

PROBLEMS OF PROTECTING CHILDREN'S RIGHTS WHO ARE CITIZENS OF UKRAINE ENJOYING TEMPORARY PROTECTION IN EU COUNTRIES

Olena SUSHCH, ORCID 0000-0002-8619-8964, ResearcherID rid67043

¹Faculty of Law, University of Helsinki, Helsinki, Finland

Corresponding author: Olena Sushch, olena.sushch@helsinki.fi

Abstract. The full-scale war in Ukraine caused a mass migration of its population and led to the increase in private relations complicated by a foreign element, which are the subject matter of private international law. 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 provided the opportunity for citizens of Ukraine to receive the status of temporary protection on the territory of the EU countries. Cases of children being taken away from their accompanying persons or from their families have become a new challenge for Ukrainian children and their parents, who moved from Ukraine to the territory of the EU and who are under the temporary protection status. Those cases occur due to differences in legislation in matters of guardianship and parental responsibility. The author of the article has studied and systematized cases, when social services of the host country are authorized to act urgently in the interests of a child and take a child away from the family. National and international legislation on the protection of children's rights has been analyzed.

Key words: unaccompanied child, legal qualification, children's rights, child protection, Directive 2001/55/EC, Private International Law, temporary protection, the best interest of the child.

Acknowledgements

The manuscript was prepared within the project "Relevant Problems and Development Perspectives of Private international Law Within Modern Conditions", funded by the Academy of Finland (358210).

Funding

This work was supported by the Academy of Finland under the project "Relevant Problems and Development Perspectives of Private international Law Within Modern Conditions", [358210].

Author contributions

The author prepared the article independently. The author independently selected the literature, analyzed it and formulated conclusions

Disclosure statement

The author does not have any competing financial, professional, or personal interests in relation to others.

INTRODUCTION

The article is focused on the relevant problem of family and Private International Law – the protection of children's rights who are citizens of Ukraine enjoying temporary protection in the EU countries. Temporary protection is a new mechanism of international protection, and being used for the first time in the EU to provide protection to citizens of Ukraine on the basis of 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 (the Council Directive 2001/55/EC) and 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 the Article 5 of the Directive 2001/55/EC, and having the effect of introducing temporary protection (Council Implementing Decision (EU) 2022/382).

Migration of Ukrainian citizens increased due to the application of temporary protection mechanism in EU countries that led to the increase in the number of private relations complicated by a foreign element. There are practical problems in regulating a wide range of private relations, where the participants are citizens of Ukraine having temporary protection. Those problems arise due to the fact that temporary protection, as a mechanism of international protection, is new, insufficiently regulated and poorly studied (Sushch, 2023). Most of the problems are in the field of family law, in particular in matters of child welfare, as well as parental responsibility and protection of children's rights. There have been recorded cases of applying emergency measures to children who are citizens of Ukraine enjoying temporary protection on the territory of the EU countries by the social services of EU countries over the past year in the form of taking children away from accompanying persons or from families.

The indicated situations are stipulated by the conflicts in legal regulation of private relations. Thus, a citizen of Ukraine from the moment of acquiring the status of temporary protection is simultaneously subject of two legislations – the national legislation of the EU country that granted temporary protection and the national legislation of Ukraine. The national legislation of those countries that provide temporary protection has significant differences in determining the status of a guardian or custodian parent, as well as the procedure for acquiring such a status. Besides, there is also a significant difference in regulating parent-child relations and parental responsibility. The totality of all mentioned circumstances create prerequisites for applying emergency measures by the social services of EU countries within minimal suspicion of a threat of children's rights violations or non-compliance of supporting documents with the legislation of the host country.

However, the actions of social services in regard of taking children away from accompanying persons or from families, as a rule, do not correspond to the best interest of a child and take place contrary to the fundamental rights of children and their parents declared in the Convention on the Rights of the Child of 1989 and the Universal Declaration of Human Rights, as well as contrary to the Directive 2001/55/EC.

The purpose of this article is to study the problem of protecting the children's rights who are citizens of Ukraine enjoying temporary protection in the EU countries in cases of applying emergency measures to them by the social services of the country that granted temporary protection. To achieve this purpose, the author will accomplish analysis of the national legislation of Ukraine and the norms of international acts on issues of protecting children's rights.

LITERATURE REVIEW

The issue of protecting children's rights is extremely relevant today. A significant number of scholars are trying to identify problems in the realization of children's rights and find ways to overcome such problems. Thus, H. Grabovska and A. Lysiuk gave their exclusive scientific attention to the protection of the rights of orphans and children deprived of parental care during armed hostilities (2023). M. Kornienko studied the current state of children's rights protection in Ukraine (2019). O. Kotliar focused on the regulation of international protection of children's rights who were forced to leave their country (2016). M. Stefanchuk studied the protection of the subject civil rights of children in conditions of armed conflicts through the principle of adaptation of the legislation of Ukraine to the EU standards (problems of priorities and terminologies) (2017). O. Klymenko made an attempt to characterize the problems of unaccompanied children migration (2021). C. Donato and N. Lopez analyzed the protective resources, legal status and integration of immigrants from the United States who enter as unaccompanied children (2024). E. Iglesias, C. Montserrat, J. Llosada-Gistau, and J. Gallart considered the well-being of unaccompanied migrant children: Between dreams and

reality (2024) A. Beltrame de Moura & C. Lerin analyzed the limitations of Private International Law regarding the protection of unaccompanied migrant children in the European Union (2024). Thus, it is worth noting the wide interest of scholars in the issue of child protection, however, as for the protection of the rights of children enjoying temporary protection in the EU, to date there are no scientific works that would comprehensively consider this issue. In addition, there are currently no scientific publications on the legal analysis of the problem of removal of Ukrainian children from their parents and accompanying persons by Children's Social Service in EU countries.

