

RESEARCH ARTICLE

Qualifying for international and national protection under the Polish legal order: Some remarks in the context of the war in Ukraine

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Abstract

The Russian Federation's actions against Ukraine in February 2014, having - at the time - the form of hybrid warfare, followed later by an armed assault that took place on 24 February 2022, have resulted in an unprecedented influx of refugees from across Poland's eastern border. As Poland faced a major challenge (also in legal terms), additional regulations had to be introduced to supplement the refugee protection standards already in place under national and international laws. The purpose of this paper is to identify the prerequisites (conditions) stemming from the catalogue of protective instruments provided for in Polish legal regulations that can be taken advantage of by Ukrainian citizens after the Russian attack of 24 February 2022. The thesis of this study is that Polish protective mechanisms are consistent and complementary, and that, insofar as they apply to Ukrainian citizens, they fulfil international obligations under the Convention relating to the Status of Refugees, adopted on 28 July 1951 and secondary European Union law, mainly Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

Keywords

international protection, national protection, Ukraine, refugee status, subsidiary protection, asylum, temporary protection, humanitarian residence permit, tolerated stay permit

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Introduction

The Russian Federation's actions against Ukraine in February 2014, having - at the time - the form of hybrid warfare,¹ the military intervention in and annexation of Crimea, the war in Donbas and the incident in the Kerch Strait,² followed by an armed assault that took place on 24 February 2022, have resulted in an unprecedented influx of refugees from across Poland's eastern border.³ Poland was faced with a major challenge, also in legal terms.⁴ In addition to refugee protection standards already in place under national and international laws, additional regulations have been introduced, taking into consideration the obligations assumed previously in the context of cooperation between EU Member States.⁵

The purpose of the study is to identify the prerequisites (conditions) stemming from the catalogue of protective instruments provided for in Polish legal regulations, which can be taken advantage of by citizens of Ukraine after the Russian attack of 24 February 2022. Such protection is offered under the Constitution of the Republic of Poland,⁶ the Act of 13 June 2003 on granting protection to foreigners in the territory of the Republic of Poland,⁷ and also under the Act of 12 December 2013

¹ For more information on the essence of hybrid warfare, see e.g. O. Fridman, *Russian 'Hybrid Warfare': Resurgence and Politicization* (Oxford: Oxford University Press, 2018); K. Karski and P. Mielniczek, "The notion of hybrid warfare in international law and its importance for NATO," *NATO Legal Gazette* 39 (2019): 67–80; *Hybrid Warfare: Future and Technologies*, ed. R. Thiele (Wiesbaden: Springer VS, 2021).

² A. Tancredi, "The Russian annexation of the Crimea: questions relating to the use of force," *Questions of International Law* 1 (2014): 5–34; W. Baluk, "Incident czy akt agresji w rejonie Cieśniny Kerczeńskiej?," *Wschód Europy. Studia humanistyczno-społeczne* 6, no. 1 (2020): 197–224. See also E. Karska and K. Karski, "Міжнародно-правове визначення агресії," *Науковий вісник Ужгородського національного університету. Серія «Політологія. Соціологія. Філософія»* 18, no. 1 (2015): 42–48.

³ Ł.D. Dąbrowski, "Prawny wymiar pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym," in *Inwazja Rosji na Ukrainę. Wybrane konsekwencje ekonomiczne i prawne*, ed. M. Błaszczuk-Zawiła (Warsaw: Oficyna Wydawnicza SGH, 2022), 189.

⁴ K. Kopeć, "Migration of Ukrainian citizens to Poland caused by Russia's invasion of Ukraine in 2022," *Journal of Geography, Politics and Society* 12, no. 4 (2022): 42–51; A. Bodnar and A. Grzelak, "The Polish-Belarusian Border Crisis and the (Lack of) European Union Response," *Białostockie Studia Prawnicze | Białystok Legal Studies* 28, no. 1 (2023): 66; K. Andrejuk, "Rapid Evolution of Refugee Policy in Poland: Russian Invasion of Ukraine as a Focusing Event," *Journal of Immigrant & Refugee Studies* (2023); M. Kosiel-Pająk and P. Sadowski, "British and Polish Temporary Protection Schemes Addressing Displaced Persons from Ukraine," *Časopis pro právní vědu a praxi* 31, no. 4 (2023): 887–912; J. Nakonieczna-Bartosiewicz and D. Heidrich, "How Do States Challenge International Regimes?: The Case Study of Poland and the International Refugee Regime," *Problemy Polityki Społecznej | Social Policy Issues* 63, no. 4 (2023): 16, 17.

⁵ I.a. 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), OJ L 337, December 20, 2011, 9.

⁶ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, no. 78, item 483, as amended.

