

TEMPORARY PROTECTION FOR THIRD-COUNTRY NATIONALS WHO ARRIVE TO POLAND FROM TERRITORY OF UKRAINE AS A RESULT OF RUSSIAN MILITARY AGGRESSION

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Abstract. The onset of the new phase of Russian aggression against Ukraine, that started on 24 February 2022, has resulted in massive influx of third-country nationals to EU member states, with Poland seeing the greatest impact. This unprecedented wave of migration triggered the first-ever use of the EU's temporary protection mechanism in recent history. Although the decision of the Council of the European Union has established categories of third-country nationals who qualified for temporary protection, the practice of Polish migration authorities demonstrate that there are still individuals who have fled from Ukrainian territory and require legal protection, yet are not qualified for temporary protection. These groups of third-country nationals must pursue other forms of protection, typically without success in obtaining it.

Keywords: temporary protection; international protection; refugee status; subsidiary protection; third-country national; decision of the Council of the European Union

INTRODUCTION

Invasion of Russian armed forces, with partial occupation of particular parts of Ukrainian sovereign territory, constitutes a crime of aggression in accordance with international law, especially UN General Assembly Resolution (1974), that provides for definition of aggression,¹ and Rome Statute of the International Criminal Court, that establishes its jurisdiction over four most severe international crimes, including crime of aggression.² Russian full-scale military aggression against Ukraine, that has started on 24

¹ United Nations General Assembly Resolution 3314 (XXIX), 1974, annex.

² Statute of the International Criminal Court, 2187 U.N.T.S. 90.

February 2022,³ provoked the unprecedented wave of third-country nationals⁴ arriving to EU. First days of full-scale Russian military aggression against Ukraine caused two forms of migration flow: 1) the flow of internally displaced persons (IDP's) escaping from the Eastern, Southern and Northern parts of Ukraine to the Western regions, 2) unprecedented flow of people from all of Ukraine to European Union members states, mostly Poland, Slovakia and Romania. First month of Russian military aggression, was the time of a precedent, since an important number of third-country nationals coming from the territory Ukraine after 24 February 2022 were allowed to cross the EU's external border (in case of Poland and Slovakia also Schengen external border) not only without appropriate visa (if the period for non-visa regime had expired in particular individual case), but also without a valid international travel document (passport). Schengen borders code in Article 6 provides for entry conditions for third-country nationals that have to be met in order to enter Schengen Area.⁵ However, responding to the high number of third-country nationals entering Poland during the first month after Russian military aggression Polish Border Guards allowed some third-country nationals to enter Poland without valid international travel document (passport), presenting only internal Ukrainian biometric ID or even internal Ukrainian passport in old paper format.⁶ This migration flow *en masse*, that has started on 24 February 2022, has resulted in introducing the EU legal mechanism on qualifying this situation as a mass influx of displaced persons from third country and establishing minimum standards for temporary protection on the territory of EU member states.⁷ It has to be noted that it was the first time in recent history that EU has implemented that mechanism.

³ It is important to note that Russian military aggression against Ukraine actually has started in 2014 with transferring *de facto* its own soldiers to Crimean Peninsula, what enabled the following illegal annexation of that territory.

⁴ The term "third-country nationals" is used in the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Official Journal of the European Union L77/1, 23.03.2016. According to the Article 2(6) of the Schengen Borders Code "third-country national" means any person who is not a Union citizen within the meaning of Article 20(1) TFEU and who is not covered by point 5 of this Article.

⁵ The Schengen Area was introduced on the basis of the Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal of the European Communities L 239, 19-62, 22.09.2000.

⁶ Ukrainian internal ID in paper format has only Ukrainian spelling of personal data – there is no English transliteration provided.

⁷ Article 1 of 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, Official Journal of European Union L 212, 7.8.2001, p. 12.

Temporary protection had not been implemented when there was a mass migration of irregular migrants to EU member states (mostly to Greece and Italy) caused by military conflict in Libya or military conflict in Syria in 2011 [Deniz and Şirin 2019, 2]. Hence, it is essential to analyze if the EU mechanism of temporary protection, that has been introduced for the first time ever, covers all categories of third-country nationals that are in need of such protection.

