



War in Ukraine and the principle of ex nunc examination as applied by the Czech courts

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- ▶ Art. 46(3) APD (recast) – ex nunc examination of both facts and points of law – no transposition into the Czech law
- ▶ Code of Administrative Judiciary – ex tunc principle: factual and legal situation as it stood at the time of issuing the administrative decision
- ▶ no competence of administrative courts to grant international protection – only to annul negative administrative decision and return the case back to the administrative authority with a binding legal opinion
- ▶ AG Bobek in *Torubarov* (C-556/17): “procedural ping-pong”

Jurisprudence of the Supreme Administrative Court (SAC judgment of 26 November 2015, ref. No. 10 Azs 194/2015 – 32, www.nssoud.cz):

- ▶ direct application of Art. 46(3) APD (recast) by the first instance administrative courts (only to the benefit of the applicant)
- ▶ it does not apply to the Supreme Administrative Court – new facts inadmissible

Ukraine – the most frequent country of origin for IP applications in the Czech Republic:

- ▶ 2021 – 377 (113 subsequent) Ukrainian applications out of 1411 (Georgia 226, Afghanistan 176, Vietnam 70, Moldova 69)
- ▶ 2020 – 351 (109 subsequent) Ukrainian applications out of 1164
- ▶ 2019 – 311 (96 subsequent) Ukrainian applications out of 1922

Low pre-war recognition rate for UKR applications

2021 – 425 administrative decisions on UKR applications:

asylum (refugee status) – 0

subsidiary protection – 7

negative decisions – 277

discontinuation (termination) of the proceedings – 141

March – July 2022: subsidiary protection – 75

31 December 2021 – 196 875 Ukrainians – regular residence in the Czech Republic (114 630 Slovaks, 64 851 Vietnamese, 45 365 Russians, all foreigners 660 849)

- ▶ 22 March 2019 – Ukraine put on the list of safe countries of origin – except occupied Crimea and parts of Donetsk and Luhansk regions controlled at that time by pro-Russian separatists
- ▶ Are territorial exceptions compatible with Arts. 36, 37 and Annex I APD (recast)? CJEU – pending case C-406/22 *CV v. Ministry of Interior* – preliminary reference by the Regional Court in Brno (compare also pending case C-257/22 *CD v. Ministry of Interior*)
- ▶ shift of the burden of proof on the applicant – most of the applications dismissed in an accelerated procedure as manifestly unfounded
- ▶ since August 2021 – no automatic suspensory effect of appeals in these cases

- ▶ 24 February 2022 – Russian invasion to Ukraine – mass influx of Ukrainian war refugees to the EU – Czech Rep. one of the countries of destination – first protection: humanitarian visas
- ▶ 3 March 2022 – Council Implementing Decision 2022/382 – activation of Temporary Protection Directive (2001/55/EC)
- ▶ 21 March 2022 – Czech “Lex Ukraine” – modification and activation of the Temporary Protection Act – more than 400 000 temporary protection statuses granted, approx. 300 000 temporary protection holders remain in the Czech Rep., granting of the temporary protection status to an applicant for IP – stay of the IP proceedings
- ▶ Temporary protection in the Czech Rep. does not apply to Ukrainians who left Ukraine before 24 February 2022 (unless they are family members of entitled persons) x Commission Operational Guidelines (2022/C 126 I/01)

What to do with the pending Ukrainian IP cases?

- ▶ regional courts – direct application of Art 46(3) APD
- ▶ Supreme Administrative Court – 2 approaches:
 1. new facts should remain inadmissible + if unsuccessful, the applicant may lodge a new (subsequent, but admissible) application – Art. 40 APD
 2. radical change in factual circumstances – Ukraine is no more a safe country of origin, there is no safe place in Ukraine, all Ukrainians (unless excluded) are eligible at least for 15(c) subsidiary protection, only ex nunc examination may ensure effective application of non-refoulement principle, common sense argument (examination of the case on the basis of the pre-war COI would be absurd)

SAC judgment of 10 March 2022, ref. No. 10 Azs 537/2021 – 31 – ex nunc principle

SAC judgments of 25 March 2022, ref. No. 8 Azs 336/2021 – 33, of 24 March 2022, ref. No. 1 Azs 36/2022 – 31, of 31 March 2022, ref. No. 9 Azs 13/2022 – 32, of 8 April 2022, ref. No. 5 Azs 86/2021 – 33, of 14 April 2022, ref. No. 5 Azs 212/2020 – 44, of 22 April 2022, ref. No 5 Azs 218/2020 – 28 and ref. No. 5 Azs 227/2020 – 52, of 29 April 2022, ref. No. 5 Azs 280/2020 – 32, ref. No. 5 Azs 132/2021 – 58 and ref. No 5 Azs 217/2021 – 50, of 3 May 2021, ref. No. 5 Azs 154/2021 – 28) – ex nunc principle prevailed

expulsion to Ukraine: SAC judgment of 14. 4. 2022, ref. No. 5 Azs 89/2022 – 24

humanitarian visas (humanitarian residence permits) for Ukrainians: SAC judgment of 18. 5. 2022, ref. No. 5 Azs 84/2021 – 142