⁷ Act of 13 June 2003 on granting protection to foreigners in the territory of the Republic of Poland, Journal of Laws of 2023, item 1504.

on foreigners⁸ and the Act of 12 March 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state⁹ whose provisions may be considered to be “specific regulations”. Pursuant to Article 56 of the Constitution, foreigners may exercise the right to asylum in accordance with detailed statutory regulations. Foreigners seeking protection against persecution in Poland may be granted refugee status in accordance with international agreements binding upon Poland.¹⁰ The Act on granting protection to foreigners in the territory of the Republic of Poland, in turn, provides for four types of protection: granting refugee status, granting subsidiary protection, granting asylum and granting temporary protection (Article 3). Furthermore, the Act on foreigners provides for the granting of protection through the issuance of an authorisation to stay for humanitarian reasons and a tolerated stay permit (Articles 348–359).

The thesis of the study is that Polish protective mechanisms are consistent and complementary, and that, insofar as they apply to Ukrainian citizens, they fulfil international obligations under the Convention relating to the Status of Refugees adopted on 28 July 1951¹¹ and secondary European Union law,¹² mainly Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.¹³ The formal-dogmatic method was the primary research method adopted for the purposes of this study. As part of it, we selected acts of international law, European Union law and Polish law that apply to the analysed issues, and we interpreted them. We also referred to the most important literature, mainly publications by Polish authors, because they are the ones who conduct the current analysis of the practice and provisions of Polish law.

⁸ Act of 12 December 2013 on foreigners, Journal of Laws of 2023, item 519, as amended.

⁹ Act of 12 March 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state, Journal of Laws of 2024, item 167. The last act amending this law is the Act of 9 February 2024 amending the Act on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state, the Act on personal income tax and the Act on corporate income tax, Journal of Laws of 2024, item 232.

¹⁰ See M. Wiącek, “Prawo cudzoziemca do uzyskania statusu uchodźcy w świetle Konstytucji RP,” in *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*, ed. E. Karska (Warsaw: Cardinal Stefan Wyszyński University, 2020), 159–174.

¹¹ Convention relating to the Status of Refugees signed at Geneva on 28 July 1951, 189 UNTS 137.

¹² 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, OJ L 212, August 7, 2001, 12; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, June 29, 2013, 96; and, to some extent, also 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, June 29, 2013, 60.

¹³ 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), OJ L 337, December 20, 2011, 9.

Crossing the border and legalization of stay - Specific regulations

In recent years, Poland has become a destination for many people seeking to obtain refugee status.¹⁴ However, due to the threat posed by the COVID-19 pandemic, pursuant to Article 16(3)(2) of the Act of 12 October 1990 on state border protection,¹⁵ the Regulation on temporary suspension or restriction of border traffic at certain border crossings¹⁶ was issued on 13 March 2020. Originally, the suspension applied to traffic at border crossings with the Russian Federation, the Republic of Belarus and Ukraine. After the armed assault on Ukraine, the said Regulation was amended and as of 18 February 2022, the restrictions no longer applied to Ukraine. Currently, the suspension of traffic applies to border crossings with the Russian Federation and the Republic of Belarus listed in the wording of the Regulation,¹⁷ and restricts traffic at other border crossings with these countries, which are also listed in the said Regulation.

Under Polish regulations, Ukrainian citizens could enter Poland on the basis of: 1) a visa-free travel scheme, when holding a biometric passport; 2) a national visa (D) or a Schengen visa (C); 3) a visa with a D or C designation, or a residence permit issued by another Schengen country;¹⁸ 4) a temporary residence permit, a permanent residence permit or a residence permit of a long-term European Union resident and a valid residence card; 5) an application for international protection, submitted at a Polish border crossing, or 6) a consent of a Border Guard commander, granted while crossing the border. The last of the cases listed above was of particular relevance, as it applied, in practice, to refugees from Ukraine in the initial phase of the Russian invasion. The legal basis for issuing such consent is set forth in Article 32(1) of the Act on foreigners. According thereto, in the case referred to in Article 6(5)(c) of the Schengen Borders Code, a commander of a Border Guard post, having obtained the consent of the Border Guard Commander-in-Chief, may allow a foreigner to enter the territory of the Republic of Poland for a period of stay not exceeding 15 days. Under the above-mentioned provision of

¹⁴ E. Karska, "Słowo wstępne | Introduction," in *Uchodźcy. Aktualne zagadnienia prawa i praktyki*, ed. E. Karska (Warsaw: Cardinal Stefan Wyszyński University, 2017), 9.

¹⁵ Act of 12 October 1990 on the protection of the state border, Journal of Laws of 2022, item 295.

¹⁶ Regulation of the Minister of Internal Affairs and Administration of 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossings, Journal of Laws of 2023, item 1403.

¹⁷ See more E. Kuzelewska and A. Piekutowska, "Belarus' Violation of International Obligations in Connection with Artificial Migration Pressure on the Belarus-European Union Border," *Białostockie Studia Prawnicze | Białystok Legal Studies* 28, no. 1 (2023): 39–55; M. Zdanowicz, "The Migration Crisis on the Polish–Belarusian Border," *Białostockie Studia Prawnicze | Białystok Legal Studies* 28, no. 1 (2023): 103–115.

