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# Remote work for the public administration of a country of origin under the EU Temporary Protection Directive\*

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## 1. Introduction

As a result of the war in former Yugoslavia between 3.7 and 4 million people have left that area. However, since its escalation, the military conflict which started in Donetsk, Lugansk, and Crimea in 2014 has been the biggest conflict in Europe since World War II. To address displacement from Ukraine, the Council has activated for the first time the law on mass arrivals of persons (the CID).<sup>1</sup> Council

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<sup>1</sup> 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 (OJ EU L 71 of 4 March 2022). At the time of writing this paper, 4.2 million of people from Ukraine are registered for temporary protection or similar schemes in the EU. European Council, *Refugee in-*

Implementing Decision was adopted under Directive 2001/55/EC (Directive).<sup>2</sup> This directive aims at establishing minimum effective, coherent and solidary standards for giving temporary protection in the event of a mass influx of displaced persons (DPs), and promoting a balance of efforts between the EU Member States (the EUMSs) in receiving and bearing consequences of receiving such persons. This is the only binding international law on that theme which has been established to date. It is consistent with the Refugee Convention (RC),<sup>3</sup> because it facilitates providing protection to persons in need. This UN law forms the foundation of the Common European Asylum System (the CEAS).

Directive 2001/55/EC is the only part of the CEAS, which has not been amended. Therefore, it sets out only minimal common harmonization. This has left the EUMS with bigger margin of a possibility to decide on measures, which they adopt in order to meet the aims of that EU secondary law. This can be contrasted with other laws adopted under the CEAS, because they aim at establishing fully harmonized norms.

Displacement from Ukraine is distinct from other forced displacements. Firstly, “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”.<sup>4</sup> Secondly, 28% of DPs in Poland work remotely

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*flow from Ukraine*, <https://www.consilium.europa.eu/en/policies/eu-migration-policy/refugee-inflow-from-ukraine/> (access: 13.2.2024).

<sup>2</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 (OJ 212 of 7 August 2001).

<sup>3</sup> United Nations General Assembly resolution 429(V) of 14 December 1950, and 1967 Protocol (attached to United Nations General Assembly resolution 2198(XXI) of 16 December 1967). All UN documents are available at: <https://documents.un.org/prod/ods.nsf/home.xsp> (access: 6.12.2023).

<sup>4</sup> European Union Agency for Asylum, IOM, OECD *Forced displacement from and within Ukraine: profiles, experiences, and aspirations of affected populations*, Luxembourg 2022, p. 3.

in Ukraine.<sup>5</sup> Thirdly, the EU has activated for the first time Directive 2001/55/EC. Those differences may indicate a trend that will continue in the future.

Dogmatic-legal analysis conducted in this article is focused on critical identification and review of the secondary EU laws. Narrowing the analysis to providing remote work for public authorities of the country of origin (CoO) is justified by the fact that a refugee status is denied to persons cooperating with authorities of their country of origin. It is, however, unclear if this reasoning applies also to DPs or should the law regulating subsidiary protection<sup>6</sup> be used in their cases. The uncertainty partially stems from the fact that a remote work performed outside the country where the contract is concluded is not regulated by EU law.

This research is based on the assumption that a continuation of performing remote work can constitute an obstacle to grant the employee a refugee status, but it is not an obstacle to grant that employee a temporary protection for as long as that work does not contradict the aims and values of the UN law and the person is not a danger to a host state security and public security. Having in mind that temporary protection is granted *en masse* in a simplified verification procedure, authorities of the host state should be able to make an in-depth check of a right to revoke temporary protection. Such a verification should include an analysis of a relationship between a CoO and the beneficiary of protection. This is because activities performed for the CoO which are connected with an execution of that state powers can justify denying and re-

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<sup>5</sup> P. Długosz, L. Kryvachuk, D. Izdebska-Długosz, *Problemy ukraińskich uchodźców przebywających w Polsce*, 2022, DOI: 10.13140/RG.2.2.14921.01125. More on employment of DPs in R.M. Staniszewski, T. 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, DOI: 10.13140/RG.2.2.14330.88009.