In the first quarter of 2022 the EU witnessed an unprecedented situation on the Polish-Ukrainian border. It had been estimated that in the first two weeks after 24 February 2022 the number of third-country nationals that have entered Polish, and therefore EU's external border, fleeing Russian invasion reached 1 million [Klaus 2022, 21]. The statistics prepared by the Polish Border Guard Headquarters confirm that passenger traffic at the Polish and EU's external border amounted to 11 575 543 people.⁸ This number surpassed twice the corresponding indicator for 2021, which amounted to 4 897 902 people. The largest group of third-country nationals who entered Poland in 2022 were citizens of Ukraine – 5 170 689 people. There was also an increase, although not as significant, in the number of applications for international protection submitted in 2022. In the first half of 2022 there were submitted 3 255 applications in Poland. These 3 255 applications included 4 874 people. If the trend is maintained in the second half of 2022, the sum of applications for international protection for 2022 will most likely be much higher than the number of 4 298 applications for 2021. Research presented in this study will provide the explanation, why in 2022 there was a noticeable increase in applications for international protection submitted in Poland.

Among third-country nationals fleeing territory of Ukraine after 24 February 2022 the following categories can be identified: (a) Ukrainian citizens, (b) citizens of third countries, who are family members of Ukrainian citizens, (c) citizens of third countries, who received international or national protection in Ukraine or permanent resident permit, (d) citizens of third countries, who received temporary residence permit in Ukraine, (e) citizens of third countries, who applied for international protection in Ukraine, however they had not received any protection before fleeing Ukraine, (f) citizens of third countries, whose stay on the territory of Ukraine has been illegal (including stateless persons). The real legal challenge appeared when it has become clear that not all from the abovementioned categories are eligible under the so-called Polish special act from 12 March 2022⁹ for temporary

⁸ Statistical data related to the border traffic in first half of 2022 is presented in the following report: *Informacja statystyczna za I połowę 2022 r.*, Headquarters of Polish Border Guards, Warsaw, 2022, p. 4.

⁹ Act of 12 March 2022 on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this state, Journal of Laws item 583 [hereinafter: Polish special act].

protection and a proper legal solution should be provided out of the already existing forms, such as asylum, international protection (thus refugee status or subsidiary protection) or consent granted by the Commander of the Border Guards facility.¹⁰

The aim of this study is to discuss and present criteria for granting temporary protection in EU that have to be met by third-country nationals fleeing Ukraine after the full-scale military aggression has started on 24 February 2022. This study will enable to deduce those categories of people that do not qualify for temporary protection and subsequently remain in so called “legal limbo”, having an obligation to opt for other forms of protection, which by definition apply only in particular circumstances established by law.

In order to accomplish the aforementioned aim of this article, the analysis of international agreements, EU’s acts and Polish acts was based on legal and dogmatic method. An analysis of different legal acts, instruments and mechanisms was based on comparative legal method. Aforesaid methods enabled to conduct a holistic legal analysis of all forms of protection of third-country nationals available not only in theory, but also in accessible practice.

1. FORMS OF PROTECTION PROVIDED TO THIRD-COUNTRY NATIONALS IN POLAND

Poland as a member of EU is bound not only by international agreements, but also by European legal acts. Polish national law has to comply with EU legal acts and European mechanisms. According to Polish law a third-country nationals can be granted the following forms of protection: asylum,¹¹ refugee status (as enshrined in Convention relating to the status of refugees¹²), subsidiary protection (as defined in EU law¹³), temporary

¹⁰ The Commander of the Border Guards Facility in Poland can grant a third-country national with a consent for a stay for humanitarian reasons or consent for a so-called tolerate stay.

¹¹ Article 90(1) of the Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, Journal of Laws No. 189, item 1472 [hereinafter: act on granting international protection].

¹² Convention relating to the status of refugees, U.N.T.S. vol. 189, p. 137.

