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Meeting: 1331st meeting (December 2018) (DH)

Reply from the authorities (14/11/2018) to a communication from UNHCR (02/11/2018) in the case of Kebe and Others v. Ukraine (Application No. 12552/12).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1331^e réunion (décembre 2018) (DH)

Réponse des autorités (14/11/2018) suite à la communication de l'UNHCR (02/11/2018) dans l'affaire Kebe et autres c. Ukraine (requête n° 12552/12).

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

DGI

02 NOV. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

UNHCR

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02 November 2018

Notre/Our code: HCR/ST/L/18/155

Re: **UNHCR Communication in relation to the execution of the judgment of the European Court of Human Rights in the case of *Kebe and Others v. Ukraine* (Application No. 12552/12)**

Dear Mr. Sundberg,

I would be grateful if you could bring the attached Recommendations by UNHCR concerning the execution of the judgment of the European Court of Human Rights in the case of *Kebe and Others v. Ukraine* to the attention of the Committee of Ministers ahead of its 1331st Meeting which will be held from 4 to 6 December 2018 in Strasbourg.

This submission is made pursuant to Rule 9.3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

I remain at your disposal for further information.

Yours sincerely,

Roland-François Weil
Representative to the European Institutions in Strasbourg



Mr. Fredrik Sundberg
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UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

RECOMMENDATIONS BY UNHCR
concerning the execution of the judgment of the
European Court of Human Rights in the case of *Kebe and Others v. Ukraine*
(Application no. 12552/12, Judgment of 12 January 2017)

Introduction: These recommendations, addressed to the Ukrainian Government, are submitted in the context of the supervision of the execution of the judgment of the European Court of Human Rights in the case of *Kebe and Others v. Ukraine* (Appl. no. 12552/12) by the Committee of Ministers of the Council of Europe.

UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.¹ Paragraph 8(a) of its Statute and the Preamble of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)² confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

In accordance with its supervisory responsibility and in light of Ukraine’s obligations under refugee law, UNHCR also seeks to assist the Council of Europe’s Committee of Ministers in its evaluation of the measures necessary for execution of this judgment.

Legal situation: In its updated Action Plan,³ the Ukrainian Government refers to various provisions of legislation and by-laws related to the asylum procedure. Nevertheless, these provisions have minimal impact on the specific situation of persons who seek asylum at international borders before being formally admitted to the territory.⁴ In such situations, the legal framework remains unchanged since the time of the *Kebe* judgment: Persons have to submit their asylum requests to the State Border Guard Service (SBGS), which then admits them to the territory. The SBGS provides them with information about the location and contact details of the

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, available at: <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, p.137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

³ Published on 16 October 2018, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016808e64e8>.

⁴ For example, in the Action Plan, the Government refers to Art. 5(2) of the *Law on Refugees and Persons in Need of Complementary, Temporary Protection*, No. 3671-VI, but this refers to the situation of asylum-seekers who cross the border of Ukraine irregularly, not to persons arriving in transit zones. The Government refers to Art. 29(1) of the same law, which speaks generally about the border guards’ competence to arrange the acceptance of asylum applications.

nearest office of the State Migration Service, which operates only during normal business hours.⁵

Despite this provision in Ukrainian law, there are still a number of impediments to exercising the right to seek asylum and to protection from *refoulement* upon arrival at international borders.

Access to information: The European Court of Human Rights has previously found that the lack of access to information is a major obstacle in accessing asylum procedures⁶ and has reiterated the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.⁷

UNHCR calls for the implementation of effective measures to ensure that asylum-seekers arriving at international borders are provided with adequate information about the possibility of requesting international protection. Access to asylum procedures may be severely jeopardized by a lack of information. Furthermore, the information services should be made available to all persons who could potentially be in need of international protection, rather than solely to those who have already explicitly expressed the intention to apply for asylum. Currently the authorities have no legal obligation to provide written or oral information on the asylum procedure to persons who may be in need of international protection arriving at an international border. According to Ukrainian law, a person has the right to receive information about the asylum procedure in a language he/she understands only after submitting an asylum application.⁸