<sup>6</sup> 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) (OJ L 337 of 20 December 2011).

voicing temporary protection, whereas other activities are not associated with these powers. It is, however, impossible to generalize which state powers can contradict with interests of the host state and the UN's aims and values. Therefore, a case worker should be able to verify this in individual procedure. Results of this research findings can have an impact on the practice of public administration regarding their approach to providing international protection.

The innovative aspect of this research can be derived from the analysis of the law which has been adopted to address the above-mentioned distinct features of displacement from Ukraine. Nevertheless, the global popularization of a remote work also among employment at public authorities increases a likelihood that results from this research would be useful also to other geographic areas. Theoretical considerations which refer to previous research findings and to EU law reflect the law in force as of 30 June 2023 but they cannot be associated with the displacement from Ukraine. This is because that state has not obliged persons employed in public authorities to work remotely. Finally, while access to employment for asylum seekers and recognized refugees has been analyzed,<sup>7</sup> there are significant differences between these norms and directives that have not yet been researched.

The first part of this article presents the developments of the CEAS. It indicates particularities of Directive 2001/55/EC. In the next part, a concept of employment at public authorities is discussed. It underlines that performing such a work can amount to being a member of particular social group. However, under the RC, a person does not receive such a status if he/she continues to cooperate with a CoO. Nevertheless, the directive does not establish such a requirement, and it can expand the subjects of protection beyond the RC. A positive approach to remote work is analyzed in the third part of the article. It is focused on an obligation to ensure

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<sup>7</sup> Cf. S. Morano-Foadi, P. Lugosi, C.D. Croce, *Enacting "Bottom-up" Solidarity in Labor Market Integration for Refugees in England*, "Migration and Society" 2023, Vol. 6, No. 1, DOI: 10.3167/arms.2023.060107, passim; UNHCR, *Decent Work for Refugees. UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees*, 2021, <https://www.refworld.org/docid/60e5cfd74.html> (access: 9.11.2023).

full and productive employment. The text ends with a brief summary and conclusions.

## 2. Common European Asylum System

The EU is a regional organization, so it has to respect the UN regulations, but it can also develop them.<sup>8</sup> Thus, the EU can adopt more precise norms to increase the efficiency of the law, taking into account, e.g., social and economic particularities of its members. This also strengthens cooperation between the EUMSs by establishing coherent solutions to common problems.

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”,<sup>9</sup> and the EU’s secondary legislation.<sup>10</sup> This is declared in Article 78 of the Treaty on the Functioning of the European Union. It expands protection beyond the RC and applies also to persons who cannot be returned because of the risk to their life or an exposition to torture, inhuman or degrading treatment after the return. In that way, EU law is coherent with the European Convention on Human Rights and Fundamental Freedoms<sup>11</sup> (the ECHR). Although that treaty does not explicitly

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<sup>8</sup> K. Orzeszyna, *Universalism of Human Rights: Notion of Global Consensus or Regional Idea*, “Review of European and Comparative Law” 2021, Vol. 46, No. 3, DOI: 10.31743/recl.12428, p. 165; P. Sadowski, *The EU’s approach to the extraterritorial processing of asylum claims and its compliance with international law*, “Revista General De Derecho Europeo” 2021, No. 53, pp. 40–42.

<sup>9</sup> M. Zdanowicz, *The Migration Crisis on the Polish–Belarusian Border*, “Białostockie Studia Prawnicze” 2023, Vol. 28, No. 1, DOI: 10.15290/bsp.2023.28.01.06, p. 108. Other UN laws also protect persons in need. K. Orzeszyna, M. Skwarzyński, R.K. Tabaszewski, P. Gumola, *Chapter V. Protection of the rights of national minorities, migrants and refugees*, in: *International human rights law*, eds. K. Orzeszyna, M. Skwarzyński, R.K. Tabaszewski, P. Gumola, Legalis, p. 7–8.