METHODOLOGY

The methodological procedures for the study of this issue are general scientific and special methods of scientific knowledge. The dialectical method of scientific knowledge made it possible to identify and characterize the problems of protecting the rights of children-citizens of Ukraine enjoying temporary protection status in the EU countries. The application of the comparative legal method made it possible to compare the legal status of unaccompanied children under the national legislation of Ukraine, the Convention on the Rights of the Child of 1989 and Council Directive 2001/55/EC. A comprehensive literature review made it possible to find out the state of research on the issue in Ukraine and other countries. The formal logic method resulted in ways to overcome the problem.

RESULTS AND DISCUSSION

1. General characteristics of circumstances that are reasons for taking a decision on the application of emergency measures by social services of EU countries to children who are citizens of Ukraine enjoying temporary protection in EU countries

The Article 25 (2) of the Universal Declaration of Human Rights of 1948 specifies that motherhood and childhood are entitled to special care and assistance (Universal Declaration of Human Rights, 1948). The Preamble of the Convention on the Rights of the Child of 1989 stipulates that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding (Convention on the Right of the Child, 1989).

The Article 11 of the Law of Ukraine “On the Protection of Childhood” (2001) declares that “The family is a natural environment for the physical, spiritual, intellectual, cultural, social development of a child, its financial support and is responsible for creating appropriate conditions for this. Every child has the right to live in the family together with the parents or in the family of one of them and to parental care. Father and mother have equal rights and responsibilities towards their children. The main concern and the main duty of parents is to ensure the interests of their child”.

A significant number of international treaties are focused on the protection of children's rights, but current realities demonstrate that rights of Ukrainian children, internationally declared, are systematically violated as a result of armed aggression in Ukraine. Hundreds of thousands of children were forced to leave Ukraine and receive temporary protection in the EU and other countries. At the same time, they did not always have the opportunity to leave Ukraine with both or one of their parents. Parents quite often evacuated their children with authorized by them persons – grandparents, other relatives or friends. The legislation of Ukraine allows the departure of a minor not accompanied by parents, by observing the rules for crossing the customs border of Ukraine, and a child who has reached the age of 16 has the right to independently leave the country (Ruling of Cabinet of Ministers of Ukraine of 27.01.1995 N57 “On the approval of the Rules for crossing the state border by citizens of Ukraine”). There are 5,982,900 Ukrainians in Europe according to official data, and the majority of them are women and children who received temporary protection (UNHCR, Ukraine Refugee Situation, 2024).

New challenges awaited Ukrainian families after receiving temporary protection in the EU countries, in particular, it concerns the application of emergency measures for children who received temporary protection. 240 cases were recorded when social services of European countries took children

from families of Ukrainian citizens with temporary protection status as of June, 2023. Fifty five children were taken in Poland, 50 – in Germany, 30 – in Spain and 17 – in Italy as of June 2023 (In the EU, children were taken from 240 families of Ukrainian refugees..., 2023). As of March 2024, 340 such cases were recorded (Gorban, 2024). For example, those are cases when a mother was forced to stay in Ukraine and a child was evacuated with a grandmother. The grandmother did not have a proxy notice to represent the child's interests and is not considered a relative to this child under European law. Thus, social services can involve the police and take the child from the family according to European law. And, for example, a person who has reached the age of 65 is not considered as a guardian in Italy or France (240 children have already been removed from the families of Ukrainian refugees in the EU, the Office of the Ombudsman intends to solve the problem, 2023). Such situations gained wide publicity in society and raised concern of international institutions. However, there is so far no appropriate mechanism for overcoming this problem and quick return of children to their families, legal representatives or accompanying persons. The issue of returning children is resolved at different terms and according to different procedures in various countries. A child can be returned without a trial under some circumstances, in other cases – by diplomatic means.

Taking children from parents, guardians, other legal representatives or authorized persons to accompany a child occurs under different circumstances and each situation is individual, but having systematized the cases, they can be conditionally divided into the following two groups:

- (1) stay of unaccompanied child in the EU who is a citizen of Ukraine;
- (2) taking children who are citizens of Ukraine from their families on the basis of “parental neglect duty” or “improper performance of parental duties”, results in proceedings on the deprivation of parental rights.