¹³ Article 15 of 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 (recast), Official Journal of European Union L 337/9-337/26; 20.12.2011.

protection (as provided in EU law¹⁴).¹⁵ It has to be noted that additionally Polish authorities can grant a third-country national with a consent for stay for humanitarian reasons or tolerate stay.¹⁶ The last two forms of protection result from Poland's international obligations, enshrined in such international agreements as Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷ or Convention on the Rights of the Child [Dąbrowski 2020, 690].¹⁸ Consequently, these two forms of protection are provided to third-country nationals whose return may violate their right to private life, family life or children's rights to the extend, which may endanger their psychophysical development. Hence, the consent for stay for humanitarian reasons or consent for a so-called tolerate stay are not subject to this study, as these are forms of national protection and criteria for granting them are not enshrined in international law.

1.1. Asylum

Granting asylum is considered to be a general principle of international law and a prominent institution of international law that is well established in state practice [Gil-Bazo 2015, 3]. However, it is not defined neither in international nor in Polish law. Even though in 1928 American states signed Convention on asylum, it does not establish a definition of asylum or criteria to be met by asylum seeker.¹⁹ According to Polish law a third-country national may, at his request, be granted asylum in Poland, when it is necessary to ensure his protection and when it is justified by an important national interest of Poland.²⁰ Practice shows that national interest of Poland in majority of cases prevails over the necessity to ensure somebody's protection. In terms of differences between application for asylum and application for international protection it is worth noting that application for asylum in Poland does not have to be submitted at the Polish Border (before the Polish Border Guards official) or in facility of Border Guards in particular Polish city,²¹ as application for international protection. Application for asylum

¹⁴ Article 2(a) of 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, Official Journal of European Union L 212, 7.8.2001, p. 12.

¹⁵ Article 3 of act on granting international protection.

¹⁶ Article 348, 351 of act of 12 December 2013 on foreigners, Journal of Laws of 2021, item 2354.

¹⁷ Convention for the protection of human rights and fundamental freedoms, ETS No. 005.

¹⁸ Convention on the rights of the child, U.N.T.S. vol. 1577, p. 3.

¹⁹ Convention on asylum, OEA/Ser.X/I. Treaty Series 34.

²⁰ Ibid.

²¹ In case of a third-country national, who is already on the territory of Poland.

may be submitted to the Chief of the Office for Foreigners in Poland via Polish Consul in practically any city in the world, where Poland has established its Consulate. It should be considered as an important facilitation, which is related to the fact that third-country nationals applying for asylum in Poland should prove that granting them asylum is in accordance with Polish national interest. It may happen that a third-country national seeking asylum in Poland due to a variety of reasons, usually related to personal security of a person concerned, can not travel till Polish Border and is obliged to apply for asylum in Poland via the Polish Consul in the country of his current residence. For instance, in case no. DPU.422.14.2019 the Applicant – third country national – was residing in one of the EU member states, where he had applied for international protection, thus he could not leave that country. However, bearing in mind that there is not much chance of issuing decision on granting international protection in that member state and previously cooperating with Polish government, he submitted the application for asylum via Polish Consul in that country.²² The application for asylum was accepted and currently is under consideration.

1.2. Refugee status

Refugee status and subsidiary protection are two types of international protection provided to third-country national in EU.²³ Both forms of protection are defined in national and international law, including EU law. Refugee status is granted to third-country nationals who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”²⁴ European Union and Polish law implemented the same definition, explaining additionally which acts constitute persecution.²⁵ The core of that definition is the “well-founded” fear, which is considered as a state of mind and a subjective condition that must be supported by an objective situation.²⁶ The term “wellfounded fear”

²² Case no. DPU.422.14.2019 before the Chief of the Office for Foreigners in Poland.

²³ Article 2(a) of the 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 (recast), Official Journal of European Union L 337/9-337/26; 20.12.2011.

²⁴ Article 1(2) of the Convention relating to the status of refugees.

²⁵ Article 13-14 of act on granting international protection.

²⁶ United Nations High Commissioner for Refugees, Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 convention and the 1967 protocol relating to the status of refugees, Reissued edition 2019, p. 19.

contains a subjective and an objective element, and in determining whether wellfounded fear exists, both elements must be taken into consideration.²⁷ In order to be granted refugee status one does not have to prove that he had already suffered from persecution or violence due to any of the reasons provided in the abovementioned definition. What has to be proven however is that there are sufficient grounds, supported by an objective situation, for considering that when returning to his country of origin one will be persecuted.