¹⁸ For more information on the functioning of the Schengen Area, see e.g. S. Karanja, *Transparency and Proportionality in the Schengen Information System and Border Control Co-operation* (Leiden: Brill | Nijhoff, 2008), 67–84; S. Peers, E. Guild and J. Tomkin, *EU Immigration and Asylum Law (Text and Commentary)*, 2nd ed. (Leiden: Brill | Nijhoff, 2012), 97–117, 251–314; E. Socha, "Rights of Polish Citizens on the Basis of Schengen Convention," *Jurisprudencja* 72, no. 64 (2005): 66–71.

the Schengen Borders Code, in turn, third-country nationals who do not meet one or more of the conditions laid down in paragraph 1 (do not hold a valid travel document, do not hold a valid visa) may be allowed by a Member State to enter its territory on humanitarian grounds, for reasons of national interest or due to international obligations.¹⁹ Pursuant to Article 32 of the Act on foreigners, officers were making decisions to allow Ukrainian citizens who often did not have a full set of documents, or whose documents were not valid, to enter the territory of Poland.²⁰

In the Polish legal system, the Act of 12 March 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state is of fundamental importance in the context of legalizing the stay of Ukrainian nationals. The Act provides for the legal status of Ukrainian nationals and citizens of Ukraine holding a *Karta Polaka* (Pole's Card) who arrived in Poland, together with their immediate family members, because of hostilities (Article 1(1)). Spouses of Ukrainian nationals who do not have Ukrainian citizenship are treated on an equal footing with Ukrainian nationals, provided that they come to the territory of Poland from the territory of Ukraine in connection with military operations conducted in the territory of that country and are not Polish nationals. According to the Act, if a citizen of Ukraine has arrived to Poland legally on or after 24 February 2022, and they declare their intention to stay in Poland, their stay is deemed to be legal until 30 June 2024 (originally, that period of time equalled 18 months from 24 February 2022). The stay of a child born in the territory of Poland by a Ukrainian mother is also considered legal (Article 2 of the Act). These regulations apply *mutatis mutandis* to Ukrainian nationals holding a Pole's Card.²¹ The stay of a Ukrainian national who has been allowed to enter Poland by a commander of a Border Guard post pursuant to Article 32(1) of the Act on foreigners of 12 December 2013, is also considered legal for a period of 18 months (Article 44) - this deadline has not been harmonized with the date of 30 June 2024, which should be considered a legislative oversight. The Act also provides for certain exemptions, according to which its regulations do not apply to citizens of Ukraine: a) holding a permanent residence permit; b) holding a residence permit for a long-term resident of the European Union; c) holding a temporary residence permit; d) having refugee status; e) enjoying subsidiary protection; f) holding a tolerated stay permit; g) holding an authorisation to stay for humanitarian reasons, who have submitted applications for international protection in Poland or on whose behalf such applications have been submitted, or who have declared their intention to submit applications for international protection in Poland, or

¹⁹ 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) (codification), OJ L 77, March 23, 2016, 1.

²⁰ Dąbrowski, "Prawny wymiar pomocy obywatelom Ukrainy w związku z konfliktem zbrojnym," 199.

²¹ Dąbrowski, 199.

who are the subjects of such declarations of intention. These exclusions are a natural consequence of the fact that these individuals already enjoy the protection referred to above.²²

Refugee status

Pursuant to Article 13(1) of the Act on granting protection to foreigners in the territory of the Republic of Poland, a foreigner is granted refugee status if, as a result of a well-founded fear of persecution in their country of origin on account of race, religion, nationality, political opinion or membership in a particular social group, they are unable or unwilling to take advantage of the protection of that country. The statutory prerequisites for granting the refugee status coincide with those set forth in the Geneva Convention and in Directive 2011/95/EU.²³ A foreigner can only be granted refugee status if he or she demonstrates that he or she meets at least one of the conditions qualified as persecution.²⁴ Thus, state authorities deciding whether to grant refugee status make specific determinations in two different areas. Firstly, they assess the general situation in the country of origin of the person applying international protection (the applicant) and, secondly, they are obliged to clarify the circumstances described by the applicant, regarding the threats that they face.²⁵

The notion of “persecution” provided for in Article 56(2) of the Constitution, serving as a basis for granting protection to a foreign national, is not defined in detail. This means that persecution may be based, *inter alia*, on political, national, racial, religious and other grounds, but must be prohibited under the laws of Poland.²⁶ Nonetheless according to its statutory definition (Article 13 of the Act on granting protection to foreigners in the territory of the Republic of Poland), in order to qualify as persecution, such a notion must constitute, due to its essence or repetitive nature, a serious violation of human rights, in particular rights whose abrogation is inadmissible under Article 15(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms,²⁷ or must have the form of accumulation of

²² M. Jaźwińska, “Art. 2 [Okres pobytu uznawany za legalny],” in *Ustawa o pomocy obywatelom Ukrainy. Komentarz z wzorami dotyczącymi pobytu, dostępu do rynku pracy, świadczeń społecznych, edukacji i opieki zdrowotnej*, ed. P. Dremkowski (Warsaw: C.H.Beck, 2022), 6, 7.

²³ See more M. Perkowska and A. Gutaszkas, “Were the Lithuanian and Polish Responses to the Refugee Influx Legal or Illegal?,” *Białostockie Studia Prawnicze | Białystok Legal Studies* 28, no. 1 (2023): 117–136.