Modality of asylum applications: In order to facilitate the identification of asylum-seekers and to ensure that they are able to access international protection status determination procedures at the border, UNHCR suggests that the Ukrainian authorities consider implementing the provisions of Article 10 of the *Practical Handbook for Border Guards* of 6 November 2006, developed by the European Commission, that states; “A third-country national must be considered as an applicant for asylum/international protection if he/she expresses – in any way – fear of suffering serious harm if he/she is returned to his/her country of origin or former habitual residence. The wish to apply for protection does not need to be expressed in any particular form. The word

⁵ According to Ukrainian law, persons arriving at the border may apply for asylum, regardless of whether they hold valid travel documents. The State Border Guard Service is obliged to transfer individuals who seek asylum upon arrival at the border without valid travel documentation to the migration service authority within 24 hours of their having provided an explanation of the circumstances of their arrival. See *Law on Refugees and Persons in Need of Complementary, Temporary Protection*, No. 3671-VI, 8 July 2011, Art. 5(2), <http://zakon1.rada.gov.ua/laws/show/3671-17>. An unofficial English translation of the law is available at: <http://www.refworld.org/docid/51cd36464.html>.

⁶ See European Court of Human Rights, *Grand Chamber judgment in the case of M.S.S. v. Belgium and Greece* (Appl. No. 30696/09), Grand Chamber judgment of 21 January 2011), § 304, available at: <http://hudoc.echr.coe.int/eng?i=001-103050>.

⁷ See European Court of Human Rights, *Grand Chamber judgment in the case of Hirsi and Others v. Italy* (Appl. No. 27765/09, Grand Chamber judgment of 23 February 2012), § 204, available at: <http://hudoc.echr.coe.int/eng?i=001-109231>.

⁸ Item 12 of Art. 7 of the Law on Refugees and Persons in Need of Complementary, Temporary Protection stipulates that SMS registers an asylum application and then familiarize the applicant or its legal representative upon its signature with the procedure for making a decision on their applications, rights and duties of the person in respect of whom a decision was made to process documents for resolving the issue of recognition as a refugee or a person in need of complementary protection; at: <http://zakon.rada.gov.ua/laws/show/3671-17/print>.

“asylum” does not need to be used expressly; the defining element is the expression of fear of what might happen upon return.⁹ Also, the European Court of Human Rights in its *Hirsi and Others v. Italy* Grand Chamber judgment found that the fact that the applicants had failed expressly to request asylum did not exempt the defendant State from fulfilling its obligations under Article 3 ECHR.¹⁰

It would be advised that all competent Ukrainian authorities receive corresponding instructions in this regard. Currently the SBGS has no obligation to admit an individual to the territory if he/she simply expresses a fear of suffering serious harm upon being returned.¹¹

Interpretation: UNHCR recommends that persons should be provided with the services of a competent interpreter for submitting his/her asylum application. Currently, the SBGS has no legal obligation to provide interpretation to persons who wish to make an asylum application at an international border.¹² The budget of the SBGS does not include a line for the hiring of interpreters to assist in receiving asylum applications at international borders. To apply for asylum, persons must fill out an application-questionnaire, which is eight pages long.¹³ The application-questionnaire must be submitted in the Ukrainian language.

Legal assistance: UNHCR recommends that the SBGS provides persons arriving in transit zones or in ports with access to lawyers, including those from Free Legal Aid Centers. In Ukraine, lawyers from non-governmental organizations and the Free Legal Aid Centers generally do not have access to persons in transit zones.

Access to a judicial remedy: UNHCR recommends that persons seeking international protection when arriving in airport transit zones or in ports be given access to an effective judicial remedy against a decision by the SBGS on prohibiting entry to the territory. Currently, in UNHCR’s view, there is no effective remedy against such decision, given the practical impediments in ensuring access to the asylum procedure in airport transit zones or in ports and the inherent vulnerability of asylum-seekers stranded in transit zones or arriving in a port and not being allowed to disembark. It is of fundamental importance that effective remedies be available in practice to allow asylum-seekers to challenge the prohibition of entry and gain access to protection against *refoulement*.

The relevant Ukrainian law obliges the State Border Guard Service to issue a motivated decision

⁹ European Commission, *Practical Handbook for Border Guards*, 6 November 2016, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015010%202006%20INIT>.