The full-scale Russian military aggression has changed the tendency and the practice of granting of refugee status in Poland. As far as the situation of Ukrainian citizens is concerned, statistics on granting refugee status have remained as had been before. Nevertheless, the statistics on granting refugee status for Russian citizens have completely changed, especially due to the fact that after February 24th, 2022 Russian authorities have introduced a number of legal acts that establish criminal responsibility for any public statement on so-called “discreditation” of Russian army,²⁸ therefore naming so-called Russian special operation in Ukraine as a “war” or “military aggression” in public or informing about crimes committed by Russian army in Ukraine constitutes a “crime” under Russian Criminal Code and one risks sentence up to 10 years of deprivation of liberty.²⁹ Consequently, for a Russian citizens to be granted a refugee status in Poland it is essential to prove one of the following: being member of opposition party or organization in Russia (or proving cooperation with such party), making public statements (including posts in social media) criticizing Putin’s regime or explaining the truth about Russian aggression against Ukraine, taking part in demonstrations or protests against Putin’s regime or Russian aggression or in any way supporting (including financially with transfers from bank accounts in Russian banks) Ukrainian organizations or Ukrainian citizens directly.³⁰ Applying for international protection in Poland by a Russian citizen, who fled his country of origin due to a fear of enrolling to the army and fighting on the territory of Ukraine, is not enough to be granted this

²⁷ Ibid.

²⁸ See Ст. 207.3 Уголовного кодекса Российской Федерации от 13.06.1996, N 63-ФЗ (ред. от 18.03.2023).

²⁹ One of the most controversial cases of sentencing for imprisonment for “spreading false information” (in reality writing about crimes committed by Russian army on territory of Ukraine) was the case of Ilya Yashin, a prominent opposition leader, who publicly condemned atrocities committed by Russian army on civilians in Bucha and as a result was sentenced for 8,5 years of imprisonment.

³⁰ These were the reasons for granting refugee status by the Chief of the Office for Foreigners in Poland in the following cases: DPU.420.2302.2022, DPU.420.1926.2022, DPU.420.1273.2022, DPU.420.3108.2022, DPU.420.1271.2022, DPU.420.631.2022, DPU.420.1277.2022, DPU.420.3525.2022.

type of protection. Although, it should be underlined that it is not the case of regular enrollment to the national army on the basis of national laws, yet rather a case of forcibly enrolling a man to take part in military activities on foreign sovereign soil, which according to the international law constitute a crime of aggression and therefore one is becoming an accomplice in such crime. Nevertheless, Polish Chief of the Office for Foreigners does not consider such applicants as refugees or those who are granted subsidiary protection and issues a decision on denying any of the two forms of international protection.

1.3. Subsidiary protection

According to the EU and Polish law subsidiary protection is the second type of international protection that is granted to those third-country nationals who in case of return to the country of origin may experience serious harm as a result of: death penalty or execution; torture or inhuman or degrading treatment or punishment, indiscriminate violence in situations of international or internal armed conflict.³¹ As the practice of EU members states has shown subsidiary protection effectively covers third-country nationals, who are not eligible to be granted refugee status, though still require protection [Di Marco 2015, 184]. For instance, when demonstrations broke out after falsified elections in Belarus in 2020 and Lukashenko's regime introduced harsh repressions on demonstrators, Polish authorities enabled Belarus citizens to easily apply for humanitarian visas till today have granted Belarus citizens, who applied for international protection in Poland, subsidiary protection as a rule.³² In some cases of Belarus citizens, who provide evidence on risk of persecution in country of origin for the reasons enshrined in the refugee status definition, Chief of the Office for Foreigners in Poland issues the decision on granting refugee status. Such cases mostly concern political leaders or activists, NGO's workers, journalists or Belarussians who in their activity in any way criticize Lukashenko's regime. What concerns the beginning of the full-scale invasion of Ukraine on 24 February 2022 and its consequences in terms of Ukrainians seeking international protection in Poland, all Ukrainian citizens, who applied for international protection receive subsidiary protection without individually held interview or without any further consideration of individual circumstances in the case. The only

³¹ Article 15 of 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 (recast), Official Journal of European Union L 337/9-337/26; 20.12.2011.