<sup>10</sup> E. Karska, E. Morawska, J. Czepek, Ł. Dąbrowski, B. Oręziak, K. Gałka, *Human Rights in the European Paradigm of the Protection of Aliens*, Warsaw 2023, Vol. 15, p. 151.

<sup>11</sup> ETS No. 005.

refer to a refugee hood, the European Court of Human Rights (the ECtHR) has progressively interpreted it to protect foreigners from refoulement.<sup>12</sup> Judges have underlined that all rights protected by the Convention have to be respected in practice.<sup>13</sup> Thus, they find infringements when states have not adopted laws or have not established efficient practices to protect those rights, and when the steps that they have taken are inefficient.

Since 2009, i.e., since the entry into force of the Treaty of Lisbon,<sup>14</sup> the EU has been obliged to accede to the ECHR. That requirement has not been met yet, but the ECHR sets a minimum standard for EU law. This is explicitly stated in Article 52(3) of the EU Charter of Fundamental Rights, which has legal power equal to the EU Treaties. A need to respect what the EU calls “fundamental rights” can also be derived from Article 2 of the TEU.

Article 18 of the Charter explicitly provides a right to asylum.<sup>15</sup> Some scholars support the idea that a right to asylum is a subjective right of a person,<sup>16</sup> but other authors contest that view.<sup>17</sup> Nevertheless, it is a dominant view that an individual can rely on his/her rights as a refugee since he/she receives a decision on granting refugee status.<sup>18</sup>

The CEAS has been created in two stages. At first, minimum harmonization norms were adopted. The System has regulated:

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<sup>12</sup> A.G. Hurwitz, *The collective responsibility of states to protect refugees*, New York 2009, p. 190.

<sup>13</sup> ECtHR, *Airey v Ireland*, 9 October 1979, App. No. 6289/73.

<sup>14</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon (OJ C 306 of 17 December 2007).

<sup>15</sup> K. Karski, *Migration*, in: *Legal Studies on Central Europe*, ed. A. Raisz, Budapest 2022, Vol. 9, p. 227.

<sup>16</sup> M.-T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*, “Refugee Survey Quarterly” 2008, Vol. 27, No. 3, DOI: 10.1093/rsq/hdn044, p. 41.

<sup>17</sup> E. Borawska-Kędzierska, K. Strąk, *Przestrzeń wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej, część 2: Polityka wizowa, azylowa i imigracyjna*, Warszawa 2009, p. 126.

<sup>18</sup> J. Jagielski, *Status obywatela i cudzoziemca w orzecznictwie*, Warszawa 2001, p. 254 and subsequent.

- common procedures for granting and withdrawing international protection;<sup>19</sup>
- 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);
- standards for the reception of applicants for international protection;<sup>20</sup> and
- the criteria and mechanisms for determining the EUMS responsible for examining an application for international protection.<sup>21</sup>

Under the Treaty of Lisbon of 13 December 2007, the Area of Freedom, Security and Justice has been regulated by the ordinary legislative procedure.<sup>22</sup> This has initiated the second stage of a development of the CEAS. A uniform status and procedures for granting refugee status and subsidiary protection have been established, which has narrowed the discretion of the EUMSs in regulating, e.g., reception conditions for asylum seekers.

Moreover, the CJEU has received a right to decide on the EU's asylum policy. This has increased coherency of European interpretation of EU law, e.g., by referring to the ECtHR's cases.<sup>23</sup> This was particularly important, having in mind that the RC has not established any authority that could issue a legally binding interpretation of the RC.

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<sup>19</sup> 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 (OJ EU L 180 of 29 June 2013).

<sup>20</sup> 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 (OJ EU L 180 of 29 June 2013).

<sup>21</sup> 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 (OJ EU L 180 of 29 June 2013).

<sup>22</sup> E. Karska et al., *Human Rights*, p. 336.

