**Temporary protection: Europe, Croatia and the UK**

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**Abstract**

*This paper considers contemporary temporary protection in Europe using Croatia and the UK as case studies. Both countries are signatories to the 1951 Refugee convention and as member states of the EU are subject to EU law and the EU Temporary Protection directive (TPD). This paper looks at TP as a protection mechanism, the specific purposes of the TPD, its transposition into national law, and explores reasons why it has never been activated. While there are risks with a transposition stage, as a study of Croatia shows, this is not the explanation for failure to activate the TPD. One compelling perspective is that European countries, reflecting a political backlash to elevated numbers of asylum applications, the UK being but one, which is considered as in this paper, trust more national forms of temporary rights for asylum seekers than regional EU response. In considering the position of Croatia and the UK, this paper considers in the light of this perspective national law and practice on temporary rights for asylum seekers.*

*Key words, Temporary Protection, EU, Croatia, UK*

**Introduction**

The first part of this paper considers the meaning of *temporary protection* (TP) at a global level through consideration of the 2014 UNHCR ‘Guidelines on Temporary Protection or Stay Arrangements’ (2014 UNHCR Guidelines).[[1]](#footnote-1) The second part considers the EU formulation of TP through the adoption and operation of the 2001 TP Directive (TPD).[[2]](#footnote-2) Transposition of this instrument is explored by using Croatia as a case study. The third part contrasts, on the one hand, the UNHCR guidelines and the TPD – linked by their emphasis on a shared regional response, with on the other hand, the notion and practice of TP at the national level with the UK as a case study. These case studies enable some observations and conclusions about contemporary perspectives on the role of TP in Europe. One conclusion is clear that despite supposed lessons from the past promoting a regional TP response, the evidence shows that in Europe states opt for national forms in preference. Various explanations can explain the failure of regional TP in Europe, which in sum, represent the strength of national interest over regional solidarity.

**1. Defining and distinguishing TP**

**1.1 Fundamentals**

TP is something other than protection under the 1951 Refugee Convention.[[3]](#footnote-3) A justification for this is the fact that the EU has its own TP instrument, TPD, and yet all EU states are signatories to the 1951 Convention. As explained below, the history behind the TPD explains a close relationship and to some extent overlap with protection under the 1951 Convention. Be that as it may, the two are distinct and separable.

One conundrum in distinguishing the two forms of protection is that refugee status by its nature and design is temporary. It is temporary because it is not meant to be a permanent status. As Hathaway has written, “in law, temporary protection is already the universal norm”.[[4]](#footnote-4) In making this point he was countering the assumption, particularly in Europe, that asylum leads to permanent stay in Europe. His point is that as a matter of Treaty law, taking account of the clear intent behind it, protection should not be assumed to be synonymous with permanent stay.[[5]](#footnote-5) The 1951 Convention recognizes this, for example, Article 1 C of the 1951 Convention brings to an end a states duty to protect when the cause of flight ceases to exits. On the other hand, in line with Treaty law, refugee status ends because the refugee’s status changes through the grant of permanent resident status,[[6]](#footnote-6) or, through gaining the nationality of the host state through naturalization under national law.[[7]](#footnote-7) So despite different outcomes, refugee status should always be a temporary one, without any compromise to protection of the person.

**1.2 TP: a global perspective**

TP has emerged as an alternative and distinct basis of protection to 1951 Convention in different regions of the globe including in Europe. As noted above given that European states are signatories to the 1951 Convention, its emergence in Europe serves to indicate its separateness from the 1951 Convention.

While TP is acknowledged globally, there is no agreed definition as it is a contested concept with both its advocates and its critics. Instead, the best level of consensus has formed around a set of UNHCR guidelines. These guidelines, entitled, ‘Guidelines on Temporary Protection or Stay Arrangements’[[8]](#footnote-8) were published in 2014 following a series of expert meetings which recognised developments in international law including the EU’s TPD.[[9]](#footnote-9)

It is made clear in the guidelines (at para 8) that TP is not a replacement for obligations under the 1951 Convention, “TPSAs are without prejudice to the obligations of States under international law, including particularly the 1951 Refugee Convention and/or its 1967 Protocol, as well as other human rights and/or regional refugee instruments to which they are party.”

Instead they propose (at para 3) TP as a “pragmatic tool” of international protection. Within these guidelines the scope of application of TP is identified (at para 9) as a suitable response to:

(i) large-scale influxes of asylum-seekers or other similar humanitarian crises;

(ii) complex or mixed cross-border population movements, including boat arrivals and rescue at sea scenarios;

(iii) fluid or transitional contexts [e.g. at the beginning of a crisis where the exact cause and character of the movement may be uncertain, or at the end of a crisis, when the motivation for departure may need further assessment]; and

(iv) other exceptional and temporary conditions in the country of origin necessitating international protection and which prevent return in safety and dignity.