The application of the indicated measures is based on observing the best interests of the child and the protection of children's rights. Thus, there is a chain of questions: who are unaccompanied children and what are the circumstances for the social services of the country that granted temporary protection to apply emergency measures? Is it possible for a child who has the temporary protection status to stay with a person authorized by the parents to accompany a child? What actions of parents can be classified as improper performance of parental duties? What is considered to be the best interests of the child? The law of which country will be applied to resolve disputes?

It is impossible to comprehensively consider all of these circumstances in one article, as we are limited by the scope of the publication. Therefore, it seems necessary to consider such a reason for the children taking away as the children's stay in a foreign country unaccompanied by adults.

2. Unaccompanied child as the reason for taking emergency measures by the social authorities of the EU country that granted temporary protection

To determine the status of “unaccompanied child” it is important to analyze the conceptual and categorical apparatus at the national level of Ukrainian legislation and at the international level.

The legislation of Ukraine does not contain the definition of the term of “unaccompanied child”. The Law of Ukraine “On the Protection of Childhood” (2001) reveals the content of the concept of “children separated from their families”. The Article 1 of this Law states that a child separated from the family is a child who arrives or has arrived on the territory of Ukraine unaccompanied by parents or one of them, a grandparent, an adult brother or sister, or a guardian or a custodian appointed in accordance with the law of the country of origin, or other adults who voluntarily or by virtue of the custom of the country of origin took responsibility for upbringing the child before arriving to Ukraine. As we can see from the mentioned concept, the legislator equates the statuses of “unaccompanied child” and “child separated from the family”.

It should be also noted that the legislator in the context of the Law of Ukraine “On the Protection of Childhood” (2001) defines the status of a child separated from the family only in relation to children who arrived on the territory of Ukraine from foreign countries, but does not regulate the status of children who are citizens of Ukraine and left Ukraine unaccompanied or are separated from their families.

‘Unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member

State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States (Directive 2011/95/EU). It is worth noting that the national legislation of most EU countries defines unaccompanied children who have not reached the age of 18 and are abroad without parents. For example, Italian legislation (Law No. 47 of 07.04.2017 and Legislative Decree No. 220 of 22.12.2017) enshrines the legal term “unaccompanied minor” parents” (*minore straniero non accompagnato*). According to Italian law, this category of children includes all foreigners under the age of 18 who arrived in Italy unaccompanied by their parents (persons identified in the child’s birth certificate) (Unaccompanied minors, 2024)). In Netherlands, unaccompanied minors (*alleenstaande minderjarige vreemdeling/amv*) are legally defined as children from a third country or children who are stateless who arrive in the Netherlands unaccompanied by an adult responsible by law or custom and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the Netherlands (EU Family Reunification Directive, article 2(f) (UNICEF, unaccompanied children from Ukraine). In France, an unaccompanied minor, or child (UAC), is a young person below 18 years old who does not hold French nationality and is separated from his/her parents or legal representative on French territory (Who are the unaccompanied children of calais ?).

The term of “unaccompanied child” at the level of international and legal regulation is also defined differently, for example, the definition of the concept of “unaccompanied minors” is enshrined in the Article 2 (f) of the Directive 2001/55/EC, and such term as “a child who is temporarily or permanently deprived of his or her family environment” (Article 20) is used in the Convention on the Rights of the Child of 1989.

The European Commission estimated the number of unaccompanied / separated children from Ukraine in 23 EU countries to be around 23,000 as of July 2022, noting that this data is based on only partial information from these countries and supposing that the real number of such children in the EU is probably bigger (The situation of children from Ukraine in European countries after February 24, 2022; The EC Staff Working Document “Supporting the inclusion of displaced child en from Ukraine in education: Considerations, key principles and practices for the school year 2022-2023). The UN Committee on the Rights of the Child, while considering the State party’s report of Ukraine (91st session, August 2022), in cooperation with member countries, noted the need to take measures to strengthen the identification and registration of unaccompanied or separated children fleeing armed conflict, with the aim of family reunification (Concluding observations on the combined fifth and sixth periodic reports of Ukraine (Adopted by the Committee at its ninety-first session (29 August–23 September 2022)). However, the problem continues to exist and is caused by a significant difference between laws on guardianship and custody issues, as well as migration legislation.

Based on the replies given by 19 Member States of EU to a Questionnaire circulated in April 2022 via the Solidarity Platform, and an Expert Workshop held on 30 May 2022 (Report of the Expert Workshop), the Commission services identified some specific challenges in terms of the registration, reception and care of unaccompanied children from Ukraine, including the separated ones and those from Ukrainian institutions: (1) gaps in the registration of the children: unaccompanied children, including the separated and those from Ukrainian institutions, are not always referred to the national child protection authorities for follow up and protection; sometimes children are not registered anywhere as present on the territory of a Member State until they take up temporary protection – which is a step that is however sometimes delayed, when procedures for the recognition/appointment of guardians are still ongoing; (2) recognition/appointment of guardians appointed in Ukraine: sometimes acts issued by the Ukrainian authorities to appoint guardians are not directly recognised – as they should, under the Hague Convention on the protection of children (1996); (3) the need to provide support to the guardians appointed in Ukraine, and who are themselves displaced and in need of protection; (4) the need to provide quality reception and care for children from Ukrainian institutions (many of whom are disabled), in line with their best interests, while maintaining close contacts of the initial groups (Unaccompanied and Separated Children fleeing from war in Ukraine – FAQs on Registration, Reception and Care, 2022)).