<sup>23</sup> The ECtHR contributes to that coherency by referring to the CJEU decisions.

Directive 2001/55/EC was the only part of the CEAS that has not been amended. This explains why it has established only minimum standards for giving temporary protection in the event of a mass influx of DPs from third countries. A passage from 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” illustrates that view. It does not provide any procedural or material conditions for that authorization, which can be contrasted with, e.g., procedures on obtaining a single permit for non-EU nationals to reside and work in the EUMS.<sup>24</sup> This permit has to respect the uniform format as laid down in Regulation (EC) No 1030/2002, but “Member States shall determine whether applications for a single permit are to be made by the third-country national or by the third-country national’s employer”. Thus, even though access to labor market is not an exclusive EU competence,<sup>25</sup> other policy areas may (at least indirectly) determine some issues at the EU level.

The EU law on temporary protection is a very peculiar piece of legislation on international protection, because it regulates issues that are not stipulated in binding UN norms.<sup>26</sup> However, the

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<sup>24</sup> 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 (OJ L 343 of 23 December 2011).

<sup>25</sup> L. 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. M.-C. Foblets, J.-Y. Carlier, series “Ius Comparatum”, No. 31, Cham 2022, pp. 149–150.

<sup>26</sup> M. Ineli-Ciger, *The Missing Piece in the European Agenda on Migration: the Temporary Protection Directive*, 8 July 2019, <https://eulawanalysis.blogspot.com/2015/07/the-missing-piece-in-european-agenda-on.html> (access: 29.6.2023); P. Sadowski, *Czy zakres podmiotowy prawa polskiego jest zgodny z Decyzją wykonawczą Rady (UE) 2022/382 w sprawie masowego napływu wysiedleńców z Ukrainy?*, “*Studia Iuridica*” 2022, Vol. 94, DOI: <https://doi.org/10.31338/2544-3135.si.2022-94.20>, p. 338.



Council of Europe<sup>27</sup> has underlined a need to admit DPs and to express solidarity with countries welcoming those persons. Nevertheless, the Committee has not recommended adopting a binding law on temporary protection.

### 3. Does employment with the public authorities of the country of origin constitute an obstacle to obtaining protection?

According to Adam Krzywoń, the term “work should be understood as any gainful activity for another entity, leading to economic dependence between them”.<sup>28</sup> In the context of this article, an employer’s obligations to guarantee safe and healthy working conditions gain particular importance. Achieving that standard can be impossible during a military conflict, owing to deficiencies in the general safety of the country. Still, an infringement of safe and healthy working conditions would not justify granting international protection to DPs from that state. This is because a close catalog of prerequisites that have to be met to receive refugee status does not contain a reference to working conditions in a CoO.

Nevertheless, a well-founded fear of persecution owing to, *inter alia*, membership of a particular social group may justify granting refugee status to persons who cannot benefit from protection from the CoO, and to those who are unwilling to benefit from that protection. There is no legally binding definition of what constitutes a “social group”, but “an essential element in any description [of that term] would be a combination of matters of choice with other matters over which members of the group have no control”.<sup>29</sup>

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<sup>27</sup> Recommendation (2000) 9 of the Committee of Ministers on temporary protection adopted by the Committee of Ministers on 3 May 2000 at the 708th meeting of the Ministers’ Deputies (Recommendation (2000) 9).

<sup>28</sup> A. Krzywoń, *Rozdział 13. Wybrane prawa gospodarcze, społeczne i kulturalne. Prawa pracownicze*, in: *Prawa człowieka*, eds. W. Brzozowski, A. Krzywoń, M. Wiącek, Warszawa 2019, p. 306.

<sup>29</sup> G.S. Goodwin-Gill, J. McAdam, *The refugee in international law*, New York 2007, p. 75.