²⁴ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 5 January 2011, case no. V SA/Wa 410/10.

²⁵ Judgment of the Supreme Court of 7 June 2001, case no. III RN 110/00.

²⁶ P. Sarnecki, “Artykuł 56,” in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd ed., eds. L. Garlicki and M. Zubik (Warsaw: Wydawnictwo Sejmowe, 2016), 2 (Articles 30–86): 306, 307; M. Florczak-Wątor, “Art. 56 [Prawo azylu i status uchodźcy],” in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, 2nd ed., ed. P. Tuleja (Warsaw: Wolters Kluwer, 2023), 208, 209.

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, ETS no. 5, as amended.

various acts or omissions, including those constituting human rights violations, the impact of which is as severe as persecution. The Act specifies also some examples of persecution. These include, inter alia, physical or psychological violence, including sexual violence.

The interpretation of the concept of “persecution” should be done while keeping in mind the concept of “well-founded concerns”,²⁸ as such an approach combines both the subjective and objective aspects.²⁹ This means that the definition of the refugee status is based on feeling expressed by the subject, but during the course of the status determination procedure, it has to be confirmed by an analysis of the objective situation.³⁰ Hence, the fear of persecution needs to be individualized, i.e., it has to affect a person in specific.³¹ Escaping from a hostile region where there is a threat to life or health for anyone (i.e. it can affect anybody in the region in which the hostilities are taking place) does not serve as a legitimate base to grant the status of refugee to a subject.³² It can be explained by the fact that human beings which are obliged to escape from their home country because of an armed conflict – of international or internal character – are usually not understood as being refugees as described under the 1951 Convention or the 1967 New York Protocol,³³ but can receive protection under other international instruments, e.g. the Geneva Convention Relative to the Protection of Civilian Persons in Time of War adopted in August 12, 1949 and Additional Protocol to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts adopted on 8 June 1977.³⁴ This, however, does not change the fact that the invasion by a foreign

²⁸ A. Górny *et al.*, *Uchodźcy w Polsce. Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje* (Warsaw: Committee on Migration Research of Polish Academy of Science, 2017), 11.

²⁹ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 14 October 2009, case no. V SA/Wa 279/09, Lex no. 562843.

³⁰ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 2 August 2013, case no. IV SA/Wa 409/13, Lex no. 1368248; Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 24 April 2008, case no. V SA/Wa 239/08, Lex no. 513890; Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 17 May 2016, case no. IV SA/Wa 3752/15, Lex no. 2090136. See E. Karska *et al.*, *Human Rights in the European Paradigm of the Protection of Aliens* (Warsaw: Cardinal Stefan Wyszyński University, 2023), 156.

³¹ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 17 January 2013, case no. V SA/Wa 1490/12, Lex no. 1326657.

³² A. Gajewska *et al.*, *Definicja uchodźcy. Wybór orzecznictwa międzynarodowego* (Cracow: Human Rights Centre of the Jagiellonian University, 2005), 6–8.

³³ See V. Holzer, “The 1951 Refugee Convention and the protection of people fleeing armed conflict and other situations of violence,” in *In Flight from Conflict and Violence: UNHCR’s Consultations on Refugee Status and Other Forms of International Protection*, eds. V. Türk, A. Edwards and C. Wouters (Cambridge-New York: Cambridge University Press, 2017), 61–93.

³⁴ *Zasady i Tryb Ustalania Statusu Uchodźcy: Zgodnie z Konwencją dotyczącą statusu uchodźcy z 1951 r. oraz Protokołem dodatkowym do niej z 1967 r.: Podręcznik*, 2nd ed. (Geneva: UNHCR, 2007), 54; Karska *et al.*, *Human Rights in the European Paradigm of the Protection of Aliens*, 157.

power and/or the entire or partial occupation of a country may result in the persecution as defined under the 1951 Convention.³⁵ However, in this case, it is obligatory to show “a well-founded fear of persecution” in the territory being occupied.³⁶ Nevertheless, a military conflict is in itself a factor that may contribute to the determination of eligibility for subsidiary protection as stated under the recast Qualification Directive.³⁷

Subsidiary protection

A foreigner who does not meet the conditions for obtaining refugee status shall be granted subsidiary protection where their return to the country of origin may expose them to a real risk of suffering serious harm. According to Article 15 of the Act on granting protection to foreigners in the territory of the Republic of Poland, the notion of serious harm includes, inter alia, a serious and personalized menace to the physical integrity or to the life of a civilian stemming from a situation of indiscriminate violence during an armed conflict, either international or internal.³⁸ In this regard, it is understood that the nature of these actions do not have to be intentional³⁹ and do not have to target foreigner in particular, or the group to which the foreigner is belonging.⁴⁰ Therefore, we can include actions that are threatening an undefined group of people, such as the use of chemical or biological weapons or also explosions and continuous shelling.⁴¹ Even though it is required that “the threat be of an individual nature, affecting a specific person, it should simultaneously be linked to the widespread use of violence or an armed conflict, which means that the anonymization of potential victims is allowed,⁴² as they will not be attacked due to their individual characteristics, but due to staying in a certain area, for example”.⁴³ While the February 2014 actions of the Russian Federation against Ukraine, having the form of hybrid warfare and hostilities and taking place

³⁵ Karska *et al.*, *Human Rights in the European Paradigm of the Protection of Aliens*, 157, 158.