The numbers of people in the movement and the complexity or uncertainty of the situation are the base characteristics of TP situations in these guidelines. The impact that justifies applying the Guidelines is that the existing framework to manage the movements will not work or simply there is none. As the Guidelines (at paras 10 and 11) state:

10. In each of these scenarios, individual status determination is either not applicable or feasible, or both.

11. In designing TPSAs, it will be important to agree on the target situations or trigger events to ensure predictability and to clarify the beneficiary category/ies.

Whereas according to these Guidelines, TP is based around “categories, groups or scenarios”, in contrast, protection under the 1951 Convention is based upon determination of *individual* persecution.

The other key characteristic for the application of TP as conceived in these Guidelines is that it is understood as applying as a coordinated response at either a regional or international level through some form of burden sharing, (paras 6, 8, 19 and 23).

The Guidelines recognise (at paras 8 and 20) that TP will be brought to an end because TP are “solutions-oriented and time-limited”, even if “states may agree to set extendable timeframes.” In these guidelines the ending of protection is, like the 1951 Convention, understandably countenanced on change of circumstances (cause of flight or status of persons who fled), but not by the simple fact of the passing of time. In this respect it is hard to draw a distinction with the foundational protection principle of non-refoulement under article 33 of the 1951 Convention.[[10]](#footnote-10)

**2. European TP**

The 2014 Guidelines make clear (at para 8) that they are not applicable where there are pre-existing mechanisms. The EU has, since 2001, its own regional mechanism.

This is the Council Directive 2001/55 on TP (TPD).[[11]](#footnote-11) It defines the circumstances of its application and the duration of TP. Unlike the 2014 UNCHR guidelines it sets out in hard law rights and obligations for the application of TP.

Before looking at it, it is instructive to summarise, in brief, the history leading to its adoption.

**2.1 The European story**

In Europe TP is associated with mass influxes. The immediate history before the adoption of the TPD, which is acknowledged in it, was the influx crisis caused by the break-up of Former Yugoslavia (FY), and notably, influxes caused by the Bosnian war (1992-5). At the beginning of the crisis in 1992, there was no EU-wide asylum system and no regional TP. Frontline states concerned by the numbers of asylum seekers from Bosnia sought support within the EU in the form of some commitment to burden sharing. A number of EU states including the UK successfully resisted this.[[12]](#footnote-12) So there could be no regional response. Instead EU states responded to the influx of Bosnians at the national level. In most EU states the type of response was the same – the implementation of TP.[[13]](#footnote-13)

While there was disparate practice and rules, one could say there was a common purpose behind adopting TP. One part was positive towards those fleeing to the EU, to expand the basis for protection given that it was not clear to everyone that the obligations under the 1951 Convention extended to those fleeing, en masse, war zones. The other part was a counter-balance, that their stay would be temporary with the expectation that Bosnians would return home as quid pro quo for extending protection to such numbers.[[14]](#footnote-14)

In the end, national TP had mixed results. While most states accepted Bosnians fleeing FY on the basis of TP, the levels of protections were variable and in some states the status was subject to criticism due to its precarious nature, inadequate basic rights and because the rules were deliberately designed to prevent integration such as through prohibition on a right to work. The counter-balance measures had mixed success too in that significant numbers did not return following the end of the conflict. Germany, the most burdened state was an exception, but it was heavily criticized for pressuring returns of large numbers of Bosnians. Other states recognized that the basis for forced return was weak given the precarious situation in Bosnia following the ceasefire and recognized that on an individual basis many Bosnians had a case for refugee status under the 1951 Convention or were to be granted another form of humanitarian protection such as under the ECHR. No doubt a permanent stay outcome was easier to accept in these states as they were much less burdened than Germany.

In 1999, with the Bosnian influx over a new scare caused by a mass displacement of Kosovars in Serbia, gave EU states a second fright and thus a motivation to implement an EU level approach to asylum. Through the Treaty of Amsterdam reforms EU states agreed the structure to create a common European asylum system to manage asylum movements into and around the EU. The first piece of substantive law for this new regional approach was the TPD.

**2.2 TPD**

**2.2.1 The beneficiaries**

The basis for application of the TPD is “mass influx” of persons in need of protection, Article 1:

The purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries.

Article 2(d) states that a mass influx is

arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme.

There is no specified number or proportion to determine a “mass influx” other than it is a “large number” arriving in the EU. No formula was ever devised. Under article 2(a) risk to the functioning of the “asylum system” is identified as a particular indicator that the influx is large. Ultimately, determination of “mass influx” is not based on a formula or a number, it is a political judgment, and as we shall see, a decision that inevitably allows for other considerations to be taken into account.

Article 2 (c) defines displaced persons as including those

who may fall within the scope of Article 1A of the Geneva Convention …, in particular:

(i) persons who have fled areas of armed conflict or endemic violence;

(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights”.