¹⁰ European Court of Human Rights, *Grand Chamber judgment in the case of Hirsi and Others v. Italy* (Appl. No. 27765/09, Grand Chamber judgment of 23 February 2012), § 133, available at: <http://hudoc.echr.coe.int/eng?i=001-109231>.

¹¹ Art. 1(8) of the *Law on Refugees and Persons in Need of Complementary, Temporary Protection* stipulates that an asylum application shall consist of an application-questionnaire in the standardized form in the Ukrainian language. According to the State Migration Service, they cannot accept asylum applications in other languages as this is not envisaged by the applicable by-laws in Ministry of Interior Order No 649 dated 7.09.2011.

¹² Art. 5(2) of the *Law on Refugees and Persons in Need of Complementary, Temporary Protection* does not oblige the SBGS with an interpreter to assist the asylum-seeker in filling out the application form.

¹³ The Rules for consideration the applications, approved by Ministry of Interior Order No 649 dated 7.09. 2011 stipulates in its annex a specimen of application- questionnaire (“ЗАЯВА-АНКЕТА”), available at: <http://zakon.rada.gov.ua/laws/show/z1146-11>.

in writing regarding the prohibition of entry, against which the individual can file an appeal.¹⁴ However, this remedy cannot currently be considered effective either in law or practice due to lack of suspensive effect and no guarantees for speedy examination.¹⁵ Also, the most basic facilities necessary to correspond with the domestic court by mail are absent. As indicated above, the lack of access to a lawyer or interpreter is a further serious impediment to exercising a judicial remedy, since submission of an appeal to the court against the prohibition of entry must be written in the Ukrainian language. According to the law *On Border Control*, when an individual is denied entry to Ukraine, the SBGS shall order the carrier to remove the person to the State from which s/he arrived, to his/her country of origin, or to identify other ways of removing the individual¹⁶. As a result, an individual would normally have little time — only the time until the next available flight to his/her destination — in order to appeal.

Access to UNHCR: UNHCR calls on the authorities to allow its prompt access persons arriving at international borders, including in airport transit zones or having crossed a sea border and arriving in a Ukrainian port. Despite the fact that UNHCR's agreement with the Government of Ukraine provides for UNHCR's access to persons of concern, irrespective of where they are, in practice the authorities do not extend this to ports or to airport transit zones. In meetings with UNHCR in the first quarter of 2018, the SBGS explained that UNHCR was not allowed to monitor the situation of persons in international transit zones. Access can be arranged only for the Office of the Ombudsperson for Human Rights. In 2018, UNHCR's partner has unsuccessfully asked for access to the airport transit zone in Kyiv seven times for the purpose of providing legal assistance to persons seeking international protection. UNHCR's partner was not granted access to any of these individuals. Having already shared positive examples with the authorities of how such access for UNHCR and lawyers is organized in other European countries, UNHCR reiterates its availability to cooperate with the competent authorities in devising a system for monitoring access to the asylum system at international borders. UNHCR welcomes the fact that the authorities have requested an exchange with other European countries on asylum procedures at international airports and looks forward to facilitating this exchange before the end of 2018.

Recent practices: Since asylum-seekers arriving at the border, particularly at international ports and airports, do not have the capacity to draw attention to their situation, due to lack of access to legal services or UNHCR, it is difficult to assess the scale of the problem of access to asylum at the border. However, UNHCR observes that only few persons are admitted to the asylum procedure upon arrival at international borders, which raises concerns about the effectiveness of access to asylum at the borders. Upon UNHCR's semi-annual request, the SBGS provides data about the number of persons who have approached them to apply for asylum. Many of these persons make applications after being detained for attempting to exit the country irregularly, i.e., at the western border with the European Union. The SBGS provides a breakdown of persons who applied for asylum upon regular entry at the border. Thus, in the first half of 2018, of 59 persons who submitted asylum applications through the State Border Guard Service, 21 applied upon entry to the country. In 2017, of 77 persons who submitted applications, 24 applied upon entry. In 2016, of 53 persons who submitted applications, 33 applied upon entry. In two-and-a-half years, only

¹⁴ *Law on Border Control*, No. 1710-VI, 5 November 2009, Art. 14(1), available at: <http://zakon2.rada.gov.ua/laws/show/1710-17%20>.