³⁶ See S. Jaquet, “The cross-fertilization of international humanitarian law and international refugee law,” *International Review of the Red Cross* 843 (2001): 658.

³⁷ See Karska *et al.*, *Human Rights in the European Paradigm*, 160.

³⁸ See M. Kowalski, “Konflikt na Ukrainie a praktyka udzielania ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej,” 96–115.

³⁹ See P. Dąbrowski, “Art. 15 [Przesłanki udzielenia ochrony uzupełniającej],” in *Prawo o cudzoziemcach. Komentarz*, ed. J. Chlebny (Warsaw: C.H.Beck, 2020), 958.

⁴⁰ See B. Mikołajczyk, “Nowa forma ochrony udzielanej cudzoziemcom,” *Państwo i Prawo* 10 (2008): 34–45.

⁴¹ Judgment of 17 February 2009, C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*. See Dąbrowski, “Art. 15 [Przesłanki udzielenia ochrony uzupełniającej],” 957–959.

⁴² See Mikołajczyk, “Nowa forma ochrony udzielanej cudzoziemcom,” 42.

⁴³ See Górny *et al.*, *Uchodźcy w Polsce. Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje*, 11.

on the territory of Ukraine, were not sufficient to grant the international protection, Russia's armed assault that took place on 24 February 2022 changed the situation dramatically. This day, indeed, marked the beginning of a new stage of Russian action against Ukraine, during which the entire of its territory was subject to armed attacks. It was then that a full-scale war began.⁴⁴

Asylum

No single definition of the term “asylum”⁴⁵ exists in the doctrine, but it may be assumed that asylum consists in granting refuge (i.e., the right of entry and settlement) to a foreigner prosecuted in their home country or in a third country for committing a political crime or for other political reasons.⁴⁶ The Universal Declaration of Human Rights (1948) indicates, in Article 14, that any persecuted person has the right to seek and enjoy asylum in other countries, making the caveat, however, that this right does not apply to prosecutions arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. On 14 December 1967, the UN General Assembly adopted the Declaration on Territorial Asylum,⁴⁷ which provides in Article 1(1) that asylum is granted by a state in the exercise of its sovereignty, and it is the state that sets the conditions under which it decides whether to grant or deny asylum.⁴⁸ The right of foreigners to be granted asylum is recognized, inter alia, in the constitutions of Portugal, Spain, Slovenia and Poland.⁴⁹ The Constitution of the Republic of Poland (Article 56(1)) provides for the possibility of granting the right of asylum to a foreigner and specifies that statutory regulations apply in such a scenario. The prerequisites for granting asylum are indicated, in very general terms, in the Act on granting protection to foreigners in the territory of the Republic of Poland (Article 90(1)). These include indispensability of granting protection to the foreigner and important interests of the Republic of Poland.

International law does not provide for absolute prerequisites, which, once met, would warrant the granting of asylum to a foreigner. Examples of circumstances

⁴⁴ See Karska *et al.*, *Human Rights in the European Paradigm*, 171–174.

⁴⁵ See more E. Karska, “Kilka uwag o uchodźstwie jako zagadnieniu prawnym,” in *Uchodźstwo XXI wieku z perspektywy prawa międzynarodowego, unijnego i krajowego*, ed. E. Karska (Warsaw: Cardinal Stefan Wyszyński University, 2020), 12.

⁴⁶ Cf. B. Kowalczyk, *Polski system azylowy*, 101; J. Ślęzak, “Status uchodźcy, azylanta a obowiązki państwa przyjmującego,” in *Ochrona praw człowieka w polityce migracyjnej Polski i Unii Europejskiej*, eds. W. Pływaczewski and M. Ilnicki (Olsztyn: University of Warmia and Mazury, 2016), 119, 120.

⁴⁷ UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII).

⁴⁸ T. Pezacka-Groblewska, “Deklaracja ONZ o azylu terytorialnym,” in *Prawa i obowiązki obywatelskie w Polsce i świecie*, ed. M. Szczepaniak (Warsaw: Państwowe Wydawnictwo Naukowe, 1974), 446.

