

**Case C-753/23 [Krasiliva]<sup>i</sup>**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

7 December 2023

**Referring court:**

Nejvyšší správní soud (Supreme Administrative Court) (Czech Republic)

**Date of the decision to refer:**

30 November 2023

**Applicant at first instance:**

A. N.

**Defendant at first instance:**

Ministerstvo vnitra

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**Subject matter of the main proceedings**

The subject matter of the dispute in the main proceedings is whether an application for a residence permit for the purpose of giving temporary protection to foreign nationals submitted by a person who is a national of a non-EU State may be returned as inadmissible on the ground, inter alia, that the person concerned has already applied for temporary protection in another Member State, and whether the procedure for returning the application may be reviewed by a court.

<sup>i</sup> The name of the present case is fictitious. It does not correspond to the real name of any of the parties.

## Questions referred for a preliminary ruling

**1. Does Article 8(1) of Council Directive 2001/55/EC, having regard also to the Member States' agreement not to apply Article 11 of that directive, preclude national legislation under which an application for a residence permit for the purpose of giving temporary protection is inadmissible if the foreign national has applied for a residence permit in another Member State or has already been granted a permit in another Member State?**

**2. Does a person enjoying temporary protection under Council Directive 2001/55/EC have the right to an effective remedy before a tribunal under Article 47 of the Charter of Fundamental Rights of the European Union against the failure of a Member State to grant a residence permit within the meaning of Article 8(1) of Council Directive 2001/55/EC?**

### Provisions of European Union law relied on

Treaty on the Functioning of the European Union ('TFEU'): Article 78, first sentence

Charter of Fundamental Rights of the European Union ('the Charter'): Article 47, first paragraph

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 ('Directive 2001/55'): Article 2(a) and (g), Article 5(3), first sentence, Article 8(1), Article 11, Article 15(6), Article 26(4), Article 28(1), and Article 29

Council 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 ('the Council Decision'): recital 16

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 Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 ('Communication 2022/C 126 I/01')

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) ('the Schengen Code'): Article 6(1)(b)

Rules of Procedure of the Court of Justice of the European Union ('Rules of Procedure of the Court of Justice'): Article 107(1)

### **Provisions of national law relied on**

Zákon č. 221/2003 Sb., o dočasné ochraně cizinců (Law No 221/2003 on the temporary protection of foreign nationals): Paragraph 1(1)(b), Paragraph 2(1), Paragraph 4(1), and Paragraph 17(1)

Zákon č. 65/2022 Sb., o některých opatřeních v souvislosti s ozbrojeným konfliktem na území Ukrajiny vyvolaným invazí vojsk Ruské federace (Law No 65/2022 on certain measures in connection with the armed conflict in the territory of Ukraine caused by the invasion of troops of the Russian Federation ('the Lex Ukrajina'): Paragraph 2, Paragraph 4(3), first sentence, a

Paragraph 5(1) of the Lex Ukrajina provides that an application for temporary protection is to be inadmissible if (a) it is not submitted in person, (b) it is submitted by a foreign national who is not referred to in Paragraph 3, (c) it is submitted by a foreign national who has applied for temporary or international protection in another Member State of the European Union, (d) it is submitted by a foreign national who has been given temporary or international protection in another Member State of the European Union, (e) it is submitted by a foreign national who is a citizen of the European Union, of a State bound by an international treaty negotiated with the European Union which gives him or her a right to free movement equivalent to that of citizens of the European Union, or of a State bound by the Agreement on the European Economic Area.

Paragraph 5(2) of the Lex Ukrajina provides that the Ministry of the Interior or the Police of the Czech Republic is to return an inadmissible application to the foreign national and inform him or her of the reason for the inadmissibility thereof; judicial review is to be excluded.

### **Facts, essential arguments and main proceedings**

- 1 The applicant at first instance ('the applicant') is a national of Ukraine. After entering the territory of the European Union, she applied for temporary protection in Germany in July 2022 and subsequently in the Czech Republic in September 2022. A decision on temporary protection in Germany has not yet been taken. The Ministry of the Interior ('the defendant at first instance' or 'the defendant') returned the application to her as inadmissible under Paragraph 5(1)(c) and (d) of the Lex Ukrajina. That provision states, as a ground for return, inter alia, the fact that the person concerned has applied for or obtained temporary protection in another Member State.
- 2 The applicant brought an action against the defendant before the Městský soud v Praze (Municipal Court, Prague) ('Městský soud'), claiming that, under Directive

2001/55, she is a person who can be given temporary protection since Directive 2001/55 does not state, as a ground for the exclusion of temporary protection, the fact that a foreign national has applied for temporary protection in another Member State.

