

NEWS

CONFLICT IN UKRAINE: THE MIGRATION STATUS OF UKRAINIANS

The purpose of this paper is to analyse the migration status of Ukrainians in the context of the current conflict with Russia in the light of the legal situation as of March 9, 2022. However, in view of the rapidly changing political situation, this legal situation may change, which is why we invite you to check the website of the State Secretariat for Migration (SEM) regularly for the latest developments.

GENERAL

As a preliminary remark, it should be recalled that Ukraine is a „Third-State“, i.e. a state that does not belong to either the EU or EFTA, so that its nationals do not benefit from the facilitated conditions of entry and residence in Switzerland enjoyed by EU and EFTA nationals.

At present, Ukrainians do not need a visa or residence permit for a stay in Switzerland of less than 90 days without gainful employment (Art. 10 para. 1 FNIA). Thus, Ukrainian refugees can now legally enter and stay in Switzerland without working for up to 90 days.

For a stay in Switzerland of more than 90 days, a permit is nonetheless required (Art. 10 para. 2 FNIA). It is one of these authorisations, i.e. the one granted to a person in need of protection (Permit S), that will be the subject of this analysis.

PROTECTION STATUS S

Political decision

On February 28, Federal Councillor Karin Keller-Sutter, head of the Federal Department of Justice and Police, stated that Switzerland was looking for non-bureaucratic solutions for Ukrainian nationals.

One of the solutions considered and recommended by the Federal Commission on Migration (FCM) to the Federal Council (FC), would be to receive persons in need of protection from Ukraine by granting them protection status S, as in 1999, during the war in former Yugoslavia¹. The FCM also supported the following measures²:

- The Federal Council should grant Ukrainian fugitives collective protection in Switzerland as quickly as possible and without complications;
- Individuals who are personally persecuted or potentially targeted (journalists, activists, politi-

cians, etc.) should, however, have the possibility to apply for asylum and obtain refugee status;

- Family reunification should be allowed immediately;
- After the end of the war, the safe return to Ukraine should be supported;
- Furthermore, the FCM recommends that it be clarified at an early stage how those who would not be able to return home after the end of the war could be quickly channelled into the regular integration process and into an alternative residence status.

On March 3, 2022, the EU Ministers of Justice and Home Affairs decided to introduce a temporary protection status for Ukrainians who have fled their country. To this end, the Council activated for the first time the mechanism provided for in the 2001 Directive on minimum standards for granting temporary protection. This directive applies to all EU Member States but is not directly applicable to Switzerland. However, the protection status S is close to what the EU Directive provides.

At its meeting held on March 4, 2022, the Federal Council decided to activate protection status S for Ukrainians forced to leave their war-torn countries, thereby endorsing the solution adopted by the majority of EU member states the day before. This week, the Federal Council will consult the cantons, aid organisations and the United Nations Refugee Agency (UNHCR). It will likely make a final decision on the introduction of this status at its meeting on Friday, March 11, 2022.

Definition and purpose of protection status S

Protection status S, provided for in the Federal Asylum Act (AsyIA), grants collective reception and a right of residence on sight. This authorisation to assemble with temporary protection aims

¹ <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-87371.html>

² <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-87371.html>

to „protect persons in need of protection as long as they are exposed to a serious general danger, in particular during a war or civil war as well as in situations of general violence“ (art. 4 AsylA).

This S protection status, which aims to unclog the asylum system, is thus very well adapted to grant protection to the fleeing civilian population quickly and rapidly, without an asylum procedure, for the duration of the acute threat.

The introduction of this status also ensures that sufficient capacity is maintained to continue to carry out the regular asylum procedures for persons seeking protection from other countries and thus ensure the proper functioning of the asylum system.

Conditions for obtaining protection status S

Only persons falling into the category of those provided for in Art. 1 let. b and 4 of the Asylum Act may be granted the status of person in need of protection. The SEM defines the group of persons in need of protection more precisely and decides who can benefit from temporary protection in Switzerland. It takes into account the principle of family unity (Art. 68 para. 1 AsylA).

Application procedure for protection status S (Art. 66 to 79a AsylA)

With regard to the procedure for an application by a person in need of protection, certain provisions relating to the asylum procedure apply by analogy (Art. 69 para. 1 AsylA).

Thus, the application may be filed at a border control point at a Swiss airport or, upon entry into Switzerland, at an open border crossing or in a federal centre (Art. 19 para. 1 AsylA). Anyone filing an application must be present at the Swiss border or on Swiss territory (Art. 19 para. 1 AsylA).