The beneficiaries of the TP Directive are unambiguously defined as a wide category of people which contrasts with the 1951 Convention, and in this it addresses the problem of narrow interpretations of beneficiaries - individualised persecution - under the 1951 Convention. It is worth noting here that this expanded protection was adopted in subsequent EU law as the concept of *subsidiary protection* in the Qualification Directives, which is very similar to the TPD notion of “displaced persons” in that it protects those fleeing war and armed conflict. Subsidiary protection is an existent legal right unlike TP rights under the TPD, which, as we shall see presently, is dependent upon a political decision to activate it.

**2.2.2 Activating the TPD**

Rights and obligations under the TPD are dormant unless and until it is activated. Under article 5 the process commences with the Commission submitting a proposal, which may have been requested by a state, to the Council for a temporary protection regime for a prescribed group or groups of displaced persons. Under article 25 states are then required to indicate, “in figures or in general terms” their capacity to receive such persons. The Council (of ministers representing each state), assessing the circumstances and the scale of the movements of displaced persons, votes on the proposal. Activation is secured by a qualified majority vote.

So the TPD requires each state to pledge to accept a quota of displaced persons. Each state decides for itself the numbers it is prepared to accept. There is no obligation or formula to determine a fair share between EU states, say, based on GDP or asylum capacity. Though replying to the Commission proposal is a legal requirement, the quota system is a weak burden sharing mechanism based purely upon extant political good will. This reflects a long-standing and unresolved problem for European states to meet on a consensus for a basis for fair sharing. This is unresolved because it fundamentally reflects a corresponding perception of loss of sovereignty over a policy area which is a particularly sensitive one in some states such as the UK.[[15]](#footnote-15) Following the pledges, each state would accept its self-determined quota, and provide a basis in national law for residency. The TP period is initially for one year, and can be extended to a maximum period of three years, (article 4).

The TPD provides for the basis for forced returns following the end of TP period, however this is subject to other rights or bases for protection (article 22) and the activation of TP cannot prevent a claim for asylum under 1951 Convention (article 17).

**3 Transposition**

As an EU directive, the TPD must be transposed, that is, put into national law by every member state to which it is addressed.[[16]](#footnote-16) Then, as national law, it provides rights and obligations and if necessary can be enforced in national courts. Given the large number of states which are required to transpose it, there is a risk that the transposition will not happen in some states and or it will not be effected correctly in across all states.

As evaluative studies have made clear, transposition has not been without its problems with delays to transposition in some states and gaps and deficiencies in national law in a number of states.[[17]](#footnote-17)

The section which now follows considers the transposition of the TPD into Croatian law and in doing so demonstrates the points above that states do pick and choose what to transpose. Of course poor transposition can be detrimental to protection rights for those in need, and for states runs the risk, but not necessarily the reality, of legal action by the EU.

**3. 1.1 Transposing the TPD - Croatia**

Croatia is the last state to have joined the EU (in 2013) and so transposed it later than most states. The Croatian Law on Foreigners (LoF)[[18]](#footnote-18) is the principal law transposing the provisions of the TPD. This law is consistent with the principal purpose of the Directive by linking TP in Croatia to an emergency situation in the event of a mass influx or possible mass influx of displaced persons from third countries who can not be returned to the country of origin, (Article 78 (1) of the LoF). Croatia did not opt to put into national law the optional application of Article 7 of the TPD to extend temporary protection to additional categories of displaced persons over and above those that would be included in a Council’s decision to activate.

The LoF requires, in line with the TPD that the Government takes a decision on the introduction of temporary protection on the basis of an article 5 TPD decision to activate.

According to the provisions of the LoF (Article 79(3)) TP is explicitly granted for a period of one year, with a possibility to extend protection automatically to six months and then up to one year. The LoF regulates that temporary protection may be extended for a maximum period of one further year on the basis of a decision of the Council of the European Union. So in line with the TPD, the total TP period in Croatia may extend to three years.

National provisions on exclusion from temporary protection are in accordance with the provision of Article 28 of the TPD. Thus TP will not be granted in Croatia to a person who has committed a crime against peace, a war criminal or a person who has committed a crime against humanity established by the provisions of international acts, person who committed, instigated or participated in the commission of a serious non-political criminal offence prior to arrival in the Republic of Croatia, including particularly cruel acts, even if committed with the alleged political objective, nor to a person who has committed acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. The requirement under article 28.2 TPD that any decision on exclusion be based on proportionality has not been transposed explicitly into the LoF, though it is liable to apply being a general principle of EU law.

**3.1.2 Scope of TP Rights in Croatia**

One of the objectives of the TPD was to harmonize the scope of rights of persons under TP and to overcome differences in national measures. Croatia has transposed, if imperfectly, the obligations in national law regulating the right of residence, right to work, basic living resources, access to health care and education, right to family reunion and right to practice religion.