⁴⁹ Sarnecki, “Artykuł 56,” 305.

may be found in the regulations of other countries that justify the granting of asylum, for instance in the case of persecution: for democratic political views and activities (Macedonia), for the exercise of political rights and freedoms (Slovakia), for promoting human rights and fundamental freedoms (Slovenia), for promoting democracy, social and national liberation, peace among nations, as well as freedoms and rights of human beings (Portugal).⁵⁰

As neither the Constitution nor the Act on granting protection to foreigners in the territory of the Republic of Poland specifies the rights that need to be protected, the decision is, in each case, with the administrative authorities making it based on their assessment of facts. The Act only requires that the interest of the Republic of Poland in granting asylum be demonstrated, and states that such interest must be “important.” Thus, the legislator has clearly indicated that the granting of asylum is supported not by just any interest of the Republic of Poland, but by one that is related to matters of fundamental importance to Poland.⁵¹ This, however, does not change the fact that the regulations concerned are of a general nature, and the relevant authorities make a free assessment of the degree of such importance.⁵² The decision to grant asylum is, therefore, discretionary and within the exclusive competence of the state, and the notion of asylum has been interpreted that way since its very introduction. The above gives the institution of asylum a political character, which may mean that the interest of the applicant shall give way to the interest of the state (e.g., maintaining friendly relations with the applicant’s state).⁵³ This, in turn, undermines the institution of asylum, as it aims to protect foreigners from persecution.⁵⁴ On the other hand, the institution may be used, in specific situations, as an auxiliary measure. This applied, for instance, to Ukrainian citizens of Polish nationality who were brought to Poland from the conflict area by Polish authorities.⁵⁵

⁵⁰ P. Kuczma, “Prawo cudzoziemca do ubiegania się o udzielenie azylu terytorialnego,” in *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłonski (Wrocław: University of Wrocław, 2014), 286.

⁵¹ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 29 January 2008, case no. V SA/Wa 2289/07.

⁵² K. Bem, *Glosa do wyroku NSA z dnia 7 lutego 2000 r., V SA 1486/99* (Warsaw: Wolters Kluwer, LEX/el., 2008). Pursuant to Article 94 of the Act, decisions on granting and depriving of asylum status are made by the Head of the Office. The issuance of a decision to grant or deny asylum requires the approval of the Minister of Foreign Affairs.

⁵³ E. Prandota-Prandecka and A. Haręża, “Azyl terytorialny (polityczny) jako forma ochrony udzielanej cudzoziemcowi na terytorium Rzeczypospolitej Polskiej. Wybrane zagadnienia,” in *Współczesne europejskie problemy prawa administracyjnego i administracji publicznej. W 35. Rocznice utworzenia Instytutu Nauk Administracyjnych Uniwersytetu Wrocławskiego*, eds. A. Błaś and K. Nowacki (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, *Acta Universitatis Wratislaviensis*, 2005), no. 2770, 337.

⁵⁴ Kuczma, “Prawo cudzoziemca do ubiegania się o udzielenie azylu terytorialnego,” 290.

⁵⁵ See more M. Kowalski, “Konflikt na Ukrainie a praktyka udzielania ochrony cudzoziemcom na terytorium Rzeczypospolitej Polskiej,” in *Status cudzoziemca w Polsce wobec współczesnych wyzwań międzynarodowych*, ed. D. Pudziałowska (Warsaw: Wolters Kluwer Polska, 2016), 96–115.

Temporary protection

Temporary protection is provided for in Council Directive 2001/55/EC of July 20, 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,⁵⁶ and, accordingly, in Article 106(1) of the Act on granting protection to foreigners in the territory of the Republic of Poland. These regulations provide for the possibility of granting temporary protection to foreigners arriving in a Member State *en masse*, if they left their country of origin or a specific geographic area due to a foreign invasion, war, civil war, ethnic conflict or gross human rights violations, regardless of whether their arrival was spontaneous or resulted from assistance provided to them by that Member State or the international community. Temporary protection is granted until it becomes possible for foreigners to return to their previous place of residence, however for no longer than one year. If, after one year, the obstacles preventing them from returning safely continue to prevail, the period of temporary protection shall be extended for 6 more months, but not more than twice. Temporary protection is granted to the entire group, without the need to evaluate each case individually. This is advantageous in such scenarios as the wars in Syria and Ukraine or the specific political situation in Belarus, and the significant migration flows caused thereby.⁵⁷ EU Member States must ensure that the displaced persons have expressed their will to be received onto their territory (Article 25(2) of the Directive).⁵⁸

The EU Member States are obliged to provide the persons enjoying temporary protection with residence documents, and such persons shall also have the right to take up work and shall have the right to education, accommodation and medical care. Those taking advantage of temporary protection must be given an opportunity to apply for asylum, and the EU Member State receiving a given person is responsible for processing such an application.⁵⁹

Temporary protection is introduced in all EU Member States by means of a Council decision confirming the mass influx of displaced persons into the EU and

⁵⁶ 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, OJ L 212, August 7, 2001, 12.

⁵⁷ Górny *et al.*, *Uchodźcy w Polsce. Sytuacja prawna, skala napływu i integracja w społeczeństwie polskim oraz rekomendacje*, 12.

⁵⁸ Some persons may be excluded from temporary protection schemes. This group includes the following: persons suspected of committing: crimes against peace, war crimes, crimes against humanity, a serious non-political crime, persons being guilty of acts contrary to the purposes and principles of the United Nations, posing a danger to the security of the host EU Member State (Article 28 of the Directive).