After filing his application, the applicant will be accommodated in a federal centre (Art. 24 al. 3 AsylA), where the SEM will carry out checks (identity, etc.), collect his personal data and question him about the reasons for his arrival (Art. 26 al. 2 and 3 AsylA). Then, if the conditions are met, the person will be granted temporary protection in Switzerland and will be allocated by the SEM to a canton (art. 27 para. 3 AsylA). In addition, the spouse of the person in need of protection and his/her minor children - who may attend school - will also benefit from this protection (art. 71 al. 1 AsylA).

Status of persons in need of protection

The right to stay in Switzerland under status S will be limited to one year, but may be extended (Art.

54 para. 1 of the Asylum Ordinance No 1). After five years, if the Federal Council has still not revoked the temporary protection, the person in need of protection will receive a residence permit (Permit B) from the canton where he or she resides, which will end when the protection is revoked (Art. 74 para. 2 AsylA). Ten years after the granting of temporary protection, the canton may issue a settlement permit (Permit C) to the person in need of protection (Art. 74 para. 2 AsylA).

In addition, the Federal Council proposes, on certain points such as freedom of travel, to adapt the status S to that granted by the EU Member States to Ukrainians, by guaranteeing that persons in need of protection will be able to continue to travel in the Schengen area after 90 days.

Accommodation for persons in need of protection

The Swiss Confederation, together with partner organisations, has prepared to receive displaced persons from Ukraine. Several thousand accommodation places are currently available in the federal asylum centre (FAC), and additional capacity is being sought.

As a general rule, the person in need of protection will reside in the canton to which he or she has been allocated (Art. 74 para. 1 AsylA). The Federal Council has proposed that the cantons be compensated by the Confederation by means of a lump sum to cover accommodation, compulsory health insurance and supervision of the persons concerned.

The person in need of protection may also be placed with a private person, who will not be paid. However, the cantons will be free to compensate this person in special situations. Many offers for private accommodation have already been received from the public.

The Swiss Refugee Council (SRC) will coordinate the use of these offers and will place Ukrainians with private hosts or in cantonal structures, in close cooperation with the cantons. For more information, we invite you to consult the SRC website³.

Gainful activity of the persons in need of protection

During the first three months following entry into Switzerland, the person in need of protection will in principle not be allowed to engage in gainful employment. Once this period has elapsed, the conditions for admission to gainful employment will be governed by the FNIA (Art. 75 para. 1 AsylA).

However, the Federal Council will be able to impose less stringent conditions (Art. 75 para. 2 AsylA),

³ <https://www.refugeecouncil.ch/>

which is likely to be the case since it has proposed to adapt the status S to that granted by the EU Member States to Ukrainians, by allowing the exercise of a lucrative activity after a period of one month already.

Termination of protection and removal of persons in need of protection

The Federal Council will determine when temporary protection is to be revoked (Art. 76 para. 1 AsylA). The SEM will then issue a removal order (Art. 76 para. 4 AsylA). In addition, the Swiss Confederation will support international efforts to or-

ganise the return of persons in need of protection (Art. 77 AsylA). Lastly, temporary protection will also be terminated if the person in need of protection has obtained a permanent residence permit under the FNIA (Art. 79 let. c AsylA).

Such is the analysis of the issue of the migration status of Ukrainians in the context of the current conflict with Russia on March 9, 2022.

Yours sincerely

—



STÉPHANIE FULD
Attorney-at-Law, lic. iur.
SAV Certified Expert
Partner



NASSIM SEDDIK
Attorney-at-Law, MLaw.
Associate

BIANCHISCHWALD LLC
mail@bianchischwald.ch
bianchischwald.ch

GENEVA
5, rue Jacques-Balmat
P.O. Box 1203
CH-1211 Geneva 1
P +41 58 220 36 00
F +41 58 220 36 01

ZURICH
St. Annagasse 9
P.O. Box 1162
CH-8021 Zurich
P +41 58 220 37 00
F +41 58 220 37 01

LAUSANNE
12, avenue des Toises
P.O. Box 5410
CH-1002 Lausanne
P +41 58 220 36 70
F +41 58 220 36 71

BERN
Elfenstrasse 19
P.O. Box 1208
CH-3000 Bern 16
P +41 58 220 37 70
F +41 58 220 37 71