The above-cited authors provide a list of reasons that can justify being a member of a group: ethnic, cultural, and linguistic origin, education, family or other background, economic activity, shared values, outlook, and aspirations. However, refugee status can be granted only if the identification of these reasons is accompanied by an assessment of ill-treatment accorded to these persons by the authorities of a CoO. That treatment includes the state's approach to the need to effectively protect the human rights of persons staying under its jurisdiction, in particular the right to life and freedom from torture.

A lack of protection can be the result of a state's discriminatory policy towards a group of persons. Consequently, the state would expose members of the group to attacks of military forces of another state or of non-state actors. This kind of a situation occurred in Ethiopia.<sup>30</sup> Nevertheless, the CoO may also be "a source" of risks to life and to freedom from torture. This may occur, e.g., when its forces attack members of a particular social group. The situation of Rohingya in Myanmar exemplifies this kind of infringements.<sup>31</sup> It is undisputed that the identification of actions described in this paragraph may justify granting refugee status if other prerequisites specified in the RC are met by the applicant.

Nevertheless, a state may be unable to offer such protection even when it is interested in providing it. This may happen, e.g., when individuals are exposed to risks owing to activities of another state or of non-state actors when these risks result from a lack of resources to execute the state's jurisdiction in a certain area of the state. Still, the state may be interested in benefiting from the work performed by individuals if they are able to stay safe. Thus,

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<sup>30</sup> "Almost all the women and girls said their attackers appeared to be members of a military group, often from neighboring Eritrea, whose soldiers fought alongside Ethiopian forces against Tigray fighters and allegedly remain in [...] Tigray". The Associated Press, *Scores of women and girls were sexually assaulted after peace deal in Ethiopia's Tigray, study shows*, 24 August 2023, <https://apnews.com/article/ethiopia-sexual-assault-tigray-rape-eritrea-ddfd46041e224365f08c4035fc6d93f> (access: 24.11.2023).

<sup>31</sup> Cf. Human Rights Watch, *Myanmar: No Justice, No Freedom for Rohingya 5 Years On*, <https://www.hrw.org/news/2022/08/24/myanmar-no-justice-no-freedom-rohingya-5-years> (access: 24.11.2023).

the state may promote remote work and (this has not occurred in Ukraine but may happen in other military conflicts) encourage persons performing certain activities (e.g., engineers) or belonging to certain social groups (e.g., women) to seek protection in another country. Employment by public authorities may continue when work is performed remotely, e.g., using electronic means of communication. Consequently, a person who has left the country does not break his or her ties with that state.

For many years, such a situation was attributed to performing services for diplomacy. However, developments in electronic communication have popularized remote work in other areas of the execution of a state's competencies. That trend has also been observed, especially after the COVID-19 epidemic. Providing education in a remote form perfectly illustrates that view. Firstly, the number of teachers is higher than the number of diplomats. Therefore, it is more likely that teachers rather than diplomats would claim refugee status. Secondly, diplomacy and education are attributes of a state. Hence, diplomats and teachers execute the competencies of a state. Still, the relationship between them and a state differs.

The interpretation of the RC should refer to current social and economic realities when it comes to breaking ties between a person applying for international protection and a CoO. The examination should be changed from looking at the formal aspect of employment (being a party to an employment contract) to considering the consequences of the execution of powers attributed to a state by the applicants. Hence, it should include verification of whether the subordination of an employee to an employer involves direct or indirect participation in the exercise of powers conferred by public law. The exercise of powers can take the form of taking administrative decisions, which "use coercion to carry out their [administration] orders".<sup>32</sup> Members of a government, representatives of the government administration, persons employed in public administration, as well as members of police or military units, perform such duties.

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<sup>32</sup> E. Ochendowski, *Prawo administracyjne: część ogólna*, Toruń 2002, pp. 24–25.

Still, it is unlikely that such an attribution would be important, e.g., for teachers who would be teaching children remotely.

Another reason supporting the interpretation of the RC looking at the consequences of executing powers attributed to a state by the applicants can be derived from the fact that it may be impossible to apply a formal criterion. This is because “there is 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”.<sup>33</sup> These views have been expressed in the context of the freedom of movement of public sector workers in the EU. Still, they are adequate also in asylum issues because, from the point of view of an authority that analyzes a case, a decision on granting protection depends on the nature of the activities performed by a displaced person.