³² That was the exact reason for granting the Applicant with subsidiary protection even without personal interview in the following case: DPU.420.1113.2021.

reason provided by the Chief of the Office for Foreigners in decisions granting Ukrainian citizens with subsidiary protection is that the whole territory of Ukraine is where the international military conflict is taking place as a result of military aggression or there is a risk of imminent military activities.³³ Additionally, Chief of the Office for Foreigners in Poland provides the argument that as a consequence of international military conflict on the territory of Ukraine civilian population may become a victim of widespread violence or direct military activities. As the practice of Polish Chief of the Office for Foreigners has shown, even though the full-scale military invasion that has threatened the whole territory of Ukraine has started on 24 February 2022, subsidiary protection is granted to all of Ukrainian citizens regardless of the date when they arrived to Poland or when they submitted the application for international protection on the territory of Poland.

In the light of the abovementioned it is crucial to explain, why was it necessary to introduce temporary protection for people fleeing military aggression against Ukraine, while all of Ukrainian citizens, irrespectively of the date of their entry to EU, are currently granted subsidiary protection, not only by Polish authorities, but also by other EU member states? There are at least three reasons that support the necessity of introducing temporary protection on the territory of all of EU member states. First of all, out of all categories of people that had fled territory of Ukraine only Ukrainian citizens fulfil the criteria for subsidiary protection, since its territory of their country of origin that is under constant threat of military activities. As a consequence, Ukraine is a potential country of origin (potential return) that is considered as such in proceedings on international protection. For instance, in case of citizens of other third-countries, that were residing in Ukraine on the basis of temporary resident permit, their application for international protection will be considered taking into account situation in their countries of origin, and therefore they may not meet the criteria for subsidiary protection, since situation in their respective countries of origin may be stable and safe. Consequently, temporary protection apart from Ukrainian citizens and their family members covers more categories of people that had fled territory of Ukraine and are in need of legal protection on the territory of EU – for example citizens of other countries than Ukraine, whom Ukrainian authorities granted permanent residence in Ukraine. Second of all, the procedure of submitting application for international protection lasts from 3-4 hours and requires the presence of the interpreter, use of Border Guards facility with the access to database system fingerprinting equipment. Therefore, submitting an application for international protection can

³³ The following justification was provided in decisions on granting subsidiary protection in the following cases: DPU.420.3130.2022, DPU.420.813.2021, DPU.420.211.2022, DPU.420.1868.2022.

not be considered as a solution in the situation of massive wave (thousands of third-country nationals crossing the border a day) of third-country nationals to the EU, including Poland, as each Border Guard facility in Poland can accept from 3-5 applications daily.³⁴ Currently, there are 8 border crossing points at the Polish-Ukrainian border,³⁵ where applications for international protection should be submitted when a third-country national entering Poland does not possess a valid document allowing to enter Poland (and thus EU and Schengen Zone), for instance visa, has no days left within so-called non-visa regime,³⁶ does not possess a biometric travel document (passport) or does not possess a valid travel document (passport) at all.³⁷ Thirdly, those third-country nationals who qualify for temporary protection are entitled to work from the very first day after the arrival. This right helps them to support themselves financially. While being in the procedure for international protection one does not have a right to work, unless 6 months after submitting the application had passed and decision in the case has not been issued yet, then the Applicant has a right to receive a special work permit, which is valid until the final decision in the procedure.³⁸ Consequently, in case of a massive influx of third-country nationals to EU due to military activities in a third country, those third-country nationals would not be able to maintain themselves or their families.

For the abovementioned reasons, regardless of the prospect on receiving subsidiary protection, temporary protection mechanism had to be launched and this type of protection had to be provided to hundreds of thousands of third-country nationals, mostly Ukrainian citizens, escaping military activities on the territory of Ukraine.

³⁴ It has to be underlined that one application for international protection does not necessarily mean one person. Application is submitted by the "Applicant", however if the Applicant has a wife and 4 children, who arrived together with him, then his application includes six people instead of one. All six people have to be present during submission of the application. Border Guard officer has to take fingerprints and photos of all of them. As a result, submission of an application from an Applicant and his five family members may take much longer than submission from one person.

³⁵ Information available on the following website: https://granica.gov.pl/index_wait.php?p=u&v=pl&k=w [accessed: 28.09.2023].