The practice of recognizing Ukrainian children enjoying the temporary protection status as unaccompanied children is based on the following grounds:

a. deficiency (inconsistency, non-recognition) of documents authorizing a person who accompanies a child for taking care of a child – the legislation of EU countries recognizes such children as unaccompanied children, which is the basis for taking the child away from the person authorized by the parents to accompany the child. The rules for crossing the state border by citizens of Ukraine stipulate that children under the age of 16 have the right to travel abroad adhering the following requirements:

(1) accompanied by one of the parents, grandmother, grandfather, adult brother, sister, stepmother, stepfather or other persons authorized by one of the parents with a written statement certified by the Child Protection Services, carried out without the notarized consent of another parent and having the passport of Ukrainian citizen or a child's birth certificate;

(2) with the consent of both parents (adoptive parents) and accompanied by them or persons authorized by them who have reached the age of 18 at the time of departure from Ukraine, including accompanied by crew members of the aircraft, on board of which they are traveling.

Accompanied by one of the parents or other persons authorized by one of the parents with notarized consent, the following shall be carried out: (1) with the notarized consent of another parent indicating the country of destination and the corresponding period of stay in that country, if another parent is not present at the checkpoint; (2) without the notarized consent of the second parent: if the second parent is a foreigner or a stateless person, which is confirmed by an entry about the father in the child's birth certificate, and who is not present at the checkpoint; if there is a record of departure to a permanent place of residence outside Ukraine in the passport of a citizen of Ukraine for traveling abroad, with which a citizen who has not reached the age of 16 crosses the state border, or a mark (stamp) of being entered into permanent consular registration in a foreign diplomatic institution of Ukraine, or the stay of such a citizen on permanent consular registration is confirmed by a certificate of stay on consular registration, which is formed by using the means of the departmental information system of the Ministry of Foreign Affairs (Ruling of Cabinet of Ministers of Ukraine of 27.01.1995 N57 "On the approval of the Rules for crossing the state border by citizens of Ukraine).

Accompanied by persons authorized by both parents, it is carried out with the notarized consent of both parents, indicating the country of destination and the corresponding period of stay in this country.

Even if the child is accompanied by a person authorized by the parents on the basis of the documents specified in the Rules for crossing the state border by citizens of Ukraine (1995), these documents may not be sufficient on the territory of a foreign state that provides temporary protection, or the form and content of the documents may not meet the requirements of the legislation of the host country. In such cases, a local guardian (representative) will be appointed to the child by a court decision;

v. non-compliance (non-recognition) of documents on the right to guardianship, issued in Ukraine, with the requirements of the host country that granted temporary protection. The legislation of most of the EU countries stipulates that the guardians of a child are the parents, in certain cases guardianship can be granted based on a court decision. Therefore, children who leave Ukraine in compliance with the legislation of their citizenship (the legislation of Ukraine) may in some cases be considered unaccompanied children in a foreign country. As a result, the state providing temporary protection can apply the necessary measures and immediate actions – take away the child from the persons authorized by the parents or relatives not recognizing their right of representation or guardianship. Although, in accordance with the Article 24 of the Law of Ukraine «On Private International Law» (2005) establishment and cancellation of guardianship and custody over juveniles, minors, incapacitated persons, persons whose civil legal capacity is limited, are regulated by *lex personalis* of a ward. Obligation of a guardian (custodian) to accept guardianship (custody) is determined by *lex personalis* of a person appointed as a guardian (custodial). And Part 2 of the Article 16 of the Law of Ukraine «On Private International Law» (2005) determines that *Lex personalis* is the law of the state of which an individual is a citizen. Thus, the analysis of the Law of Ukraine «On Private International Law»

gives reasons to believe that if guardianship over a child who went abroad is established in Ukraine in accordance with the national legislation of Ukraine, which is the personal law of a child, such guardianship should be recognized in the country providing temporary protection. That will render impossible to take away children;

c. independent stay of a child on the EU territory, who is a citizen of Ukraine and has reached the age of 16, left Ukraine independently and is on the EU territory without parents and accompanying persons. The procedure for crossing the state border of Ukraine is regulated by the Rules for crossing the state border by citizens of Ukraine (1995). This document entitles a child who is a citizen of Ukraine to leave the territory of Ukraine on his / her own upon reaching the age of 16 and in possession of documents giving the right to leave the country. That is, the independent resettlement of a child in the age of 16 and over across the customs border of Ukraine will not be considered a violation of migration and customs legislation.

It is necessary to provide reliable information to parents and persons authorized by parents to accompany children about the legislation of the host country regarding the issue of guardianship and custody, as well as the legal representation of the interests of minors on the territory of a foreign state providing temporary protection. That will assist to avoid situations of taking away children – citizens of Ukraine on the basis of recognizing them as unaccompanied children.

An important aspect in overcoming this problem is the development and signing of bilateral treaties with those countries that provide temporary protection regarding the recognition of Child Protection Services documents issued in Ukraine, which grant the right to accompany the child (to confirm guardianship and custody documents).