⁵⁹ See more K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (The Hague-London-Boston: Kluwer Law International, 2020), 80, 425–436.

identifying groups of people in need of protection (Article 5(3) of the Directive). Such a decision was issued by the Council on 4 March 2022. It acknowledged the mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC and resulted in the introduction of temporary protection⁶⁰ due to an armed conflict (Article 1 of the decision).⁶¹ Thus, the Directive's regulations, which were partially transposed into the Act of 13 June 2003 on granting protection to foreigners in the territory of the Republic of Poland (Article 116 - working without a permit), apply to Ukrainians who were also granted other rights by means of the Act of 12 March 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state.

The temporary protection given to persons displaced from Ukraine referred to in Article 2 of Council Implementing Decision of 4 March 2022 was extended for a period of one year until 4 March 2025 by Article 1 of Council Implementing Decision of 19 October 2023 extending temporary protection as introduced by Implementing Decision (EU) 2022/382.⁶²

Furthermore, the executive decision provides for the possibility of applying its regulations also 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 (Article 2(3)).

Authorisation to stay for humanitarian reasons and tolerated stay permit

Authorisation to stay for humanitarian reasons is another form of protection available to foreigners that has been provided for in the Act on foreigners. The said Act defines two groups of conditions justifying the issuing of an authorisation to stay for humanitarian reasons (Article 348). The first group is related to civil rights violations, while the other to respecting the right to private and family life. The former relates to situations in which a refusal to grant protection would force the foreigner to return to a country where, inter alia, their right to life, liberty and personal security would be threatened, or they might be subjected to torture as well as inhuman or humiliating treatment or punishment. The latter group relates to cases where the forced return would violate the foreigner's right to family

⁶⁰ 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, OJ L 71, March 4, 2022, 1.

⁶¹ See K. Karski, "Migration," in *International Law from a Central European Perspective*, ed. A. Raisz (Miskolc-Budapest: CEA Publishing, 2022), 228.

⁶² OJ L, 2023/2409, October 24, 2023.

or private life or would violate the rights of a child⁶³ to a degree that significantly endangers its physical and mental development.⁶⁴

The tolerated stay permit (Article 351), on the other hand, is granted to a foreigner if they may be obliged to return only to a country where, *inter alia*, their right to life, liberty and personal security would be threatened, or where they might be subjected to torture as well as inhuman or humiliating treatment or punishment - where there are circumstances justifying the refusal to issue an authorisation to stay for humanitarian reasons.

The conditions that need to be met for granting an authorisation to stay for humanitarian reasons and a tolerated stay permit significantly overlap not only each other, but also the conditions considered while granting refugee status and subsidiary protection. Circumstances such as violations of the right to family or private life, or violations of children's rights significantly compromising their physical and mental development should also be taken into account when considering the granting of international (as well as internal) protection. Refusal to grant refugee status to a foreigner does not relieve the authorities from the requirement to diligently collect and evaluate evidence in order to establish whether there are any grounds for granting a tolerated stay permit.⁶⁵

As in previously described situations, the granting of national protection should also involve an individual assessment of every single case. Some guidance related to understanding and interpreting the premises contained in the above regulations is provided by case law. As far as the protection of children's rights is concerned, it was ruled that an authorisation to stay for humanitarian reasons may be issued if the expulsion of the foreigner would violate the rights of his or her children to an extent significantly endangering the physical and mental development of their children, *i.e.* exposing them to qualified risks, and not just any disadvantages that the foreigner's minor children may face due to the expulsion of their parent. Thus, this does not apply to a foreigner who has come to Poland with children of mandatory school age.⁶⁶

As far as circumstances related to one's health status are concerned, the court ruled that it cannot, in principle, constitute an obstacle preventing the authorities from obliging a foreigner to return to their home country when it could be

⁶³ Specified in the Convention on the Rights of the Child adopted by the UN General Assembly on 20 November 1989, 1577 UNTS 3.

⁶⁴ I. Klimowicz and S. Juźwiak, "Wsparcie cudzoziemca w szczególnych okolicznościach: o możliwościach i barierach udzielania pomocy społecznej cudzoziemcom w kontekście zbrojnej agresji Rosji w Ukrainie," *Doradca w Pomocy Społecznej*, April 5, 2022, accessed December 1, 2023, <https://doradkawpomocyspoecznej.pl/arttykul/wsparcie-cudzoziemca-w-szczegolnych-okolicznosciach>.

⁶⁵ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 26 October 2005, case no. V SA/Wa 2794/04.

⁶⁶ Judgment of the Supreme Administrative Court (NSA) of 21 June 2018, case no. II OSK 3077/17; Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 23 March 2017, case no. IV SA/Wa 3278/16.

demonstrated that he or she would not be able to rely on basic medical care in the country of origin. Such a situation could exhaust the premise of being subjected to torture, inhuman or humiliating treatment or punishment, thus exposing the foreigner to inhuman conditions.⁶⁷ As far as the economic situation is concerned, it was ruled that a potential deterioration of the economic standing of a foreigner upon their return to the country of origin does not constitute a circumstance justifying the issuing of an authorisation to stay for humanitarian reasons.⁶⁸ A tolerated stay permit or an authorisation to stay for humanitarian reasons cannot be considered to stem from the general instability of the situation in the country of origin, from rule of law-related deficiencies, or even from general insecurity. This is because the assessment performed focuses on the situation of the foreigner, and not on that of their country of origin.⁶⁹ Thus, the hypothetical materialization of a threat caused by an unstable situation in the country of origin is not sufficient to establish the existence of grounds for granting a stay permit.⁷⁰ In order for the conditions for issuing an authorisation to stay for humanitarian reasons or a tolerated stay permit to be considered fulfilled, solid grounds must exist for concluding that the foreigner is truly affected by specific risks and threats. Therefore, it needs to be demonstrated that the return to their country of origin will cause a case-specific and real threat to the protected rights and freedoms.⁷¹ The mere possibility of a threat materializing is, therefore not, sufficient.