³⁶ Ukrainian citizens, who hold biometric passports, will be able to travel visa-free to Schengen Area countries for up to 90 days within a 180-day period. Respective agreement between EU-Ukraine was signed on June 2017.

³⁷ Due to force majeure situation Polish Border Guards allowed to enter third-country nationals without possessing valid travel document (passport). Those were required to contact their Consul on territory of Poland as soon as possible after entering Poland in order to apply for the document.

³⁸ Article 35 of act on granting international protection.

1.4. Temporary protection

Temporary protection is the last type of protection provided to third-country nationals by the EU member states. Temporary protection is not defined in international law, since there is no international agreement that represents international consensus over this issue and over the categories of people that are eligible to apply for temporary protection [Ineli-Ciger 2016, 281-82]. Moreover, the most important circumstance that has to occur in order for temporary protection mechanism to be introduced is a massive influx of third-country nationals. Consequently, temporary protection is considered to be the most flexible form of protection, whose implementation depends on the decision of particular states. In case of EU application of temporary protection by member states depends on the Council of the European Union's³⁹ decision that defines specific categories of third-country nationals eligible for temporary protection and the date on which the temporary protection will take effect. On 4 March 2022 the Council issued the decision on establishing the existence of a mass influx of displaced persons from Ukraine, who had to flee this country as a consequence of armed conflict.⁴⁰ According to Article 2 of this decision it was established that temporary protection applies to the following categories of people: a) Ukrainian nationals residing in Ukraine before 24 February 2022, b) stateless persons and national of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022, c) family members of the persons referred to in points (a) and (b). Furthermore, the Decision provides that temporary protection applies to stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law, and who are unable to return in safe and durable conditions to their country or region of origin. It has to be underlined that the Decision correspondingly provided that Member States may also apply this Decision to other persons, including to stateless persons and to nationals of third countries other than Ukraine, who were residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin. However, the practice shows that for instance third-country nationals who possessed temporary residence permit in Ukraine before 24 February 2022 unfortunately do not qualify for temporary protection. It is therefore evident, that the idea of the Council

³⁹ Hereinafter: the Council.

⁴⁰ 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, Official Journal of the European Union L 71/1, 4.3.2022.

was to cover with temporary protection as many groups of third-country nationals as possible, nevertheless, the practice of EU member states may differ, what eventually results in significant legal gaps.

2. TEMPORARY PROTECTION IN POLAND – WHO FALLS WITHIN THE SCOPE OF THE COUNCIL’S DECISION AND POLISH SPECIAL ACT?

As a consequence of the Council Decision adopted on 4 March 2022 EU member states had an obligation to implement that decision and adopt laws that will provide for the specific period of legal stay of those categories of third-country nationals that were established in the Decision and their rights (especially right to work) while benefiting from temporary protection on the territory of the EU.

The first legal basis for providing temporary protection on the territory of Poland is the act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this state (special Polish act), adopted on 12 March 2022. The act is the form of implementing the Council’s Decision from 4 March 2022 and establishes two categories of people that are eligible for temporary protection in Poland: Ukrainian citizens, who arrived to EU after 24 February 2022 and citizens of third countries, who are spouse of Ukrainian citizens and arrived together with their Ukrainian spouse after 24 February 2022.⁴¹ It has to be noted that special Polish act very narrowly determines who is a family member of Ukrainian citizen, qualifying only spouse as a person to whom the temporary protection applies. As a result, children of Ukrainian citizen, who do not possess Ukrainian citizenship, will not qualify for temporary protection under Polish special act [Klaus 2022, 23]. Nevertheless, minor unmarried children of Ukrainian citizens, as defined in the Council’s Decision from 4 March 2022, can benefit from temporary protection in Poland and on the basis of the Council’s Decision itself can apply for temporary protection. As defined in Polish special act, applying for temporary protection consists of receiving a national identification number in Poland (PESEL number), which proves that their stay is considered to be legal up to 18 months from the day they arrived to EU. This period may be prolonged. Additionally, those who qualify for temporary protection under special Polish act have an unlimited right to work and right to apply for social benefits.