All persons enjoying temporary protection in Croatia have a right to obtain a residence permit in a form of an identity card for the duration of the protection. However the LoF does not incorporate the quasi-supplication in article 8.3 that states facilitate, if they are required, visas with a minimum of fuss.

The right to work as well as educational opportunities for adults under TP is unrestricted under article 86 of the LoF.

Access to health care for foreigners in general, including persons enjoying international protection, is problematic in Croatia because there are various restrictions and legal obstacles to access health care. In 2009 and 2013, the Council of Europe’s European Committee of Social Rights (ECSR) concluded that the situation in Croatia “was not in conformity with Article 13.4 of the European Social Charter, as it had not been established that all non-resident foreign nationals in need, whether legally present or in an irregular situation, are entitled to emergency medical and social assistance”.[[19]](#footnote-19) For persons under TP, article 87 of the LoF does provide for emergency medical assistance, though the requirement to provide care for “essential treatment of illness” been not been transposed. Medical assistance is provided for in national law to vulnerable groups. This is in line with article 13 of the TPD, though the LoF does not, unlike the TPD, specify the categories of vulnerable people identified in article 13.4.

The LoF grants a right to education which is actually wider in scope than the TPD: all persons under temporary protection enjoy a right to primary and secondary education, as well as re-qualification and additional education under the same conditions as Croatian citizens; however the LoF does not extend to adult education as encouraged but not mandated under art 14.2 of the TPD.

Croatia has not transposed into national legislation article 13.2 of the TPD ensuring access to basic welfare and subsistence in cases of need. Article 22(2) of the Social Welfare Act stipulates that only persons under subsidiary protection and recognized refugees have access social welfare rights. Those under TP and in need would in Croatia therefore be vulnerable and at risk of destitution.

Under the LoF accommodation rights for persons under temporary protection are weaker than the requirements set out in the TPD in that the former unlike the latter links access to accommodation to financial means.

Croatian law regulates family reunification in very general terms and without specifying who is eligible to be considered as a family member for this purpose. In relation to children, Croatian legislation has not included, as required under article 15.4, the best interests of the child principle for consideration on the eligibility for family reunification. Furthermore, the whole set of provisions under article 16 concerning the rights of unaccompanied minors have not been transposed into Croatian law. So appointment of a legal guardian for an unaccompanied minors, the provision on placement of unaccompanied minor with relatives or in foster family, and access to reception center or access to the person who looked after the child while fleeing to Croatia, have not been transposed.

The right to claim asylum under article 17 is secured in Croatian law. The LoF recognizes the right under article 92 to submit a request for international protection, though beneficiaries may not enjoy the rights of the asylum seeker until TP disapplies. Article 17(2) of the TP Directive protecting the right to an on-going claim for asylum after the end of the TP period has not been transposed into Croatian legislation.

Provisions on voluntary and forced return have been transposed. Under Croatian law the Ministry of Interior has a duty to consider relevant reports on the state of the country of origin and to take into account compelling humanitarian reasons which would render the return of individuals temporarily impossible or unreasonable. This is in line with the principles in article 22 of the TPD.

**3.2 Transposition in the UK**

It is worth considering briefly the UK position in relation to the TPD. Under EU law, the UK, along with Denmark and Ireland, can opt out from being bound by any measure in the area of EU asylum law. The UK has opted into much of it and opted into all of the early legislation including the TPD. Given the UK’s history of resisting EU obligations in this area it is interesting to consider why the UK opted in. The reason is seemingly the view at that time of the adoption of TPD that the development of a EU approach to asylum was in the UK’s national interest in that it would help shift the burden from the UK.[[20]](#footnote-20) Between 1999-2002 the UK experienced its highest levels of asylum applications and was one of the two top receiving EU states. The TPD was transposed, late, in the UK under the authority of primary legislation, the European Communities Act 1972. To all intents and purposes the UK transposed the essential requirements of TP Directive.[[21]](#footnote-21) The transposition is split between Part 11A of the immigration rules[[22]](#footnote-22) made under the 1971 Immigration Act and 2005 UK Regulations made by a 2005 statutory instrument laid under the authority of the 1972 Act.[[23]](#footnote-23) The immigration rules set out the legal framework for recognizing a TP situation and the beneficiaries as per the TPD, and under Immigration Rule para 355B, provides for the key right to enter and reside as a beneficiary of TP and a right to documentary proof under Rule 355E; the Rules also provide for the rights of reunification of family members and the right to work; the 2005 Regulations provide for key subsistence and social rights.

**4 Europe: responding to a crisis**

From around 2010 the data showed a steady increase in the overall number of asylum applications in the EU. Then suddenly in 2015 the EU was in a crisis with over 1.3 million reported application made that year, (up 110% from 2014), followed by over 1.2 million applications in 2016.[[24]](#footnote-24) These numbers were unprecedented.[[25]](#footnote-25) It was acknowledged as the largest migration and humanitarian crisis in Europe for decades. The majority of the migrants were considered to be fleeing war and persecution with Syrian nationals making the highest number of applications across the EU.

