
Russian invasion of Ukraine and international protection of Ukrainian citizens

Ville Punto¹

Russia's attack on Ukraine on 24 February 2022 has created the biggest refugee crisis in Europe since World War II. After the Yugoslav Wars, most refugees in Europe have come from areas outside of the European Union. There was a significant spike in the number of refugees in 2015, when a record-breaking 1.26 million people, mostly people fleeing the internal conflicts of Syria, Iraq and Afghanistan, sought refuge in EU member states. This crisis also affected Finland, which saw the number of asylum applications rise to an all-time high of 32,476 by the end of 2015. However, the mix of nationalities among those who sought refuge in Finland differed from that seen elsewhere in Europe: the majority of applicants in Finland were from Iraq and Afghanistan as well as from Somalia, and Syrians were only fourth on the list.

The Finnish Aliens Act recognises two forms of international protection: refugee status and subsidiary protection status. A third form of international protection – humanitarian protection – was removed from the Aliens Act on 16 May 2015 to harmonise Finnish law with those of other EU countries. The 2015 refugee crisis was a shock to the Finnish asylum system, which was resourced to handle a few thousand applications per year. Only recently has the damage done to due process by the lack of preparedness and the reversal of asylum seekers' rights in 2016 been repaired.

On the system of international protection in general

The system of international protection is founded on the Convention Relating to the Status of Refugees, which was approved in 1951, and the associated 1967 Protocol ('Geneva Refugee Convention'). The Convention sets out the criteria that must be satisfied for a person to qualify for refugee status. Subsidiary protection is a complementary system fundamentally based on Article 2 of the European Convention on Human Rights (ECHR), which guarantees the right to life, and Article 3, which prohibits torture. Parties to the ECHR have an obligation not to

¹ The author is a Helsinki-based attorney-at-law specialising in residence permits and citizenship issues.

remove from their territory anyone who, if returned to their country of origin, could face a risk of suffering serious harm constituting a violation of Article 2 or 3.

Other key legislative instruments in this context include 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) ('Qualification Directive') and 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 ('Asylum Procedures Directive'). The system of international protection provided for in the Finnish Aliens Act is essentially based on these Directives and the European Court of Justice's interpretations of them.

Under the Aliens Act, aliens in Finland are granted asylum if they reside outside their home country owing to a well-founded fear of being persecuted for the reasons specified in the definition of 'refugee' and if they, because of this fear, are unwilling to avail themselves of the protection of that country. The reasons for persecution listed in the definition are origin, religion, nationality, membership of a particular social group, and political opinion. If none of these applies, asylum will not be granted. However, the reasons for persecution are meant to be understood broadly and interpreted flexibly. The personal circumstances of each asylum seeker must always be considered. In the event of a mass influx of refugees as a result of conflicts and violence, refugee status can also be granted to an entire group of people without an individual assessment. In practice, only the UN Refugee Agency (UNHCR) has recognised larger groups of people as refugees based on such a *prima facie* presumption, and the tool has never been employed in the assessment of the need for international protection under the Finnish asylum system.

Under the Finnish Aliens Act, an alien residing in Finland is granted subsidiary protection if there are substantial grounds to believe that the person, if returned to his or her country of origin, would face a real risk of being subjected to serious harm, and he or she is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country. Serious harm means the death penalty or execution; torture or other inhuman or degrading treatment or punishment; or serious and individual threat as a result of indiscriminate violence in situations of international or internal armed conflicts.

Subsidiary protection can be granted based on an assessment of the applicant's personal circumstances or, in the case of armed conflict, on the overall security situation in the applicant's country or area of origin, if the risk of indiscriminate violence is deemed to be so high that anyone in the area could be in danger.

International protection is intended to be a secondary option. If an alien is able to relocate to another part of their country of origin and can reasonably be expected to reside there, international protection will not be granted. This is known as the 'internal flight alternative' (IFA). If a refugee has dual nationality, there is a presumption for them to settle in the country of their other nationality. If the authorities of the country of origin are able to provide effective protection, the presumption is for refugees to avail themselves of the national protection of the authorities of their country of origin.

International protection is intended to be temporary. If the reason for persecution or the grounds for believing in a real risk of serious harm cease to exist due to a significant and non-temporary change in the circumstances of the country of origin, protection can be lifted. In practice, however, international protection often turns into permanent immigration, as aliens in Finland are given a permanent residence permit after four years of residing in the

country. In the case of residence permits granted on the basis of international protection, the four-year period is calculated from the date of entry into the country. Continuously reviewing the circumstances of recipients of international protection would be a waste of the authorities' resources. In practice, revocation of international protection status may be applied if one commits a serious offence or several offences while residing in Finland.

Temporary protection of Ukrainian refugees

The European Union has reacted quickly to the mass flight of refugees from Ukraine as a result of the Russian invasion. This coordinated European response is in stark contrast to the 2015 refugee crisis. Soon after the attack, the EU invoked for the first time in its history the Temporary Protection Directive (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). The Directive was introduced in the aftermath of the Yugoslav Wars to prepare for any future mass influx of refugees to the territories of EU member states as a result of new conflicts in Europe or nearby areas.