The second legal basis for providing temporary protection on the territory of Poland is a direct implementation of the Council’s Decision from 4 March 2022, since the Polish special act does not provide for temporary

⁴¹ Article 1(2-3) of the Polish special act.

protection for nationals of third countries other than Ukraine, who benefited from international protection or equivalent national protection in Ukraine before 24 February 2022 and does not provide for temporary protection for stateless persons, and nationals of third countries other than Ukraine, who can prove that they were legally residing in Ukraine before 24 February 2022 on the basis of a valid permanent residence permit issued in accordance with Ukrainian law. Consequently, these three categories of people and minor unmarried children of Ukrainian citizens have a right to apply to the Polish Chief of the Office for Foreigners for a certificate that confirms they were granted temporary protection in Poland. The certificate is issued by the Head of the Office for Foreigners at the request of the person concerned. The certificate includes the third-country national's personal data, the legal basis for temporary protection (both article 106 of the Act on granting protection and the Council's Decision of 4 March 2022) and the period of validity of the certificate. As a consequence, in situations where the national legal instruments of EU member states do not cover all categories of third-country nationals as defined in the Council's Decision, the Council's Decision itself is still considered to be the legal basis for temporary protection in EU member states.

After adopting the Council's Decision on 4 March 2022 and consequently Polish special act on 12 March 2022 it has become evident that not all of third-country nationals fleeing Russian military aggression, who are in need of legal protection, qualify for this form of protection in the EU. The practice has shown that the following categories of third-country nationals fleeing Ukraine do not fall neither within Council Decision from 4 March 2022 nor Polish special act: a) nationals of third countries other than Ukraine, who applied for international protection in Ukraine, however they had not receive any protection before fleeing Ukraine; b) nationals of third countries other than Ukraine, whose stay on the territory of Ukraine has been illegal (including stateless persons). Additionally, there exists a category of nationals of third countries other than Ukraine who received temporary residence permit in Ukraine. Chief of the Office for Foreigners refuses however to issue a certificate on temporary protection to third-country nationals who have invalid residence permits issued by the Ukrainian authorities (whose expiry date had passed) and had not managed to obtain new ones before leaving Ukraine after 24 February 2022. In such cases, it does not always mean that these third-country nationals were staying in Ukraine illegally. Their stay could be legal, nevertheless there was a need to obtain a new (another) document, which ultimately only confirms the legality of their stay.⁴²

⁴² This is the case of nationals of third countries other than Ukraine, who held permanent residence permit in Ukraine.

Abovementioned categories of third-country nationals facing no opportunity to apply for temporary protection have the obligation to apply for other forms of protection, otherwise their stay will be illegal and they may be subject to deportation procedure to the country of their origin.⁴³ In practice all of the third-country nationals that had fled Russian military aggression and arrived to EU, who do not qualify for temporary protection, have no other choice than submitting an application for international protection in Poland. This situation constitutes a direct cause for an abrupt increase in the number of applications for international protection in Poland that was presented in the statistical evaluation of Polish Border Guards Headquarters. The most problematic legal issue is whether third-country nationals who had fled Russian military aggression against Ukraine and entered Poland as a measure of last resort fulfill the criteria to be granted refugee status or subsidiary protection? The practice has shown that not all of third-country nationals fleeing Russian military aggression on territory of Ukraine, who applied for international protection, meet the criteria established by the definition of refugee or person that should be granted subsidiary protection. It has to be underlined that in case of not fulfilling the criteria for international protection, the Applicant receives negative decision, which, if upheld by the higher administrative authority in Poland (Council for Refugees), may lead to initiating procedure on deportation by Polish Border Guards authority.

According to Article 288 of the act on foreigners, a third-country national during his stay on the territory of the Republic of Poland is obliged to have a valid travel document and documents entitling him to stay on the territory of the Republic of Poland, if required.⁴⁴ In the case of temporary protection in Poland, a third-country national has a notification confirming the assignment of a PESEL number, which includes an annotation indicating temporary protection under the Special Act or a certificate on temporary protection based on the Council Decision of March 4, 2022 issued by the Chief of the Office for Foreigners. Taking into account the aforementioned, if a third-country national had not been granted temporary protection had not possessed an appropriate document confirming this circumstance, then, as a rule, he would have no other alternative but to submit an application for international protection on the territory of Poland

⁴³ In procedure on granting international protection a country of origin constitutes country of citizenship or country of last residence, if it is not possible to identify the country of citizenship.