Conclusion

The legal instruments relied upon while granting protection to citizens of Ukraine, provided for in Polish legal regulations, are consistent and complementary. They are also in line with the regulations of international and European Union law. In Poland, Ukrainian citizens may be granted international protection (refugee status, subsidiary protection) or national protection. Hence, even if the rights offered under special regulations expire, Ukrainian nationals have additional protective instruments at their disposal. As a general rule, Ukrainian citizens are also not subject to the same burden of proof as applied to refugees of other nationalities. International refugee laws do not provide for direct rules on the distribution of the burden of proof. However, it is assumed that such an obligation lies with the

⁶⁷ Judgment of the Supreme Administrative Court (NSA) of 1 August 2018, case no. II OSK 257/18.

⁶⁸ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 19 September 2016, case no. IV SA/Wa 599/16; Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 14 February 2017, case no. IV SA/Wa 2266/16.

⁶⁹ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 13 June 2017, case no. IV SA/Wa 3210/16.

⁷⁰ Judgment of the Supreme Administrative Court (NSA) of 24 May 2018, case no. II OSK 1158/17.

⁷¹ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 27 February 2017, case no. IV SA/Wa 2634/16. See M. Kumela-Romańska, *Ustawa o cudzoziemcach. Komentarz*, 2nd ed. (Warsaw: Wolters Kluwer, LEX/el., 2022).

party applying for international protection.⁷² The burden of proof in proceedings is not regulated by the Polish Code of Administrative Procedure.⁷³ Case law of administrative courts shows, however, that the burden of proof rests on the party deriving legal consequences from a given fact.⁷⁴ Therefore, the right to adduce evidence must be manifested, in this regard, not only by the authority concerned, but first and foremost by the party to the proceedings. If the foreigner fears persecution or a threat of persecution exists, it is the foreigner who is obliged to demonstrate the existence of this fear (as it is a subjective feeling that cannot be identified in a direct manner).⁷⁵ Notwithstanding the above, the authority is obliged to take evidence concerning the circumstances which are relevant for issuing the decision, regardless of whether such evidence is presented by the party involved, or not.⁷⁶ In this regard, the Act on granting protection to foreigners in the territory of the Republic of Poland explicitly imposes, on the authority conducting the proceedings, an obligation to determine, inter alia, the relevant facts relating to the applicant's country of origin, or whether conditions are met enabling the applicant to enjoy protection of another country they are a national of (Article 43). In the case of Ukrainian nationals, Ukrainian citizenship is the only and sufficient proof. Such an approach follows from the Act of 12 March 2022 on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state and the Council Implementing Decisions confirming the mass influx of displaced persons into the EU and defining the groups of persons in need of protection. In this way, Ukrainian citizens do not have to meet the general conditions that apply to other foreigners to obtain the right to legally stay on the territory of Poland.

Data availability

No data are associated with this article.

⁷² I. Staffans, *Evidence in European Asylum Procedures* (Boston, 2012), 71.

⁷³ Act of 14 June 1960 Code of Administrative Procedure, Journal of Laws of 2023, item 775.

⁷⁴ Judgment of the Supreme Administrative Court (NSA) of 11 July 2002, case no. I SA/PO 788/00; Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 22 February 2008, case no. IV SA/Wa 46/08, Lex no. 489215, Judgment of the Supreme Administrative Court (NSA) of 16 February 1999, case no. III SA 2322/98, Legalis no. 52437.

⁷⁵ Judgment of the Voivodeship Administrative Court (WSA) in Warsaw of 13 December 2005, case no. V SA/Wa 1719/05, Lex no. 190867.

⁷⁶ B. Adamiak, "Art. 77 [Zbieranie i ocena dowodów]," in *Kodeks postępowania administracyjnego. Komentarz*, 18th ed., eds. B. Adamiak and J. Borkowski (Warsaw: C.H.Beck, Legalis, 2022); F. Elżanowski, "Art. 77 [Zbieranie i ocena dowodów]," in *Kodeks postępowania administracyjnego. Komentarz*, 8th ed., eds. R. Hauser and M. Wierzbowski (Warsaw: C.H.Beck, Legalis, 2023); F. Elżanowski, "Art. 77 [Zbieranie i ocena dowodów]," in *Kodeks postępowania administracyjnego. Komentarz*, 31st ed., eds. M. Wierzbowski and A. Wiktorowska (Warsaw: C.H.Beck, Legalis, 2023).