- 3 The Městský soud upheld the action. It first considered whether it has jurisdiction to hear the case since Paragraph 5(2) of the Lex Ukrajina excludes from judicial review the return of an application for temporary protection on the ground of inadmissibility. It considered that such exclusion from review is contrary to Article 29 of Directive 2001/55 since that exclusion is to apply only to the cases referred to in Article 28 of Directive 2001/55. As it considered the applicant to be a person excluded from temporary protection within the meaning of Article 29 of Directive 2001/55, the applicant had, in its view, a right of appeal under that article, in conjunction with the first paragraph of Article 47 of the Charter. The Městský soud therefore concluded that Directive 2001/55 has direct effect which precludes the application of Article 5(1)(c) of the Lex Ukrajina.
- 4 The defendant lodged an appeal on a point of law against the judgment of the Městský soud, stating that the Lex Ukrajina did not exclude the applicant from temporary protection. Paragraph 5(1)(c) and (d) of that law relates to a person who has already obtained or applied for temporary protection in another State ('second-time applicant'). An application for temporary protection is, conversely, inadmissible if it is made by a person who has not apply for temporary protection before ('first-time applicant'). With regard to Article 28 of Directive 2001/55, the applicant states that the Lex Ukrajina does not transpose that article into national law or supplement it. Thus, the inadmissibility of an application for temporary protection applies in situations which are not governed by Directive 2001/55 and therefore the EU legislature left the Member States some latitude. It further stated that, according to the Council Decision, foreign nationals have the right to choose the Member State in which to apply for temporary protection, but that does not mean that they can apply successively in several Member States, or that they can choose the State which suits them best, adding that repeated applications place a burden on the Member States' reception capacities.
- 5 In her observations on the appeal on a point of law, the applicant stated that she meets the definition of a displaced person and that the giving of temporary protection merely declares that fact. The claim that a person is not a displaced person because he or she is already established in another Member State which has given that person temporary protection is, in her view, contrary to Directive 2001/55 and the Council Decision. She pointed out that (i) she had not yet been given temporary protection in any Member State, (ii) she was therefore not abusing the right, and (iii) the Member States had agreed not to apply Article 11 of Directive 2001/55, which is intended to prevent secondary movements.

## Succinct presentation of the reasoning in the request for a preliminary ruling

### The first question referred

- 6 The referring court asks whether temporary protection under Directive 2001/55 constitutes a procedure of exceptional character, the purpose of which is to enable a displaced person to obtain a residence permit in the territory of a particular Member State and to enjoy the rights associated with temporary protection there, but which are dependent on that residence permit, or whether it constitutes a separate legal status for displaced persons established by a Council decision pursuant to Article 5(3) of that directive. It considers that the right to a residence permit in the territory of a Member State is part of temporary protection and that, if the residence permit can be understood to that effect, the Member State is required, with the exception of grounds for excluding a person from temporary protection set out in Article 28 of that directive, to grant a first-time applicant a permit automatically.
- 7 However, the referring court is uncertain whether Directive 2001/55 requires the Member State to grant a residence permit under Article 8(1) of that directive also in the case where a second-time applicant applies for a residence permit. It refers to Articles 15 and 26 of that directive, from which it follows, in its view, that temporary protection is always to be given to the same person by only one Member State, namely the Member State which granted the residence permit. However, it is not possible to deduce from those provisions how the voluntary relocation of a person enjoying temporary protection from one Member State to another for the purpose of enjoying temporary protection anew in that other Member State is to be assessed.
- 8 The referring court considers that Article 8(1) and Article 11 of Directive 2001/55 are crucial in that regard
- 9 In its view, Article 8(1) of Directive 2001/55 lays down the right of a first-time applicant to apply for a residence permit, but does not lay down an obligation on the Member State to grant a residence permit to a second-time applicant. Although a Member State is entitled, under Article 3(5) of Directive 2001/55, to adopt more favourable conditions for persons enjoying temporary protection and to grant a residence permit to a second-time applicant, where national legislation excludes such a possibility, it does not thus lower the standard of protection afforded to a second-time applicant or make it more difficult for him or her to exercise his or her rights deriving from temporary protection. Temporary protection is given to the second-time applicant in the Member State where he or she has applied for a residence permit as in the first. In that respect, therefore, neither Article 28(1) nor Article 29 of Directive 2001/55 applies in the case of an application submitted by a second-time applicant. In the view of the referring court, the conclusion that this is a right of the Member State, and not an obligation on it, is supported by recital 16 of the Council decision and by the fact that the Commission states in Communication 2022/C 126 I/01 that *'if ... a person [enjoying temporary*

*protection] subsequently moves to another Member State, where s/he receives another residence permit under temporary protection, the first residence permit issued and its ensuing rights must expire and be withdrawn, in accordance with the spirit of Articles 15(6) and 26(4) of Directive 2001/55/EC.’*

- 10 As regards Article 11 of Directive 2001/55, the referring court considers that the exclusion of the application of that provision can give rise to an obligation on the part of the Member States to grant residence permits, and therefore to give temporary protection, also to second-time applicants. In its view, Article 11 of that directive clearly provides that a person enjoying temporary protection is to reside in the State which has granted him or her a residence permit and which conferred on him or her rights deriving from temporary protection. However, by agreeing between themselves to exclude the application of that provision<sup>1</sup> in the case of persons displaced from Ukraine, the Member States have presumably enabled the free movement of persons enjoying temporary protection between Member States beyond the scope of Article 6(1)(b) of the Schengen Code.
- 11 In such a situation, Article 8(1) of Directive 2001/55 must be interpreted as meaning that the right of a second-time applicant to be granted a residence permit in another Member State derives from the right to free movement which the Member States have decided jointly to grant to persons displaced from Ukraine. However, that interpretation goes beyond the obligations of the Member States under Directive 2001/55 and was presumably not envisaged when that directive was adopted.

