
A PRAGMATIC APPROACH TO HELPING REFUGEES

Europe is currently experiencing the largest movement of refugees since the Second World War. However, unlike 2015, when many people from Syria and Afghanistan sought shelter in Europe, there are currently no demands to turn back refugees at the border. How does the situation today differ from then? And what lessons can we learn from this for the future? Our author Dana Schmalz searched for the answers to these questions.

In the immediate aftermath of Russia's attack on Ukraine in February 2022, many Ukrainians fled the country, arriving in neighboring European states. Meanwhile, as of the beginning of June 2022, more than six million people have fled Ukraine, and even more have sought safety within the country's borders. In many respects, the reception of Ukrainian refugees in the European Union differed from other groups of refugees. This text looks at these differences and situates them within general questions of refugee law.

To begin with, there is a legal and practical difference with regard to entering the European Union: Ukrainian citizens are allowed to stay in the Schengen area for ninety days without a visa, meaning that a passport is generally all that is required to cross the border. Accommodation and reception beyond this initial period have to be organized but, unlike for other asylum seekers, crossing the border itself is unproblematic. This is in marked contrast to the otherwise vehement disputes concerning entry and expulsion. In some cases, refugees are being turned back from other countries in clear violation of the law, for example, in the Aegean Sea. In other cases, the legality is in dispute such as in the recent rulings by the European Court of Human Rights on the prohibition of collective expulsion

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VIEW POINT

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17

in which the Court opted for a surprisingly narrow interpretation. These cases concerned pushbacks to Morocco in the border zone of the Spanish exclave of Melilla and collective expulsions at the border between North Macedonia and Greece.

THE COMMON EUROPEAN ASYLUM SYSTEM HAS BEEN IN CRISIS FOR YEARS

Moreover, there is widespread unanimity that those fleeing Ukraine should be admitted and aided quickly. Ukraine's direct neighbors – the EU member states Poland, Slovakia, and Romania as well as Moldova – took a generous approach and allowed even those to enter who could not present a passport. Within a few days, civil society initiatives were formed to organize accommodation and provide material support in addition to government measures. It was not the existence of civil society initiatives that was exceptional but the harmonious interplay of those activities and government measures. The Common European Asylum System has been in crisis for years now, especially the sharing of responsibility between the member states within the Dublin system is the object of continuous disputes, and reform efforts have failed so far.

The reception of persons from Ukraine, on the other hand, has been pragmatic. For the first time ever, the member states of the European Union activated the Temporary Protection Directive (TPD). It provides that those protected receive a right of residence for twelve months, which can be extended to a total of up to three years. They also receive a work permit, financial support, and accommodation. The Temporary Protected Status does not exclude the right to apply for asylum but does provide access to certain rights without the lengthy and uncertain asylum process.

Member States have some room for maneuver when it comes to applying the Directive, and some issues – such as how to deal with asylum applications, how long the protection lasts, or who it applies to – may also still be up for discussion. Nevertheless, it can already be said without a doubt that the reception of Ukrainian refugees differs significantly from that of Syrian, Afghan, or Eritrean refugees in recent years. As we have seen, there are legal reasons for this. These include the aforementioned visa exemption scheme and the fact that Ukrainian refugees can flee directly to European states, while many others seeking protection come via other states – often because they are prevented from flying. This is due to carrier sanctions, a measure designed to dissuade airlines from allowing people without visas to board, making entry by this route impossible for most asylum seekers.

A DEBATE ON PERCEPTIONS OF DISPLACEMENT IS BENEFICIAL

However, the treatment of refugees from Ukraine also reflects political decisions and a social mood. The legitimacy of that different approach has been fiercely debated: Is the higher willingness to receive refugees due to the political circumstances of the war in Ukraine? Is geographical proximity the decisive factor? Is there a sense of cultural similarity at play? Or does this difference in treatment reflect the role of racism in perceptions of war and in attitudes toward refugees, as some commentators have criticized?

To begin with, the question of whether differential treatment is legitimate must be distinguished from individual incidents of direct discrimination at the borders. For example, there were some reports of students from African states fleeing Ukraine being detained at the Polish border. There is no question that this is unacceptable. This follows from the simple application of the existing law. In addition, the Geneva Refugee Convention also explicitly prohibits discrimination.