Improving the mechanism of legal regulation of the issues related to the protection of the rights of children under temporary protection at the national and international level is also of great importance in overcoming the problem.

Persons authorized by the parents (grandmother, grandfather, other relatives or friends) who are abroad with the child enjoying temporary protection must always have the decision of the guardianship authorities or other document containing information about their authority in order to avoid situations, when children are taken away and recognized as unaccompanied children having an accompanying person.

2.1. Legal status of unaccompanied children under Council Directive 2001/55/EC

The Council Directive 2001/55/EC determines the content of the notion of «unaccompanied minors», which means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States (Article 2 (f)). That is, this category of children, according to the Council Directive 2001/55/EC, includes minors who cross the customs border without a responsible adult according to law or custom. The norms of the Directive 2001/55/EC do not specify who is the responsible person having the right to accompany the child when traveling abroad for the purpose of acquiring the temporary protection status. It is the very significant gap in the legislation regulating the issue of temporary protection, which in practice “plays” against the interests of a child – a citizen of Ukraine. I believe that the Directive 2001/55/EC should be supplemented with a norm that would define an exhaustive list of persons entitled to accompany a child in order to prevent the occurrence of conflicts on the right to accompany a child.

In this aspect, the provisions of the Council Directive 2001/55/EC stipulate that The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation by an organization which is responsible for the care and well-being of minors, or by any other appropriate representation (Article 16 (1) of the Council Directive 2001/55/EC).

It is important that the list of measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection is specified in the Article 16 (2) of the Council Directive 2001/55/EC, which has the following wording: «2. During the period of temporary protection Member

States shall provide for unaccompanied minors to be placed: (a) with adult relatives; (b) with a foster-family; (c) in reception centres with special provisions for minors, or in other accommodation suitable for minors; (d) with the person who looked after the child when fleeing.

The Member States shall take the necessary steps to enable the placement. Agreement by the adult person or persons concerned shall be established by the Member States. The views of the child shall be taken into account in accordance with the age and maturity of the child».

Therefore, the analysis of the Article 16 of the Directive 2001/55/EC gives us reason to distinguish two essential aspects, according to which it is possible to apply measures to an unaccompanied child enjoying temporary protection: first, establishing the consent of the person authorized by the parents to accompany the child; secondly, the child's opinion on the application of measures ensuring the necessary representation. These two aspects are extremely important in respecting the rights and legitimate interests of children enjoying temporary protection. The best interests of an unaccompanied child is to place him / her with adult relatives (a) or with the person who looked after the child when fleeing (d).

But in reality, children are accommodated in reception centers with special conditions for minors or in other premises suitable for minors, in most cases clauses (a) and (d) of the Article 16 (2) of the Council Directive 2001/55/EC are not applied. It may be related to the fact that the national legislation of the country providing temporary protection may differ from the rules prescribed in the Council Directive 2001/55/EC. However, it is believed that the norms of the Council Directive 2001/55/EC are legally superior to the national legislation of each hosting Member State. Therefore, taking away children, who are considered unaccompanied children under the EU law, from persons authorized by their parents to accompany children to travel abroad, is the direct violation of the Council Directive 2001/55/EC, since the child is actually separated from the family. As a rule, the consent of an adult authorized by the parents person to accompany a child is not taken into account, and the opinion of the child is also disregarded. Even if the decision of the social authorities of the country that granted temporary protection is disputed in the court hearing, it will takes a certain period of time. During the period of a trial, an unaccompanied child will be placed in a foster-family (b) or in reception centers with special provisions for minors, or in other accommodation suitable for minors (c), which negatively affects the psycho-emotional state of a child.

The next step of the state that granted temporary protection to an unaccompanied child is to appoint representatives out of EU citizens by a court decision. It should be noted that the Article 14 of the Law of Ukraine “On the Protection of Childhood” (2001) enshrines the norm that children and parents should not be separated against their will, except when such separation is necessary in the interests of the child and it is required by a court decision that has entered into force. The court hears the child's opinion and wishes in accordance with the procedure established by law while taking actions related to the child's separation from one or both parents, as well as other actions concerning the child. This Article emphasizes the prevention of separation of the child from the parents, however, by analogy we can also state the same about accompanying persons, since they are authorized to accompany the child by the parents.

It is obvious that children separation from accompanying persons in EU countries is not implemented in the best interests of such children¹. The reality is that the EU states providing temporary protection do not take into account the fact that the child left the country not with his / her parents, but with a relative or a person authorized by the parents against his / her own will. The child escaped the war, danger in compliance with the requirements of national legislation in accordance with the norms (requirements) of the Rules for crossing the state border of Ukraine. Keeping the best interests of the child it is better to leave him / her with the person who accompanied the child while fleeing the war to a foreign country seeking asylum – a relative or another person authorized by the child's parents.

