
An end to the temporary protection of Ukrainians?

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The European Union reacted quickly to the migrant crisis precipitated by Russia's attack on Ukraine on 24 February 2022. The Council decided promptly on 4 March 2022 to invoke the Temporary Protection Directive (Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof). The Directive was introduced in the aftermath of the Yugoslav Wars to prepare for any future mass influx of refugees to the territories of EU Member States as a result of new conflicts in Europe or nearby areas.

The Council invoked the Directive by a unanimous decision of the Member States that Russia's assault had resulted in a significant armed conflict on Ukraine's territory, causing thousands of people to flee the area. The activation of the Temporary Protection Directive was a powerful show of European unity. The EU demonstrated the ability of national governments to quickly make the necessary decisions, even on politically sensitive matters such as the protection of refugees. The decision on temporary protection was made at a time when Russian troops were invading Ukraine on multiple fronts and rapidly advancing on the country's capital, Kyiv. It was not known at the time how effectively the Ukrainians could fight back, stop the Russian advance and ultimately regain control of invaded areas. The war in Ukraine and the political situation in many EU countries have changed significantly since then.

Protection under the Temporary Protection Directive was initially granted for a period of one year and later extended until 4 March 2024. Those who qualify for temporary protection in Finland have been able to apply for settled status after one year in the country, which has meant a switch from the Finnish Immigration Service's reception system to local government services. In September 2023, the EU's Justice and Home Affairs Council extended the current temporary protection mechanism until 4 March 2025. That date marks the end of the three-year maximum period of protection laid down in Article 4 of the Directive.

The objective of temporary protection is to stop the Member States' asylum systems from becoming overwhelmed. The objective appears to have been achieved at least in Finland; there have been no major issues with the temporary protection regime. The activation of the Temporary Protection Directive successfully circumvented the need to examine each case of international protection individually, as temporary protection is granted to all Ukrainians,

regardless of their circumstances and whether they come from the occupied areas in eastern Ukraine, areas close to the front lines or areas that are further away from the conflict.

A total of approximately 65,000 Ukrainians had applied for temporary protection in Finland by the end of October 2023. There are no signs of the war ending any time soon. Vast areas of Ukraine are still under Russian occupation, and the counterattack mounted by Ukrainian forces has made slow progress. How the war will unfold and what its end result will be are still anybody's guess, and it is perfectly possible that the deadline for ending the temporary protection regime is reached with no resolution to the war in sight. This is why we need to start thinking about what will happen to Ukrainian refugees when the temporary protection regime ends.

The Finnish Ministry of the Interior conducted a survey to find out about the plans of Ukrainians who have fled the war back in the summer of 2022. At that time, 27% of the respondents said that they had no plans to return to Ukraine. One in three (33%) was planning to go back once the war is over, if not before. Almost 40% of the respondents were still undecided and said that their plans would depend especially on whether they can find work in Finland and how the situation unfolds in Ukraine. The survey was conducted online between June and July, and a total of 2,136 people took part. (https://intermin.fi/-/noin-joka-kolmas-ukrainalainen-haluua-jaada-suomeen-moni-on-epavarma-tulevaisuudesta?languageId=en_US).

Although the survey was carried out relatively soon after the start of the war and the situation has now changed, the results are at least indicative of what can be expected. Since September 2022, the Ukrainian army has succeeded in taking back vast areas of the country's territory, such as the city of Kherson and areas around the city of Kharkiv. Russia, in turn, has announced unlawfully that it has annexed parts of Ukraine to Russia following a number of sham referendums. How this and the apparent stalemate on the front lines are affecting the plans of Ukrainian refugees is not known, but it is possible that the percentage of those who intend to stay in their host countries has at least not shrunk as a result, especially among those whose homes are in the Russian-occupied areas.

Even when the war eventually ends, many Ukrainians may well choose to remain in Finland and elsewhere in the EU rather than return to their war-torn home country.

Once the temporary protection regime expires on 4 March 2025, those Ukrainians who wish to stay in Finland will need a residence permit. Getting a residence permit requires satisfying certain criteria, such as having a job or family in Finland. If a Ukrainian refugee has found work in Finland, opened a business or started a family with a Finnish resident, they should have no problem getting a residence permit.

According to the Directive, persons enjoying temporary protection also have the right to apply for asylum. Finland, however, has taken advantage of Article 19 of the Directive, which provides that Member States can stipulate in their national laws that temporary protection cannot be enjoyed concurrently with the status of asylum seeker. What this has meant in practice is that persons who have applied for or been granted temporary protection have not been able to apply for asylum at the same time. Anyone who has submitted an asylum application has had their application suspended and been granted temporary protection instead. The Finnish Immigration Service's statistics nevertheless show that few Ukrainians have applied for asylum in Finland and those who have did so not knowing about the possibility of temporary protection.

Once the temporary protection regime ends, Ukrainians will be able to apply for asylum, at which time their personal circumstances will be examined with the rules of international protection in mind. However, the vast majority of Ukrainians in Finland are refugees from the war and have no compelling personal circumstances. Only those Ukrainians who are from the Russian-occupied areas of the country where Russian soldiers are reported to have committed attacks and violations against civilians are likely to have personal grounds for protection that are not related to the war.