This view is supported by the fact that states can decide on the type of contract they conclude with their civil servants. Even the EUMSs may rely on different employment relationships. Polish law and practice, including in local government, perfectly illustrate these constraints.<sup>34</sup> This partially explains why “there is no definition of a worker or an employment relationship in EU law”.<sup>35</sup> Employment policy still remains primarily with the EUMSs, as stems from Article 145 of the Treaty on the Functioning of the European Union. If the EUMSs are expected only to “work to-

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<sup>33</sup> European Commission, Commission Staff Working Document – Free movement of workers in the public sector (SEC(2010) 1609 final).

<sup>34</sup> A. Giedrewicz-Niewińska, *Appointment as the Basis for Establishing an Employment Relationship in Local Government and the Regulations of the Labor Code*, “Białostockie Studia Prawnicze” 2021, Vol. 26, No. 2, DOI: 10.15290/bsp.2021.26.02.09, pp. 137–138. P. Sadowski, *Are Foreigners’ Human Rights Protected if Foreigners are Employed under the Polish Facilitated Access to Labor Market Scheme?*, “Studia Iuridica Lublinensia” 2022, Vol. 31, No. 1, DOI: 10.17951/sil.2022.31.1.149-168, p. 151.

<sup>35</sup> J. Komendová, J. Horecký, *The Notion of “Worker” for the Purpose of EU Social Policy and its Interpretation by the Court of Justice of the European Union*, “Białostockie Studia Prawnicze” 2021, Vol. 26, No. 2, DOI: 10.15290/bsp.2021.26.02.02, p. 52.

wards developing a coordinated strategy for employment”, then case workers should be able to verify the existence of employment relations in individual cases, using a national definition of the term “employment”.

In some employment relationships, the link between a state and a person performing its duties is unclear. Persons appointed by a local authority can carry out their activities independently if they are not paid a salary and are not bound to the commune by a contract of employment.<sup>36</sup> In some cases, it would need to be determined what role the state bodies could have played (or have played) in, e.g., monitoring and supervising teachers’ performance. The larger the impact a state has, the more likely it is that in a refugee recognition procedure, a person would be considered a civil servant executing state powers.

The reference to teachers is not accidental. These constraints have been identified in the context of the freedom of movement of teachers within the EU.<sup>37</sup> Every national of the EUMS has the right to work and live in another EUMS (Article 45 of the TFEU) and must be treated in the same way as nationals of their host country in relation to access to employment, working conditions, as well as social and tax advantages. That interpretation is well-grounded in the case-law.<sup>38</sup> Still, limitations are possible if employees are directly or indirectly involved in the exercise of public authority and duties designed to safeguard the general interest of the state. This must be assessed on a case-by-case basis, taking into account the tasks and responsibilities covered by the post.

It stems from reasoning *a contrario* that if a person is unable or unwilling to seek protection from a CoO because of a well-founded risk of persecution owing to reasons enumerated in a closed catalog in the RC, then that person cannot execute the powers of that state. The form of the exercise of these powers is irrelevant. Thus,

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<sup>36</sup> European Commission, *Employment, Social Affairs & Inclusion*, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0202:EN:HTML> (access: 29.6.2023).

<sup>37</sup> European Commission, *Free movement of workers in the public*, p. 8.

<sup>38</sup> Starting with ECJ, *Giovanni Maria Sotgiu v Deutsche Bundespost*, 12 February 1974, C-152/73, ECR 1974.

performing work remotely for public authorities would obstruct receiving refugee status. However, recognition as a displaced person is made *in abstracto*. Article 28 of Directive 2001/55/EC enlists reasons which can justify issuing a decision denying protection. Therefore, in the case of mass influx situations, the EUMS cannot base its decision to exclude a person on other reasons. It refers to persons who, e.g., have committed a crime against peace, a war crime, or a crime against humanity, or acts contrary to the purposes and principles of the UN. Furthermore, Article 28 of Directive stipulates that the EUMS can have “reasonable grounds for regarding [...] [a person] as a danger to the security of the host Member State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host Member State”. Thus, also reasons to exclude from protection do not prohibit DPs from cooperating with authorities of their country of origin.