⁴⁴ The phrase "if required" refers to those third-country nationals who are allowed to stay on the territory of EU on the basis on free visa agreement and therefore they do not require any additional document entitling them to stay, if their stay does not succeed 90 days during the 180 days period.

in case of not willing to return to his country of origin. While the application is under the consideration by the Chief of the Office for Foreigners in the course of administrative proceedings his stay in Poland is considered legal and a Temporary Foreigner's Identity Certificate is issued accordingly for the duration of the proceedings. If an application for international protection is not submitted, then the stay of a third-country national is illegal and in the event of an inspection of the legality of stay by Border Guard or Police officers, the competent Commander of the Border Guard Facility must initiate proceedings on the obligation to return. Thus, third-country nationals, who fled Ukraine due to military activities on its territory, yet do not qualify for temporary protection, need to apply for international protection on the territory of Poland. The abovementioned is a direct cause for the rapid increase of the number of applications for international protection in Poland in the first half of 2022 according to statistical data presented by Border Guard Headquarters.

The most problematic legal issue is whether third-country nationals, who fled Russian military aggression against Ukraine, arrived in Poland after 24 February 2022 and had to submit application for international protection, since they do not qualify for temporary protection, meet the requirements for refugee status or subsidiary protection? Practice shows that not many third-country nationals fleeing territory of Ukraine, who apply for international protection in Poland, meet the criteria set out in the definition of a refugee or a person granted subsidiary protection. It is worth noting that in the event of failure to meet the criteria for granting international protection, third-country nationals applying for international protection receive a refusal on granting both forms of international protection, which, if upheld, may lead to the initiation of proceedings for third-country nationals to return.

3. FINAL REMARKS

The previous most numerous wave of third-country nationals that entered EU in recent years is the one that has started in 2015 when more than one million of third-country nationals entered EU mostly from the Mediterranean region [Kugiel 2016, 41]. Nevertheless, EU authorities had not decided to initiate the mechanism on temporary protection. Clearly that wave of migration (usually called "irregular migration") can not be compared to the one that was caused by the Russian military aggression, as the previous one included third-country nationals that were coming from different countries, often for entirely different reasons and a large number of those migrants did not possess proper travel documents. Therefore, in that situation was either no imminent threat of military activities or irregular

migrants had entered “safe country” before entering EU, and as a result they could have stayed in that safe country (e.g. Turkey). The most recent example of applying the institution of temporary protection in European region, however outside the EU, is Turkey, which has been granting this form of protection to Syrian refugees that had fled Syria after the military conflict has started [Ilcan, Rygiel, and Baban 2018, 58]. Introducing the temporary protection mechanism by the EU in 2022 is perhaps the second most significant example of applying this form of protection to third-country nationals, as a direct consequence and response to undoubtedly the most challenging mass influx of third-country nationals to EU.

Not all of those third-country nationals, who happened to be in need of legal protection after the Russian military aggression, qualify for temporary protection in EU. The following categories of third-country nationals fleeing Ukraine do not fall neither within Council Decision from 4 March 2022, nor Polish special act: a) nationals of third countries other than Ukraine, who applied for international protection in Ukraine, however they had not receive any protection before fleeing Ukraine; b) nationals of third countries other than Ukraine, whose stay on the territory of Ukraine has been illegal (including stateless persons); c) nationals of third countries other than Ukraine who received temporary residence permit in Ukraine; d) third-country nationals who have invalid residence permits issued by the Ukrainian authorities (whose expiry date had passed) and had not managed to obtain new ones before leaving Ukraine after 24 February 2022. Even if third-country nationals from abovementioned categories submit application for international protection due to exceptional *ad hoc* circumstances, therefore fleeing Russian military aggression, their applications are subject to verification and consideration under the applicable definitions of refugee status and subsidiary protection, what in majority of cases will definitely lead to a decision on refusing to grant both forms of international protection. Subsequently, their legal status in EU may eventually become illegal and thus they may face deportation procedure, which is aimed at deporting them to the country of their origin.

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