While the overall EU figures show the scale for the EU as a whole, the impact in individual states was markedly different as a study of the situation in Croatia and the UK shows.

Croatia has not been in its recent history a county of asylum. The numbers of applications and the recognition rate were very low prior to the accession to the EU in 2013. Then in 2015 half of one million people entered Croatia. The size and character of the movement - a mass influx of displaced persons in need of protection, seemed to reflect the circumstance for activation of the TPD, article 2(d):

[The] arrival in the [EU] of a large number of displaced persons, who come from a specific country or geographical area …

The journeys made by these people to Croatia and the asylum application made there indicate that large numbers of them were from Afghanistan, Syria and Iraq – countries with high recognition rates across the EU. However only a tiny number applied for international protection in Croatia - only 152 persons.[[26]](#footnote-26)

In 2016, the number of asylum applications rose significantly on 2015 with over 2200 applications but again these were tiny compared to the movement. The positive recognition rate for these two years was respectively 24% and 4.5%. A massive number of people entered but most left and quickly.

Not many of those who transited through Croatia reached the UK. In 2015 the number of applications was around 40,000 (up from 33,000 the previous year) and in 2016 the number went down (slightly) to 39,000 applicants. Clearly there was not a mass influx in any sense into the UK. [[27]](#footnote-27)

If we look into the asylum trends in Croatia in past ten years,[[28]](#footnote-28) we can see strong fluctuations in the number of asylum applications and several instances in which there was sudden increase in number of asylum seekers. Between 2009 and 2016 Croatia had increase of 1409% in number of asylum applications - from 148 in 2009 to 2234 in 2016. Still, an increase in number of asylum applications of 1409% did not qualify as mass influx as defined by the EU TPD by the simple fact that neither the Croatian authorities nor European Council considered effecting the TP mechanism.

**4.1 TPD - not activated, why not?**

While done late in many countries, by the time of the 2015 influx crisis, most states had, if imperfectly, transposed the TPD into national law.

The 2015 crisis was without doubt a situation of mass influx into regions of the EU but not for all parts or for all states, e.g. as we have seen, not for the UK. So some states were under a great amount of pressure either because of people transiting through (e.g. Croatia), or others as destination states with significant challenges to their asylum systems and social systems being under great strain or in some cases overwhelmed.

The TPD was not activated. In fact the TPD was not even seriously considered. A number of reasons can be put forward to explain this. The problematic transposition of the TPD is symptomatic of the problem with the TPD but unlikely to be a significant cause. Nor were criticism of the activation process in the TPD likely to explain its failure.

Instead the answer surely lies with the political considerations around it and how other factors and options were considered in the response to the crisis.[[29]](#footnote-29)

In terms of the Bosnian quid quo pro approach: even without the TPD, EU law and through it EU states, offered protection to those fleeing conflict and war through *subsidiary protection*. The TP and TPD were not needed to expand protection.

The other side then of protecting those coming to the EU was to ensure, as far as possible, a minimal but shared commitment to hosting asylum seekers. As the design of the TPD perfectly illustrates, EU state in general have not been able to show when it matters most, a collective willingness to accept voluntarily burdens, and instead when possible they seek to minimize them. Croatia had a mass influx problem but Croatia allowed it to be solved as people were allowed to travel through to other states, helped no doubt by low recognition rates.

The UK was not willing to share the burden. It would never have considered calling for the TPD. It had learned its lessons, asylum seekers were likely to stay even under TP. Like some other states it may have considered that triggering it would actually encourage even greater numbers to come to the EU.[[30]](#footnote-30)

For states under pressure the TPD was pointless as it gave no guarantee of burden sharing. Attempts to activate it might very well have resulted in a humiliating failure. There was simply no faith in the TPD.

Instead the EU responded through a number of policy and financial measures and through securing, though not without some resistance, new legal measures under article 78.3 the Treaty on the Functioning of the European Union for a two year period, (so temporary), of mandatory redistribution of quotas of asylum seekers from hotspots in Greece and Italy to other states. A number of front line states refused to participate, though Croatia did. The UK did not opt into these measures.

The absence of a TPD response to the 2015-16 crisis is conspicuous given its sole purpose is to provide a mechanism to respond to a mass influx into the EU. Despite this it has not been repealed and remains EU law which still could be triggered for a future influx. But given its failure in 2015-16, it is not surprising that it has been referred to as a dead letter law.[[31]](#footnote-31)

**4.2 National forms of TP**

Refugee status itself is increasingly becoming a temporary protection measure, rather than leading to permanent resettlement and integration.[[32]](#footnote-32)

This section considers national forms of TP. In a report sponsored by the Commission evaluating the TPD, national forms of TP were acknowledged:

Beyond [the] “classical” form of temporary protection, there are other time-limited protection statuses applied by states. While these may not be associated with mass influx situations, or entitled as “temporary protection”, in reality these protection statuses have the same practical effect as temporary protection schemes. This for example includes national protection statuses with time-limited protection for humanitarian purposes to persons who fall outside the 1951 Convention.[[33]](#footnote-33)

As we have seen in relation to the Bosnian influx, resort to national forms of TP is not a new form of response in Europe. But given its mixed results and problems with it then, it raises questions why states would resort to it now or think that it will be more successful this time.