A decision denying protection has to be made in individual cases. The reasons that justify issuing a decision denying protection cannot go further than an interpretation of an exclusion clause from the RC. This is because that convention forms the foundations of the CEAS, so it establishes a minimum standard. This does not prohibit the receiving state’s authorities from the possibility of controlling whether a displaced person does not exercise the powers of the CoO in a way that conflicts with the aims of the RC.

That reasoning is also supported by the fact that EU law does not enumerate conditions that could create a risk in the CoO. It also does not associate these risks with activities (or a lack of activities) of that country. Hence, it is irrelevant whether links with the authorities of the CoO exist or not. This is because the lack of any durable protection in that country would determine whether a person could benefit from temporary protection. Links with a CoO may also be irrelevant in subsidiary protection cases.

## 4. The importance of ensuring productive employment

Social support should make it possible to achieve social policy aims by creating or co-creating “activities of various social policy entities, people’s chances for a good life”.<sup>39</sup> This interpretation can be derived from Article 11 of the UN International Covenant on Economic, Social and Cultural Rights (the ICESCR),<sup>40</sup> among others. Support can target groups of people, e.g., DPs, families, or single persons. It can also address employment issues, aiming at providing full and rational employment, which should be understood as the highest level of the most efficient employment.<sup>41</sup> Similar interpretation can be deduced from Article 9 of TFEU which refers to a “high level of employment, the guarantee of social protection, [and] the fight against social exclusion”. That so-called Horizontal Social Clause “reflects the Union aims stated in Article 2(2) TEU and the objectives in Article 3(3) TEU”.<sup>42</sup> Hence, the above-mentioned level of employment has to be taken into account when the EUMSs implement the EU’s policies, expanding beyond narrowly interpreted social policy (covering also to Area of Freedom, Security and Justice).

Full rational employment is particularly important in the context of persons from disadvantaged groups. Kaja Zapędowska-Kling correctly underlines that flexicurity (which encompasses two elements: flexibility and security of employment) is promoted by the EU social policy.<sup>43</sup> The above-cited author refers to disabled people, near retirement age persons, re-entering the labor market

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<sup>39</sup> S. Kamiński, *Koncepcje modeli polityki społecznej*, in: *Wymiary polityki społecznej*, eds. O. Kowalczyk et al., Wrocław 2021, p. 16; P. Sadowski, *Are Foreigners?*, pp. 159–161.

<sup>40</sup> United Nations, Treaty Series, Vol. 993, p.3.

<sup>41</sup> S. Kamiński, *Koncepcje modeli polityki społecznej*, p. 180.

<sup>42</sup> M. Klamert, *Article 9*, in: *The EU Treaties and the Charter of Fundamental Rights: a commentary*, eds. M. Kellerbauer, M. Klamert, J. Tomkin, Oxford 2019, p. 384.

<sup>43</sup> K. Zapędowska-Kling, *Cele i sposoby realizacji polityki społecznej w dobie postępu technologicznego*, “*Studia z Polityki Publicznej*” 2021, Vol. 8, No. 4(32), DOI: 10.33119/KSzPP/2021.4.3, p. 60.

from maternity/parental leave. She has not enlisted persons in need of international protection among persons who are vulnerable in the employment market. However, such a classification can be derived from the UN documents<sup>44</sup>.

Social policy should pay special attention to the needs of DPs. Thus, a state should take positive steps to facilitate integration, including labor market integration, of persons in need of international protection. It should also provide them with an adequate social support. Moreover, if a state is obliged to take positive steps, then it should refrain from negative obligations.