#### **The second question referred**

- 12 That question asks, in essence, whether the national legislation, specifically Article 5(2) of the Lex Ukrajina, which excludes from judicial review the return of an application for a residence permit for the purpose of temporary protection on the grounds set out in Article 5(1) of that law, which provides, inter alia, that an application is to be inadmissible if it is submitted by a second-time applicant, is compatible with the first paragraph of Article 47 of the Charter.
- 13 Another chamber of the referring court has ruled to the effect that the right to mount a legal challenge under Article 29 of Directive 2001/55 applies only to persons who are excluded from temporary protection under Article 28(1) of that directive and not, therefore, to second-time applicants who are given temporary protection in another Member State. That case-law considers that the question at issue is *acte clair*. The referring court (that is to say the chamber referring this question for a preliminary ruling) agrees that Article 29 of Directive 2001/55 does not apply to such a case, but deems it is necessary to consider whether or not a right to an effective remedy derives from the first paragraph of Article 47 of the Charter.

<sup>1</sup> <https://data.consilium.europa.eu/doc/document/ST-6826-2022-ADD-1/en/pdf>

- 14 In that connection, the referring court refers to the case-law of the Court of Justice (i) concerning the first paragraph of Article 47 of the Charter and the obligations of the Member States arising therefrom<sup>2</sup> and (ii) concerning the applicability of EU law and fundamental rights.<sup>3</sup> The Court of Justice considers that the right of persons enjoying temporary protection to be granted a residence permit in the territory of a Member State derives directly from Article 8(1) of Directive 2001/55 and that the defendant, when returning the application, applied EU law under the procedure laid down in Article 5(2) of the Lex Ukrajina, all of which implies that the situation falls within the scope of the fundamental rights guaranteed by the Charter, and thus the right to an effective judicial remedy before a tribunal under the first paragraph of Article 47 thereof.<sup>4</sup> The referring court therefore considers that the exclusion of failure to grant a residence permit from judicial review under Article 5(2) of the Lex Ukrajina is contrary to EU law since a person enjoying temporary protection has a right to an effective remedy before a tribunal, irrespective of the reason why the residence permit was not granted by the Member State. Otherwise, he or she would not be able to have his or her right to be granted a residence permit examined by a court.

### **The request for an urgent preliminary ruling**

- 15 The referring court relies on Article 107(1) of the Rules of Procedure of the Court of Justice and the first sentence of Article 78 TFEU and asks the Court of Justice to rule on the questions referred under the urgent procedure. It submits that the issue concerned has not yet been resolved in the case-law of the Court of Justice and that a decision on the questions referred is essential not only for the present case, but also for the entire present system for granting temporary protection on the basis of Council decisions in the Member States. Temporary protection will be given until 4 March 2025. It is therefore appropriate to decide as a matter of urgency the question whether and how Member States may make the granting of residence permits to persons enjoying temporary protection conditional on their migration between Member States. In view of the large number of cases in the Czech Republic in which residence permits are not granted to persons enjoying temporary protection on one of the grounds of inadmissibility set out in Article 5(1) of Lex Ukrajina, it is also necessary to clarify as a matter of urgency whether such persons have a right to an effective remedy before a tribunal.

### **Proposed answers to the questions referred**

<sup>2</sup> Judgment of the Court of Justice of 16 May 2017 in Case C-682/15, EU:C:2017:373, *Berlioz Investment Fund*, paragraph 44.

<sup>3</sup> Judgments of the Court of Justice of 26 February 2013 in Case C-617/10, EU:C:2013:105, *Åkerberg Fransson*, paragraphs 19 to 21, or of 26 September 2013 in Case C-418/11, EU:C:2013:588, *Texdata Software*, paragraphs 72 and 73.

<sup>4</sup> Judgment of the Court of Justice of 17 December 2015 in Case C-239/14, EU:C:2015:824, *Abdoulaye Amadou Fall*, paragraph 51.

16 The referring court proposes that the questions referred by answered as follows:

*1. Article 8(1) of Council Directive 2001/55/EC, even having regard to the Member States' agreement not to apply Article 11 of that directive, does not preclude national legislation under which an application for a residence permit for the purpose of giving temporary protection is inadmissible if the foreign national has applied for a residence permit in another Member State or has already been granted a permit in another Member State.*

*2. A person enjoying temporary protection under Council Directive 2001/55/EC has the right to an effective remedy before a tribunal under Article 47 of the Charter against the failure of a Member State to grant a residence permit within the meaning of Article 8(1) of Council Directive 2001/55/EC.*