As demonstrated in this section TP is applied as an immigration measure to reduce the incidence of permanent integration. From this perspective TP is a second line of defence used by states as non-entrée policies fail. National authorities are looking again at national policies for time-limited stay as, despite some periods of reductions, the numbers of applications in Europe are seen as historically high, viewed as politically unacceptable, with a public discourse increasingly bent towards hostility, with increasing tensions and political opinion hardening.

In other words, TP in Europe is a mechanism to emphasis and help execute the national objective of reducing immigration and commitments to immigrants and asylum seekers. There is discretion here as neither international law nor EU law determines the residency status of non-nationals.[[34]](#footnote-34) Even for signatory states to 1951 Convention there are no specific obligations to grant residency permission. A person seeking asylum and even one who has obtained recognition of her need of protection needs a legal basis in national law to stay.

*4.2* **UK- hostile environment**

Asylum seekers like all non-nationals are subject to UK immigration control under the 1971 Immigration Act. They need permission, ‘leave’, to enter the UK and remain and they need to be able to prove it. The importance of this has been highlighted with the scandal of the ‘Windrush generation’ – the forced removal of many immigrants from the Caribbean who having been encouraged to live and work in the UK and retired there, were, as victims of government policy to reduce immigration, denied the right to continued residence, because they could not prove their right to reside.

Entry without permission is unauthorized entry. For asylum seekers, EU law, article 7 of the EU Procedures Directive 2005/85, gives the right to remain in the UK pending their claim. [[35]](#footnote-35)

The process for recognition in the UK represents a series of stages of temporary permissions. Even for those claiming and establishing refugee status under the 1951 Convention, their presence is premised on stages of temporary stay.[[36]](#footnote-36)

Unless the asylum seeker has leave to be in the UK, unlikely, her status is tolerated, legally speaking she is ‘lawfully present’ though, without leave, not ‘lawfully resident’, *Szoma v Secretary of State for the Department of Works and Pensions.[[37]](#footnote-37)* The legal framework for such a person is covered by the Immigration Act 2016, which provides that any person who enters the UK without authorization, which includes an asylum seeker, is liable to detention but will not be detained if they meet conditions for ‘immigration bail’.[[38]](#footnote-38) This act consolidates various sources of UK law on unauthorized entry, which for asylum seekers without leave, determines their presence as ‘temporary admission’.

Under EU law, article 23 Asylum Procedures Directive 2005/85, which the UK adopted, a decision on the application for protection should normally take place within 6 months. Though there are many applications which take much longer.[[39]](#footnote-39) A positive decision for protection alone will not itself provide a basis in national law for leave - the person still requires an administrative decision to grant a basis to be ‘lawfully’ in the country, *ST (Eritrea) v SSHD*.[[40]](#footnote-40)

In the UK following a successful claim, the asylum seeker, whether as a Convention Refugee or under a humanitarian basis (subsidiary protection), will normally be granted under UK immigration rules, para 335, a temporary period of stay, known as ‘limited leave’ to remain. This period is normally five years, para 339Q.

After the five-year period the person will need a new basis to remain. The current rules require that if the person meets all the conditions, she will be given a permanent right to remain in the UK known as indefinite leave to remain, ILR or ‘settlement’, Rule 339R-S. These conditions include having remained in the UK during the limited leave, conditions relating criminal convictions, and the exercise of the government’s discretion of an assessment of the desirability of allowing the person to stay.

In recent years the UK government’s change of tone and approach towards all immigrants, colloquially referred to as a “hostile environment”, has changed the expectations for the long-term status for asylum seekers and introduced doubt that it will be granted. In 2016 the UK government introduced a new policy against an automatic transition to ILR by introducing a five-year “safe return review”. In the guidance published by the government, the five-year protection period whether as a refugee or on the basis of humanitarian leave[[41]](#footnote-41) is presented as a “probationary period of 5 years” limited leave.[[42]](#footnote-42) While this is not a change to the law as such, it introduces risk for asylum seekers and can be seen in the light of the hostile environment policy against continued stay. The guidance states the clear premise for expectations: the policy objective in granting refugee leave is primarily to provide protection and a period of limited leave to those who need it. That is, not a permanent period. While this is not a change to UK’s obligations notably in respect for the principle of non refoulement, it does introduce risk for the UK authorities to systematically search for reason to revoke permission, through for example, a new country review outcome. For asylum seeker it prolongs the uncertainty of their position, and the uncertainty for their future.