When it comes to the scope of protection under the TPD, member states adopt specific rules. In this regard, Germany decided that only Ukrainian nationals who had resided in Ukraine before February 24, 2022, and third-country nationals, who enjoyed international protection in Ukraine or otherwise cannot return to their home states, are eligible for protection. Other individuals who previously lived in Ukraine, but are able to return to their home states, do not receive protection in Germany, at least not under the TPD. While this decision may be politically contentious, it does not constitute discrimination, since no unequal treatment takes place. The situations are different because third-country nationals can seek refuge elsewhere – namely in their home state.

The fact that the admission of Ukrainians refugees is politically supported to a much greater extent cannot be judged from a legal perspective. However, it can constitute a reason to stress that the reach of responsibility is implicitly negotiated through the interpretation of legal criteria. The dependence on prior understandings was visible, for instance, in a case on humanitarian visas in which the European Court of Human Rights had to interpret the criterion of sovereignty under Article 1 of the European Convention on Human Rights. The issue was whether the Convention applies to a visa decision at all, i.e. whether the consequences of issuing or refusing a visa should be examined in light of its human rights implications. The court ruled against this. Such an interpretation is guided by the wording, context, plausibility, and previous rulings – but there are always

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underlying ideas of proximity and responsibility. In this respect, a public debate on the different perceptions of war and displacement is beneficial, since assumptions on who is owed protection are spelled out and challenged. Rather than relativizing the current willingness to admit refugees, it can provide a basis for broader empathy and engagement. Such a concrete universalism takes special connections and the role of proximity seriously but looks beyond them.

If we now look at what the treatment of Ukrainian refugees tells us about the European asylum system more generally, two points are noteworthy: firstly, the role of individual procedures, and secondly, the distribution of responsibility and freedom of movement in the European Union.

The admission of refugees under the TPD represents a temporary departure from the individual process. The history of the protection of refugees has been defined by alternating perspectives regarding groups and individuals. While the protection of the politically persecuted was strongly oriented toward individual cases, the protection of refugees was initially primarily directed at groups. Until the Geneva Refugee Convention of 1951, there was no abstract definition of a refugee; their admission was

coordinated on the basis of groups according to the situation. On the one hand, individual procedures are a significant achievement: they are the only way to ensure that the rights of each and every individual are actually protected. In this respect, the tendency to move away from individual procedures is problematic, for example, through increased screening – that is, rough assessments based on nationality, as proposed in the draft reforms of the Common European Asylum System. On the other hand, the focus on individual procedures and the ideal image of the individually persecuted person can lead to group movements being perceived as exceptional and downright “catastrophic”.

The notion of migration as an entirely individual concept contradicts the reality of refugee movements, which, in the past as well as today, often involve groups.

In this respect, it is important to realize that individual rights and collective migration exist side by side. The TPD offers an example of how lengthy procedures can be avoided pragmatically without barring the way to an individual assessment.

20

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Another noteworthy aspect of the application of the TPD is that there is no overarching system of responsibility. The distribution of people with protection status in the EU is based on where they register. Since Ukrainian citizens are allowed to move around within the EU without a visa, the place of registration and, consequently, jurisdiction depend on their choice.

The contrast with the debates on sharing responsibility in the Common European Asylum System could not be starker: there is strong opposition

here, especially with regard to the question of responsibility. The Dublin Regulation mostly stipulates that the state of first entry into the EU is the responsible state; those states at the EU's external borders consider this distribution unfair. Some landlocked states like Germany, on the other hand, are the de facto destination of many asylum seekers, and these states treat secondary migration in the EU as a significant problem. So while many asylum seekers are spread across the EU, there is considerable opposition to a free choice model. The current application of the TPD now offers a first experience with just such a model – and has worked without major difficulties so far.

It remains to be seen whether responsibility for people with protection status under the TPD will become an even more contentious issue in the months and years to come. The Directive mentions responsibility sharing in Recital 20 and states that “[p]rovision should be made for a solidarity mechanism.” Germany had already pushed for distribution according to quotas, but the Commission opposed this. Instead, a solidarity platform exists that bundles information and coordinates resources such as medical care or housing. In any case, the current self-distribution shows how such a system can work and what factors are involved when it comes to selection: primarily geographic proximity to the country of origin as well as family and other contacts.

This shows that the interests of those seeking protection and states often coincide: namely, perspectives with regard to integration, social inclusion, and access to the labor market. This paints a hopeful picture when it comes to shaping the European Asylum System: much is possible if migration is not treated as a threat and admission is organized pragmatically.