The Council of the European Union invoked the Directive on 4 March 2022 as a matter of urgency on the grounds that Russia's invasion had led to armed conflict in a significant part of Ukraine's territory and thousands of people were fleeing. The member states' decision was unanimous, even though it would have been enough for a qualified majority to vote in favour. The Temporary Protection Directive is binding on all EU member states except for Denmark, which opted out in the Treaty of Lisbon in 2007.

The general objective of the Directive is to guarantee minimum standards for giving temporary protection in the event of a mass influx of displaced persons, to ensure the capacity of member states' asylum systems, and equitable burden sharing between member states. This means that the level of protection given to people fleeing the war in Ukraine should be the same regardless of the member state in which they seek temporary protection. The distribution of refugees between member states was balanced by allowing Ukrainian refugees to choose where to seek temporary protection. The Directive also contains provisions on the burden-sharing of costs.

No personal assessment is necessary in the case of people seeking temporary protection. All that is needed is for the applicant to have been a permanent resident of Ukraine before or at the time of Russia's invasion on 24 February 2022. Protection is offered not only to Ukrainian nationals but also to any non-Ukrainian nationals and stateless people legally residing in Ukraine who are unable to return safely to their home countries. In practice, this means individuals to whom Ukraine has granted international protection or who have lived in Ukraine as stateless people. Other non-Ukrainian nationals legally residing in Ukraine are also permitted to enter the EU in order to return to their home countries. Temporary protection is extended to refugees' immediate family and other close relatives who lived together as part of the family unit. The idea is to reunite families who have been separated while fleeing the war, in the same member state.

Duration of temporary protection

The temporary protection will remain in place for an initial period of one year. Unless the Council of the European Union decides that the situation in Ukraine has changed so as to enable a safe and durable return, the temporary protection will be extended automatically by

two six-month periods, for a maximum of another year. If the reasons for temporary protection persist after two years, the Commission can propose to extend the temporary protection by a third year. Residence permits issued on the basis of temporary protection in Finland are currently valid until 4 March 2023. Whether or not the temporary protection will be extended depends on the Council's decisions. The maximum duration of temporary protection under the Directive is three years. After this, each member state will need to make its own decisions as to whether or not to continue the protection. This will depend largely on how the situation in Ukraine unfolds and when the war ends.

Scope of temporary protection

Those seeking temporary protection are issued with a residence permit for the duration of the protection. A residence permit entitles them to work and run a business. Children are entitled to attend school. No decisions have yet been made about the provision of early childhood education and care to children under school age, but many local authorities have expressed willingness to arrange it. The right to work and the right of children to attend school exist from the moment the application is filed.

Residence permits issued on the basis of temporary protection do not entitle their holders to residence-based social security. Those enjoying temporary protection will only qualify for benefits from the Social Insurance Institution of Finland in special circumstances. Circumstances in which a recipient of temporary protection may qualify include an employment at least for two years or studies leading to a professional qualification, or previous residence in Finland.

Those granted temporary protection are provided accommodation in reception centres if they are unable to arrange and pay for their own housing. Financial assistance is provided in the form of a reception allowance, which is paid by the reception centre and which amounts to less than basic social assistance and takes into account any other income and funds that the recipient has at his or her disposal. Access to health care and social services is arranged by the reception centre. The right to health care is limited to urgent medical treatment and any special support required due to an individual's having been the victim of, for example, torture or rape.

The rights of those enjoying temporary protection are in many ways consistent with the rights of asylum seekers who are waiting for a decision on their application. The services of both groups are coordinated by reception centres, and neither group is entitled to social security beyond what is absolutely necessary. Among the differences is the fact that those enjoying temporary protection have the right to work as soon as they file their application, which is not the case with asylum seekers. Those enjoying temporary protection are issued a personal identity code based on their residence permit, and they are therefore not at risk of ending up paperless. They also have the right to travel within the EU. However, the legal status of those enjoying temporary protection is temporary, similarly to those asylum seekers who do not qualify for international protection. Both persons enjoying temporary protection and asylum seekers can apply for a residence permit on other grounds and, if they qualify, be issued with a continuous residence permit. However, this is not a matter of international protection anymore, but ordinary immigration.

Continuous protection of Ukrainian refugees of war

Those fleeing the war in Ukraine can apply both, temporary protection and separately asylum, which requires individual investigation process. However, their asylum application will not be processed while they enjoy temporary protection. The processing of their asylum application will be resumed when the temporary protection ultimately ends. A significant number of Ukrainian war refugees might not qualify for international protection if it were not for the system of temporary protection.

The definition of 'refugee' is not automatically satisfied in the case of war refugees. Persons fleeing a war are more typically in need of subsidiary protection. If the well-founded fear of being persecuted due to the war is for the reasons specified in the definition of 'refugee', a person fleeing war can also qualify for refugee status. Indiscriminate violence targeted at civilians undoubtedly counts as persecution. However, persecution based solely on military activity is not usually motivated by the reasons specified in the definition of 'refugee'.