While there appears to be no data or research publicly available on the impact of this change in policy, concerns have been raised about its negative impact.[[43]](#footnote-43)

**Conclusion**

TP in its classic formulation is about addressing an emergency of mass movements of people in need of protection, and in a nutshell, doing so outside the parameters of the 1951 Convention. This is because, either states in the region where the emergency exists are not signatories, or in the region where they are, the circumstances justify a humanitarian intervention over the application of the Convention, (cf. 2014 Guidelines paras 1,3 and 8).

TP is an imperfect solution with risk and an uncertain legal basis – but these are its origins and probably still the attaining circumstances in which it operates. TP is despite its nomenclature fundamentally about securing admission – expanding protection at the moment of need, rather than about emphasising the duration of admission.

At least in Europe national forms of TP have a different philosophy, they are about what happens after admission. They work to emphasis the temporary nature of stay. TP is not a policy of first choice given the great difficulty around removal; but it is seen as a second line of defence when non-entrée policies have failed to deter.

At the time the TPD was adopted it could have been seen as a milestone in development of a common and strong asylum system for the EU. The adoption of the TPD may have given hope that the EU would employ a much more efficient and immediate system of protection to persons in need fleeing a range of hostile and violent circumstances in their own country of origin. Additionally, the TPD pointed to an ideal of a solidarity mechanism between EU States under which they would share the burden in a situation of a massive influx of persons in need. The TPD was not perfect but it was presented in its claims that lessons were learned and a new approach would be taken in a crisis. In short, the TPD was an attempt to provide both expanded protection and reduced obligations through burden sharing and temporary stay.

With huge influxes of persons in need from Syria, Afghanistan and Iraq in 2015, none of front lines states, including Croatia, formally proposed activation of TPD. This was despite the fact that these states were neither willing nor able to host large numbers of asylum seekers. In the absence of burden sharing, secondary movements, from one state to another, of asylum seekers were condoned. The TPD failed as key parts of the common European asylum system collapsed. Receiving states left to their own decisions on the mid-longer term situation, turned once again to their own national policies, which as illustrated by in the UK, included a form of TP.

Could things have been different? Could activation of the TPD have saved Europe or at least ameliorated the problem? Obviously hindsight makes the assessment easier, but probably the early hopes for its success were misplaced. The lack of a hard burden sharing mechanism was a fundamental flaw and reflects the unsatisfactory and unfinished business around burden sharing. This is unresolved to this day. But perhaps even more fundamentally, the EU’s own efforts to give TP a stronger and secured position ironically undermined any chance of regional TP in Europe: by becoming formalized, the TPD undermined a key premise for TP – flexibility for states to judge the political possibilities and to react, or not, as they judge all the circumstances. The resort to national policies around temporary stay reflects this – as states remain freer to respond based upon national needs. Whether these are better, bolder or more humane solutions is another question.

1. UNHCR, 2014 Guidelines on Temporary Protection or Stay Arrangements, (UNHCR Guidelines). [↑](#footnote-ref-1)
2. 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 [2001] OJ L212/12. (TPD). [↑](#footnote-ref-2)
3. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) as amended by the New York Protocol of 31 January 1967. [↑](#footnote-ref-3)
4. Hathaway J (ed), Reconceiving International Refugee Law (Kluwer Law International 1997) 2. [↑](#footnote-ref-4)
5. ibid 3. [↑](#footnote-ref-5)
6. In Croatia obtaining permanent residence rights: in the UK indefinite leave to remain. [↑](#footnote-ref-6)
7. In Croatia under the article 8 of the Law on Croatian Citizenship - Official Gazette Number 53/91, 70/91, 28/92, 113/93, 4/94, 130/11, 110/15; in the UK under the British Nationality Act 1981 s 6 and schedule 1and immigration rules para 339BB. [↑](#footnote-ref-7)
8. UNHCR Guidelines (n 1). [↑](#footnote-ref-8)
9. ibid para 2. [↑](#footnote-ref-9)
10. Gregor Noll and Susanne Malström, ‘Report No. 22 Temporary Protection - Problems and Prospects’, 9 May 1996, Lund, 19, 23, 33, Raoul Wallenberg Institute, ISSN: 0283-085X 1996, 25. [↑](#footnote-ref-10)
11. TPD (n 2). [↑](#footnote-ref-11)
12. Gregor Noll and Susanne Malström (n 10) 17. [↑](#footnote-ref-12)
13. ibid 33. [↑](#footnote-ref-13)
14. ibid 23. [↑](#footnote-ref-14)
15. Beirens H and others, ‘Study on the Temporary Protection Directive Final report’, (2016) undertaken by ICF Consulting Services Limited sponsored by EU Commission, 6. [↑](#footnote-ref-15)
16. Certain EU states have the right to opt out of the TPD obligations; Denmark has done this. [↑](#footnote-ref-16)
17. Beirens H and others (n 15) 12-13; also <http://odysseus-network.eu/wp-content/uploads/2015/03/2001-55-Temporary-Protection-Synthesis.pdf> accessed 5 July 2019. [↑](#footnote-ref-17)
18. Law on Foreigners, Official Gazette Number 130/11,73/13,69/17,46/18.    [↑](#footnote-ref-18)
19. Fact Sheet Croatia and European Social Charter: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680492883&format=pdf> accessed 1 July 2019.