¹ According to Article 1 of the Law of Ukraine “On Childhood Protection”, ensuring the best interests of the child – actions and decisions aimed at meeting the individual needs of the child in accordance with his age, gender, state of health, developmental characteristics, life experience, family, cultural and ethnic affiliation and take into account the opinion of the child, if he has reached such an age and level of development that he can express it (Law of Ukraine of 26.04.2001 N 2402-III “On the Protection of Childhood”)

2.2. Legal status of an unaccompanied child in accordance with the UN Convention on the Rights of the Child of 1989

All EU Member States and the Council of Europe Member States are parties to the Convention on the Rights of the Child of 1989, therefore, the Convention on the Rights of the Child is of great importance in Europe, since it establishes common legal obligations on European states in matters of legal regulation of children's rights.

As we indicated above, the Convention on the Rights of the Child of 1989 does not use the term of “unaccompanied child”. The status of a child is indicated as “a child who is temporarily or permanently deprived of his or her family environment” (Article 20) instead of this term. The Article 20 of the Convention on the Rights of the Child of 1989 provides that “a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. States Parties shall in accordance with their national laws ensure alternative care for such a child. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background” (Convention on the Right of the Child, 1989).

But in the context of the indicated Article of the Convention on the Rights of the Child of 1989, it is necessary to consider the rights of the child and his or her own best interests, because it is possible that the child objects to the provision of assistance in the form of transfer to a foster family if there is a person who was authorized by the child's parents to accompany the child. Besides, States Parties to the Convention, as it is stated in the Article 20, and in accordance with their national laws, ensure alternative care for such a child. And there is a certain inconsistency. For example, a child who is a citizen of Ukraine being evacuated from a combat zone accompanied by a person authorized by his or her parents in compliance with the requirements of Ukrainian legislation regarding documents that grant the right to accompany and to cross the customs border of Ukraine. These documents further on are insufficient in the country granting temporary protection, or do not entitle to represent the child's interests, and the child will be recognized as unaccompanied or temporarily deprived of family environment. The next step of the state granting temporary protection is to apply the Article 19 of the Convention on the Rights of the Child of 1989, which stipulates that “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (Article 19 (1)).

We would also like to pay attention to the fact that the Convention does not contain provisions on the protection of children's rights who enjoy temporary protection. The Article 22 of the Convention on the Rights of the Child of 1989 provides measures for a child seeking refugee status. O. Kotlyar, analyzing Article 22 of the Convention, noted that Article 22 provides that the State has an obligation to protect the rights of unaccompanied children and any other children seeking refugee status by providing them with all necessary assistance, including tracing their parents and/or other relatives, facilitating their return to their families or, if this is not possible, providing them with the same protection as any other child deprived of a family (Kotlyar, 2016). However, these two statuses of international protection – “status of a person enjoying temporary protection” and “refugee status” are different. Thus, a significant shortcoming of the Convention on the Rights of the Child of 1989 is the lack of a norm that would guarantee the protection of children's rights who enjoy temporary protection. The Convention on the Rights of the Child needs to be revised regarding the application of new international protection mechanisms that will be applied to children.

Although temporary protection as a mechanism of international protection has been used very seldom, its existence and problems arising from the practice of applying temporary protection create the need to review the norms of international human rights acts.

CONCLUSION

The problems studied in the article regarding the protection of children's rights, who are citizens of Ukraine enjoying temporary protection in the EU, give grounds for making the following conclusions.

Temporary protection is a new, insufficiently regulated and studied mechanism of international protection. Cognizant authorities of EU countries may apply emergency measures aimed at establishing guardianship in respect of children who are citizens of Ukraine enjoy temporary protection in accordance with Directive 2001/55/EC. The reasons for applying such measures are:

(1) unaccompanied stay in the EU of a child who is a citizen of Ukraine. Due to the differences between the national legislation of the country of citizenship and the country that grants temporary protection, a child who was displaced and accompanied by a person authorized by the parents with the supporting documents can be recognized as an unaccompanied child;

(2) taking children who are citizens of Ukraine from their families on the basis of “neglect of parental duty” or “improper performance of parental duties” results to proceedings on the deprivation of parental rights.

Children who are citizens of Ukraine may be considered unaccompanied children on the territory of a foreign country due to the invalidity, non-recognition or insufficiency of the documents granting the right to accompany a child, or in case of independent displacement of a child aged 16 and over.

It has been established that in order to avoid situations of taking children who are citizens of Ukraine being on the territory of the EU on the basis of temporary protection, it is necessary to:

first of all, to provide reliable information to parents and authorized persons about the legislation of the host country regarding the issue of guardianship and custody, as well as the legal representation of minors' interests;

secondly, to conclude bilateral treaties with countries that provide temporary protection regarding the recognition of documents issued by guardianship authorities in Ukraine, which grant the right to accompany a child (to reconfirm guardianship documents);

thirdly, to improve the mechanism of legal regulation of issues on protecting children's rights who are under temporary protection at the national and international levels.

The issues of protecting children's rights and parental responsibility in terms of the martial law and temporary protection is perspective area for further scientific research.