The above-mentioned argumentation allowing the performance of remote work by protection seekers can be further strengthened by referring to the ICESCR and the European Social Charter (the ESC).<sup>45</sup> The EU is not party to these agreements, although the Union has a legal capacity (Article 47 of TEU), so it can accede to such agreements. Nevertheless, all the EUMSs have ratified these treaties. Therefore, an interpretation of EU law should take into account also the ICESCR and the ESC because a contradictory approach could lead to an infringement of the international obligations of the EUMSs. It also follows from Article 52 of the UN Charter<sup>46</sup> that regional organizations have to ensure the coherency of their regulations with the UN law. Still, references to the ICESCR and the ESC are of a subsidiary nature.

Under Article 6 of the ICESCR, the right to work is essential for realizing other human rights, and forms an inseparable and inherent part of human dignity. An obligation stemming from 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 opportu-

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<sup>44</sup> Cf. 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).

<sup>45</sup> ETS No.035.

<sup>46</sup> 1 United Nations, Treaty Series, Vol. 16.



nity for employment (taking up employment)".<sup>47</sup> It does not specify in which country (CoO or residence) such employment should be performed.

Still, it would contravene that policy if a country of residence were to contest *in abstracto* the right of DPs to continue their former employment and perform work in a remote way. This view is supported by the fact that Article 6 of the ICESCR guarantees the right to undertake employment of one's choice, but it also "assumes the prohibition of arbitrary termination of employment".<sup>48</sup> Therefore, the state should individually analyze all cases and thoroughly justify decisions in these cases. Consequently, the country that grants protection cannot expect a protection seeker to end his/her employment contract if its performance does not contravene refugee law.

## 5. Conclusions

An analysis of the grounds for granting subsidiary protection, the concept of "displaced persons", and an exclusion clause applicable to refugee and subsidiary protection cases, leads to the conclusion that displaced persons can be "employed by the public authorities" of a state which they have left. This is a significant difference from the legal situation of refugees, who must sever all links with the authorities of their country of origin. This interpretation does not contradict the 1951 Refugee Convention, as states (and international organizations, including the EU) can extend the subjective scope of protection. Directive 2001/55/EC promotes this view. Moreover, promoting the continuation of remote work for the country of origin 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, it can be

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<sup>47</sup> E. Karska et al., *Human Rights*, p. 346; T. Zieliński, *Rozdział I. Problemy części ogólnej prawa pracy*, in: *Prawo pracy RP w obliczu przemian*, eds. M. Matey-Tyrowicz, T. Zieliński, Warszawa 2006, pp. 45–46.

<sup>48</sup> E. Karska et al., *Human Rights*, p. 354.

deduced from the UN norms that interests of both countries have to be taken into account.

## SUMMARY

### Remote work for the public administration of a country of origin under the EU Temporary Protection Directive

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 cases of mass arrivals of persons in need of international protection. The research examines whether displaced persons can work remotely for the authorities of their country of origin. The analysis 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.

**Keywords:** mass arrivals of displaced persons; temporary protection; refugees; distant work

## STRESZCZENIE

### Dyrektywa w sprawie ochrony tymczasowej a praca zdalna dla władz kraju pochodzenia

Artykuł skupia się na sytuacji prawnej wysiedleńców, którzy korzystają z Dyrektywy 2001/55/WE regulującej unijny mechanizm ochrony tymczasowej. Można ją uruchomić w przypadku masowego napływu osób potrzebujących ochrony. Analiza odpowiada na pytanie, czy osoby wysiedlone mogą pracować zdalnie na rzecz władz kraju pochodzenia. Odpowiedź na to pytanie uzależniona jest od charakteru działalności wykonywanej przez osobę wysiedloną, a nie od rodzaju umowy, jaką osoba ta zawarła z władzami.

**Słowa kluczowe:** masowy napływ wysiedleńców; ochrona tymczasowa; uchodźcy; praca zdalna

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