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20. ##  UK government ‘Review of the balance of competences between the UK and the EU: asylum and non-EU migration’ (2014) para 3.9.

 [↑](#footnote-ref-20)
21. <http://dev.ulb.ac.be/assoc/odysseus/tables/data/reports/4/uk.pdf> accessed 5 July 2019. [↑](#footnote-ref-21)
22. UK government website, Immigration Rules <[www.gov.uk/guidance/immigration-rules/immigration-rules-part-11a-temporary-protection](https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11a-temporary-protection)> accessed 5 July 2019. [↑](#footnote-ref-22)
23. 2005 No. 1379 Immigration: The Displaced Persons (Temporary Protection)

Regulations 2005 available at <[www.legislation.gov.uk/uksi/2005/1379/pdfs/uksi\_20051379\_en.pdf](https://www.legislation.gov.uk/uksi/2005/1379/pdfs/uksi_20051379_en.pdf)> accessed 4 July [↑](#footnote-ref-23)
24. UK House of Commons Library Briefing Paper, ‘Asylum Statistics’ (Number SN01403 6 March 2019) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01403> accessed 4 July 2019. [↑](#footnote-ref-24)
25. European Commission Press release (14 August 2015), available at <http://europa.eu/rapid/press-release\_SPEECH-15-5498\_en.htm> - accessed 5 July 2019 [↑](#footnote-ref-25)
26. Different sources give different figures – but all point to a tiny number compared to the flow of migrants. [↑](#footnote-ref-26)
27. Beirens H and others (n 15) 2. [↑](#footnote-ref-27)
28. Official statistics of the Ministry of Interior: <https://mup.gov.hr/UserDocsImages/statistika/2019/Tra%C5%BEitelji%20me%C4%91unarodne%20za%C5%A1tite%20u%202019%20godini/29-04-statistika-trazitelji-1-3-2019.pdf> accessed 1 July 2019. [↑](#footnote-ref-28)
29. European Commission: ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a European Agenda on Migration’, Brussels, 13 May 2015 COM(2015) 240 final. [↑](#footnote-ref-29)
30. Beirens H and others (n 15). [↑](#footnote-ref-30)
31. Colin Yeo, Free movement blog, ‘The impact of Brexit on UK asylum law: part one’

<www.freemovement.org.uk/impact-brexit-uk-asylum-law-part-one> accessed 5 July 2019.

Beirens H and others (n 15) 26. [↑](#footnote-ref-31)
32. Helen Hintjens, ‘Nowhere to run: Iraqi asylum seekers in the UK’ Race and Class Vol. 54(2) 88, 90. [↑](#footnote-ref-32)
33. Beirens H and others (n 15) 4, 25. [↑](#footnote-ref-33)
34. EEA nationals are an exception to this under EU law. [↑](#footnote-ref-34)
35. The updated – recast - Procedures Directive does not apply to the UK as it did not opt to adopt it - 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 (recast) OJ L 180/60 (29/6/2013). [↑](#footnote-ref-35)
36. Beirens H and others (n 15) 25. [↑](#footnote-ref-36)
37. [2005] UKHL 64. [↑](#footnote-ref-37)
38. S. 61; Schedule 10. [↑](#footnote-ref-38)
39. UK House of Commons Library Briefing Paper, ‘Asylum Statistics’(n 24). [↑](#footnote-ref-39)
40. [2012] UKSC 12. [↑](#footnote-ref-40)
41. Immigration rules paras 339C-H [↑](#footnote-ref-41)
42. UK Home Office, ‘Refugee Leave’ (2 March 2017) 11 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/597990/Refugee-Leave-v4.pdf > (5 June 2019) [↑](#footnote-ref-42)
43. Refugee Council, ‘Refugees Welcome? The Experience of New Refugees in the UK A report by the All Party Parliamentary Group on Refugees’ (April 2017);

Alan Travis, The Guardian, ‘Refugees applying to live in UK face being sent home after five years’ [<www.theguardian.com/world/2017/mar/09/refugees-applying-to-live-in-uk-face-being-sent-home-after-five-years](https://www.theguardian.com/world/2017/mar/09/refugees-applying-to-live-in-uk-face-being-sent-home-after-five-years)> accessed (5 July 2019);

Colin Yeo, ‘Home Office ends policy of automatic settlement for refugees after five years’ <www.freemovement.org.uk/home-office-ends-policy-automatic-settlement-refugees-five-years> (1 June 2019). [↑](#footnote-ref-43)