REFERENCES

- 240 children have already been removed from the families of Ukrainian refugees in the EU, the Office of the Ombudsman intends to solve the problem. Retrieved from: <https://interfax.com.ua/news/general/917479.htm>
- Beltrame de Moura, A., & Lerin, C. (2024). The limitations of Private International Law regarding the protection of unaccompanied migrant children in the European Union. *Cuadernos De Derecho Transnacional*, 16(1), 95–112. DOI: <https://doi.org/10.20318/cdt.2024.8415>
- Consulate General of Ukraine in Milan (2024). *Unaccompanied minors*. Retrieved from: <https://milan.mfa.gov.ua/useful-info/minore-non-accompagnato>
- Convention on the Right of the Child (1989). Retrieved from: https://zakon.rada.gov.ua/laws/show/995_021#Text
- 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. Retrieved from: <https://eur-lex.europa.eu/eli/dir/2001/55/oj>
- 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. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32022D0382>
- 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. *Official Journal of the European Union*. Retrieved from: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>
- Donato, C. M., Lypez, N. (2024). Protective Resources, Legal Status, and Integration of U.S. Immigrants Entering as Unaccompanied Children. *American behavior researcher*. DOI: <https://doi.org/10.1177/00027642241229959>
- Edgar Iglesias, Carme Montserrat, Joan Llosada-Gistau, Judit Gallart. (2024). The well-being of unaccompanied migrant children: Between dreams and reality. *Children and Youth Services Review*, 157. Retrieved from: <https://doi.org/10.1016/j.chilyouth.2023.107389>.
- France terre d'asile. *Who are the unaccompanied children of calais?* Retrieved from: <https://www.france-terre-asile.org/learn-more>
- Gorban, M. (2024). Children “taken away” in Europe, adoptions and 1759 orphans because of the war. Interview with the head of the social service. *Radio Svoboda*. Retrieved from: <https://www.radiosvoboda.org/a/syrot-y-bizhentsi-vidibrani-dity-italia-usynovlennia/32844308.html>.
- Hrabovska, H. M. & Lysiuk, A. M. (2023). Protection of the rights of orphans and children deprived of parental care during hostilities. *Analytical and Comparative Law*, 2, 80–84. DOI: <https://doi.org/10.24144/2788-6018.2023.02.13>.
- Klymenko, O. (2021). The problem of migration of unaccompanied children. *Sociological Studies*, 2 (19), 21–30. DOI: <https://doi.org/10.29038/2306-3971-2021-02-21-30>
- Kobzar, Yu. (2023). In the EU, children were taken from 240 families of Ukrainian refugees – human rights defenders. *UNIAN*. Retrieved from: <https://www.unian.ua/world/v-yes-viluchili-ditey-u-240-simey-ukrajinskih-bizhenciv-pravozahisniki-12298419.html>.
- Korniienko, M. V. (2019). Current state of problems of protection of children's rights in Ukraine. *South Ukrainian law journal*, 1. 7–10. DOI: <https://doi.org/10.32850/sulj.2019.1-2>
- Kotlyar, O. I. (2016). Regulation of international protection children's right, which forced leave their country. *Scientific Bulletin of Uzhhorod National University*, Ser. «Pravo», Issue 36 (2), 183–186
- Law of Ukraine On Private International Law, No. 2709-IV (2005, June 23). Retrieved from: <https://zakon.rada.gov.ua/laws/show/2709-15#Text>
- Law of Ukraine On the Protection of Childhood, No. 2402-III (2001, April 26). Retrieved from: <https://zakon.rada.gov.ua/laws/show/2402-14#Text>
- Ruling of Cabinet of Ministers of Ukraine On the approval of the Rules for crossing the state border by citizens of Ukraine, No. 57 (1995, January 27). Retrieved from: <https://zakon.rada.gov.ua/laws/show/57-95-%D0%BF#Text>
- Stefanchuk, M. O. (2017). Protection of the subject of children's civil rights in the context of armed conflicts through the principle of adaptation of Ukrainian legislation to EU standards (problems of priorities and terminology). *Scientific Bulletin of Uzhhorod National University*, Ser. «Pravo», Issue 45 (1), 101–105
- Sushch, O. P. (2023). Problems of temporary protection of Ukrainians abroad in terms of armed aggression of the Russian federation (European experience). *Juris Europensis Scientia*, 6, 18–24. DOI: <https://doi.org/10.32782/chern.v6.2023.4>
- The text of the Universal Declaration of Human Rights (1948). United Nations website. Retrieved from: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
- Ukraine Refugee Situation, Operational data portal. Dataset by 2024. Retrieved from: <https://data.unhcr.org/en/situations/ukraine>.
- Unaccompanied and Separated Children fleeing from war in Ukraine – FAQs on Registration, Reception and Care (2022). *Official website of European Union*. Retrieved from: https://home-affairs.ec.europa.eu/system/files/2022-07/FAQs%20UAMs%20and%20separated%20children%20TPD_en_1.pdf
- UNICEF. *Unaccompanied children from Ukraine*. Retrieved from: <https://www.unicef.nl/en/our-work/unaccompanied-children-from-ukraine>