The current temporary protection regime is based exclusively on the war in Ukraine, and the future protection of Ukrainians in Finland might be better ensured through subsidiary protection under section 88, subsection 1, paragraph 3 of the Finnish Aliens Act on the grounds of the general security situation in Ukraine than by granting asylum on personal grounds. The minimum standard for determining eligibility for subsidiary protection is, according to the so-called *Elgafaji* judgment (case C-465/07) of the Court of Justice of the European Union, that ‘the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a serious threat’.

If there is not indiscriminate violence across the whole country, the degree of violence in the applicant’s home region is what is taken into account. The assessment factors in the intensity of violence in a specific area and during a specific time as well as the severity and nature of the armed conflict. The scope of the assessment can be limited to an even smaller area, such as a specific municipality (ruling of the Supreme Administrative Court of Finland in case KHO 2017:71).

Under section 88d, subsection 1 of the Finnish Aliens Act, an applicant can be refused international protection ‘if he or she, in a part of his or her home country or country of permanent residence, does not have a well-founded reason to fear to be persecuted or face a real risk of being subjected to serious harm, or if he or she has access to protection in [some part of his or her home country or country of permanent residence]’. A further requirement is that the applicant must be able to have access safely and legally to the part of the country in question and reasonably be expected to reside there. The assessment as to whether any part of the country satisfies the criteria set out in subsection 1, both the living conditions in that part of the country in general and the individual’s personal circumstances must be taken into account.

International protection is, as a rule, designed to be a last resort. If there are areas in a person’s home country where there is no well-founded fear of being persecuted or a significant risk of serious harm, they should endeavour to settle there. The Supreme Administrative Court of Finland found in cases involving refugees from Afghanistan, for example, that the country’s capital, Kabul, offered a viable ‘internal protection alternative’ except where an individual’s personal circumstances made it unreasonable for them to relocate there (cases KHO 2017:73 and KHO 2017:74).

In the context of the war in Ukraine, the *Elgafaji* criterion concerning the degree of indiscriminate violence would probably only be satisfied along and in the vicinity of the front lines. Although Russia has also deployed explosives in various parts of Ukraine beyond the front lines, this would not, according to current interpretation, count as indiscriminate vio-

lence in these areas. There are vast areas of Ukraine that have been spared from these attacks, which have mostly targeted cities and infrastructure, and the internal protection alternative would therefore have to be explored first. It appears extremely unlikely for the criteria for subsidiary protection to be satisfied in the case of Ukrainian refugees.

If the war in Ukraine is still going on when the maximum period of temporary protection under the Directive is reached, it is possible that Ukrainians will seek asylum in the absence of other solutions. According to the aforementioned survey, 27% of the Ukrainians in Finland had no plans to return to Ukraine in the summer of 2022. Considering the number of Ukrainians currently enjoying temporary protection, this could translate to around 17,550 asylum applications. The number is approximately half of the number of applications submitted at the height of the 2015 refugee crisis. An influx of applications from Ukrainians would nevertheless raise the number of applications to many times what it has been in recent years.

Instructing Ukrainian refugees to apply for asylum through the usual channels once the temporary protection regime comes to an end would very likely overwhelm the asylum system, similarly to what happened in 2015 and 2016. Extra resources would be needed to be able to conduct the necessary asylum interviews and examine each application individually. Most of the applications would probably have to be rejected either due to non-satisfaction of the Elgafaji criteria or the existence of an internal protection alternative.

If the degree of indiscriminate violence in the applicant's home region was high enough to make them eligible for protection, the next step would be to determine whether the applicant could move to another part of Ukraine where security conditions are better, such as western Ukraine. This would also apply to individuals who are originally from the areas of Ukraine that Russia has annexed on the basis of its illegal sham referendums. Since Russia only occupies certain parts of the country and the general security situation in Ukraine varies considerably, the asylum procedure would not provide a sustainable solution for Ukrainian refugees. Considering the resources that would be needed and the likely outcome, subjecting Ukrainians to the asylum procedure seems pointless.

Since the activation of the temporary protection regime, the fact that Ukrainians have been able to travel freely to the EU has eased the pressure on the Ukrainian government to provide normal living conditions and basic services for those of its citizens who are fleeing the war within the country. The outcome of the war will determine whether these internal refugees and those Ukrainians who have sought temporary protection in the EU are able to return to their homes. The longer the war continues and if parts of Ukraine were to remain permanently occupied by Russia, the less likely this option becomes. Russia has already started moving its citizens to the occupied areas of Ukraine. Russia has destroyed civilian settlements and infrastructure, which makes life more difficult for all Ukrainians, including those potentially returning from the EU.

Resettling refugees in Ukraine will not be a quick process even when peace finally comes. We cannot expect refugees to return to their destroyed hometowns and villages until reasonable living conditions can be ensured there. Unless a solution to the war is found soon, the need for Ukrainians to reside in the EU is likely to go on for years.

The question of what happens to Ukrainian refugees when the temporary protection regime ends needs to be answered soon. On a national level, one option could be to reinstate the provisions on humanitarian protection that were removed from the Finnish Aliens Act in 2016. This would widen the scope of residence permits that can be issued on the basis of

international protection in general and would therefore contradict the current Government Programme. Finding a solution at EU level would be the simplest answer and would demonstrate the EU's consistent solidarity with Ukraine.