.

We kindly request your support in convincing the Polish authorities that the national legislation concerning temporary protection must be amended so as it is in coherence with the EU law. All persons displaced from Ukraine, who enjoy temporary protection in accordance with the Council Implementing Decision (EU) 2022/382, should have access to the Polish territory as well as to accommodation, family reunification and effective remedies. Those rights are guaranteed not only in the Temporary Protection Directive, but they arise also from the Charter of Fundamental Rights of the EU. It is then a human rights matter that requires a prompt and strong reaction of the EU.

Kind regards,



Katarzyna Slubik
President of the Board

¹⁸ Articles 117-117b of the 2003 Act on Protection.