ПРОБЛЕМИ ЗАХИСТУ ПРАВ ДІТЕЙ – ГРОМАДЯН УКРАЇНИ, ЯКІ КОРИСТУЮТЬСЯ ТИМЧАСОВИМ ЗАХИСТОМ У КРАЇНАХ ЄС

Анотація. Повномасштабна війна в Україні спричинила масову міграцію її населення та призвела до посилення приватних відносин, ускладнених іноземним елементом, які є предметом міжнародного приватного права. Директива Ради 2001/55/ЄС від 20 липня 2001 року про мінімальні стандарти надання тимчасового захисту у разі масового напливу переміщених осіб та про заходи, що сприяють балансу зусиль між державами-членами щодо прийому таких осіб та несення наслідків цього, надала можливість громадянам України отримати статус тимчасового захисту на території країн ЄС. Новим викликом для українських дітей та їх батьків, які переміщені з України на територію ЄС і користуються тимчасовим захистом, стали випадки відбирання дітей від супроводжуючих осіб або із сімей. Ці випадки зумовлені відмінністю законодавства у питаннях опіки та піклування і батьківської відповідальності. У статті надано загальну характеристику обставин, які є підставами для прийняття рішення про застосування надзвичайних заходів соціальними службами країн ЄС до дітей, які є громадянами України, які користуються тимчасовим захистом у країнах ЄС. Встановлено, що відбирання дітей у батьків, опікунів, або уповноважених осіб для супроводу дитини відбувається за різних обставин і кожна ситуація індивідуальна, але систематизувавши випадки, автором виявлено такі причини як: перебування на території ЄС без супроводу дорослих та на підставі «батьківської недбалості» або «неналежного виконання батьківських обов'язків». Здійснено аналіз правового становища дитини без супроводу відповідно до національного законодавства України та іноземного національного законодавства деяких країн ЄС. Досліджено правовий статус дітей без супроводу відповідно до Директиви Ради 2001/55/ЄС та Конвенції про права дитини 1989 року. Обґрунтовано, що практика визнання українських дітей, які користуються тимчасовим захистом у країнах ЄС, дітьми без супроводу дорослих ґрунтується на таких підставах: а) відсутність (невідповідність, невизнання) документів, що уповноважують особу, яка супроводжує дитину, на догляд за дитиною та її супровід; б) невідповідність (невизнання) документів про право на опіку, виданих в Україні, вимогам країни перебування, яка надала тимчасовий захист; в) перебування на території ЄС без батьків чи супроводжуючих осіб дитини, яка досягла 16-річного віку і самостійно виїхала з України.

Ключові слова: дитина без супроводу, правова кваліфікація, права дитини, захист дитини, Директива 2001/55/ЄС, міжнародне приватне право, тимчасовий захист, найкращі інтереси дитини.

PROBLEMS OF PROTECTING CHILDREN'S RIGHTS WHO ARE CITIZENS OF UKRAINE ENJOYING TEMPORARY PROTECTION IN EU COUNTRIES

Abstract. The full-scale war in Ukraine caused a mass migration of its population and led to the increase in private relations complicated by a foreign element, which are the subject matter of private international law. 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 provided the opportunity for citizens of Ukraine to receive the status of temporary protection on the territory of the EU countries. Cases of children being taken away from their accompanying persons or from their families have become a new challenge for Ukrainian children and their parents, who moved from Ukraine to the territory of the EU and who are under the temporary protection status. Those cases occur due to differences in legislation in matters of guardianship and parental responsibility. The author of the article has studied and systematized cases, when social services of the host country are authorized to act urgently in the interests of a child and take a child away from the family.

The article provides general characteristics of circumstances that are reasons for taking a decision on the application of emergency measures by social services of EU countries to children who are citizens of Ukraine enjoying temporary protection in EU countries. It is established that the removal of children from their parents, guardians or authorized persons to accompany the child occurs under different circumstances and each situation is individual, but having systematized the cases, the author has identified the following reasons: staying in the EU unaccompanied by adults and on the grounds of “parental negligence” or “improper performance of parental duties”. The author analyses the legal status of an unaccompanied child under the national legislation of Ukraine and foreign national legislation of some EU countries. The legal status of unaccompanied children under the Directive 2001/55/EC and the Convention on the Rights of the Child of 1989 is investigated. It is substantiated

that the practice of recognizing Ukrainian children enjoying the temporary protection status as unaccompanied children is based on the following grounds: a) deficiency (inconsistency, non-recognition) of documents authorizing a person who accompanies a child for taking care of a child; b) non-compliance (non-recognition) of documents on the right to guardianship, issued in Ukraine, with the requirements of the host country that granted temporary protection; c) independent stay of a child on the EU territory, who is a citizen of Ukraine and has reached the age of 16, left Ukraine independently and is on the EU territory without parents and accompanying persons.

Key words: unaccompanied child, legal qualification, children's rights, child protection, Directive 2001/55/EC, Private International Law, temporary protection, the best interest of the child.

Cite this article: Sushch O. (2024). Problems of protecting children's rights who are citizens of Ukraine enjoying temporary protection in EU countries, *Law and innovative Society*, 1 (22), 39-51. doi: [https://doi.org/10.37772/2309-9275-2024-1\(22\)-4](https://doi.org/10.37772/2309-9275-2024-1(22)-4)