The retreat of the Russian army from the area around Kyiv in northern Ukraine has unearthed widespread mass murder of civilians and other serious human rights violations, such as rape. The question is whether these mass murders satisfy the definition of 'genocide'. If these massacres are found to have been motivated by the nationality of the victims and the desire to kill as many Ukrainians as possible, and not just the Russian army's wanting to spread fear by terrorising civilians in the areas that it had invaded, they could be seen to constitute persecution based on refugee grounds.

Refugees within the meaning of the Geneva Refugee Convention are typically persecuted by the authorities of their home country, which is not what is happening in Ukraine. Ukrainians are fleeing invading Russian forces, which only control a geographically definable area of Ukraine. Therefore, there would be an evaluation of an internal flight alternative and the possibility of protection from Ukrainian authorities. Therefore, it might be unlikely that Ukrainian war refugees would qualify for asylum.

When the need for subsidiary protection is based on indiscriminate violence resulting from an armed conflict, an assessment must be made of the degree of violence in the country of origin. The authorities' current interpretation is that only the conflicts in Syria and Yemen involve such high degrees of violence that anyone could be in danger simply by being in these countries.

If there is not indiscriminate violence across the whole country, the degree of violence in the applicant's home region is what is taken into account. The assessment factors in the intensity of violence in a specific area and during a specific time, as well as the severity and nature of the armed conflict. The scope of the assessment can be limited to an even smaller area, such as a specific municipality. This is what the Supreme Administrative Court of Finland did in respect of the Afghanistan conflict in 2017 (KHO 2017:71).

The armed conflict in Ukraine has so far seriously affected the area around Kyiv, the east of the country and areas surrounding Crimea, which has been under Russian occupation since 2014. This is why the kind of real risk of serious harm resulting from indiscriminate violence that is required to grant subsidiary protection would probably not be deemed to exist in the whole of Ukraine's territory but only along the front lines and in the surrounding areas. Russia's isolated missile strikes in, for example, the Lviv region would probably not be deemed to be sufficiently indiscriminate to grant subsidiary protection.

International protection is, as a rule, designed to be a person's last resort. If there are areas in the person's home country where there is no well-founded fear of being persecuted or no signif-

ificant risk of serious harm, they should endeavour to settle there. The Supreme Administrative Court of Finland found in cases involving refugees from Afghanistan, for example, that the country's capital, Kabul, offered a viable internal flight alternative except where an individual's personal circumstances made it unreasonable for them to relocate there (KHO 2017:73 and 74). As the severity of the armed conflict in Ukraine is not the same throughout the country, the current internal flight alternative provisions of the Finnish Aliens Act could make Ukrainians ineligible for international protection. It is likely that western Ukraine, for example, would, as a rule, be deemed to provide an internal flight alternative in this case.

Examination of the system of international protection in the context of the war in Ukraine

Russia's attack on Ukraine represents a style of war typical of the World Wars of the early 20th century where the army of one country invades another sovereign country. The war is confined within the borders of Ukraine and, at least for the moment, limited to specific areas of the country, and there are areas in the centre and west of the country that have largely escaped the war so far.

The war in Ukraine is different from the conflicts that have created refugee crises in recent decades. The armed conflicts in Syria, Iraq, Afghanistan and Somalia were internal, and the attacks did not come from a neighbouring enemy state but from the country's own official army and various organised armed groups with a multitude of interests, which were either supported or opposed to by third countries. These characteristics made the nature of these conflicts different from that of the war in Ukraine. In the public debate around the 2015 refugee crisis, people wondered why the many fit young men among those seeking asylum had not stayed to fight for their country in the internal conflicts. There have been no such accusations in connection with Ukrainian refugees, as the majority of Ukrainian men have stayed behind to fight the foreign enemy and the refugees are mostly women, children and elderly people. Due to the more traditional nature of the war in Ukraine, the reasons for the influx of refugees have been easier for the general public to understand.

The current international protection provisions of the Finnish Aliens Act appear to not apply to the Ukrainians fleeing this traditional war. This is why invoking the EU's Temporary Protection Directive was the only way to deal with the current refugee crisis. Without EU-level cooperation, member states' asylum systems would probably have been overwhelmed and left Ukrainian refugees without legal international protection.

The temporary protection granted to Ukrainians under the EU Directive is in force for a maximum of three years. If the war lasts longer, other ways will need to be found to protect them. The means available under the Aliens Act depend crucially on how the situation in Ukraine unfolds in the future. We would all like to see the war end as soon as possible. The destruction that the Russian army has caused to civilian targets and the country's infrastructure means that it will be a while before the refugees can return to Ukraine even after peace is restored. We cannot expect refugees to return to their destroyed hometowns and villages until reasonable living conditions can be ensured there. What would be particularly challenging would be if parts of Ukraine remained in Russian control over a longer period of time or even permanently.

The refugee crisis created by the war in Ukraine should prove that only the unity of the EU and harmonised asylum and refugee policies can provide sufficient protection to refugees in need. It is important that this unity continues after the war in Ukraine.