¹⁵ *Ibid.*, Art. 14(3).

¹⁶ *Ibid.*, Art. 14.

78 persons applied for asylum upon entry. At the same time, persons from refugee-producing countries are prohibited entry to the country in larger numbers. For example, the SBGS has prohibited the entry of 179 nationals of Syria in the first half of 2018; in 2017, 372 Syrians were prohibited in entry and, in 2016, 361 Syrians were prohibited in entry.

UNHCR continues to observe in Ukraine cases in which persons face obstacles in applying for asylum in airport transit zones. For example, on 7 November 2017, eight persons from Zimbabwe, including four children, were denied entry at Boryspil Airport in Kyiv. They requested asylum. The SBGS did not accept their application. After numerous interventions by UNHCR, the State Migration Service (SMS) decided on an exceptional basis to receive their application in the transit zone, i.e., without the family having been admitted into the territory of Ukraine. The SMS rejected their asylum application on the same day. In application of carrier sanctions provisions, the family was returned to Thailand on the same day without having had access to a remedy. That is, the family was interviewed, rejected and returned within the course of a single day and without access to legal counsel. They subsequently spent three months stranded in the Bangkok airport.¹⁷

Conclusion: UNHCR notes that safeguards are particularly important when asylum is sought at the border, including at airports and ports' international zones, not least in view of the particular vulnerability of asylum-seekers in this context and the specific nature of the procedure in this context. Being held at the border can hinder one's ability to articulate a claim for international protection.¹⁸ Moreover, reception and procedural arrangements at the border often lack certain fundamental safeguards, as outlined above in respect of Ukraine. Finally, since decisions taken on whether to admit someone to the asylum procedure in this context are made within very tight time frames, the risk of making an inaccurate decision can be higher. It is therefore essential that appropriate safeguards and support be in place.¹⁹

UNHCR Representation in Ukraine
01 November 2018

¹⁷ See <https://www.bbc.com/news/world-asia-42784553>.

¹⁸ UNHCR, *Detention Guidelines*, para. 7, <http://www.unhcr.org/505b10ee9.html>.

¹⁹ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 21-23, <http://www.refworld.org/docid/3b36f2fca.html>.



Mr Pavlo Pushkar

DGI

14 NOV. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

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13.11.2018

№ 11850/5.2/25-18

Council of Europe

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На № _____

As to the communication received from the UNHCR
relating to the case of Kebe and Others v. Ukraine

Dear Mr Pushkar,

Please let me emphasise once again that the Government of Ukraine do not cast any doubt on the binding force of the European Court's of Human Rights (the "Court") judgments.

The Government of Ukraine appreciate the United Nations High Commissioner's for Refugees (the "UNHCR") kind assistance in the process of execution of the Court's judgment in *Kebe and Others* case (application no. 12552/12). We are also grateful for all recommendations which were submitted in order to evaluate by the Committee of Ministers of the measures necessary for the execution of this judgment.

In this regard the Government of Ukraine would like to reiterate that the execution process cannot be simple. Nevertheless, we understand the need of strengthening of legal protection and ensuring of favourable conditions for asylum-seekers, *i.e.*, in order to protect them from refoulement upon arrival at international borders.

As regards the lack of access to information about asylum procedures and the possibility of requesting international protection, the Government of Ukraine would like to underline that according to the newly adopted Rules "For Operational Procedures of officers of the State Border Service of Ukraine and Cooperation with Territorial Agencies of the State Migration Service of Ukraine when Foreigners or Stateless Persons File Requests for Refugee Status or Recognition as Persons in Need of Complimentary Protection", which were approved by Order of the Ministry of Interior of Ukraine No. 722 dated 10 August 2016, the refugee or asylum-seeker has at any time the right to involve an interpreter in order to carry out the necessary translation into the understandable language. As part of the legal and methodological assistance of UNHCR, an appropriate translation into different languages of the application form for recognition as a refugee or asylum seeker has been transmitted to the Administration of the State Border Guard Service of Ukraine (the "SBS"). For the purposes of an effective search of the interpreter, the SBS and Free Legal Aid Centres can use the informational Register of translators, the procedure for the formation and maintenance of which is determined by Order of the Ministry of Interior of Ukraine No. 228 of 11 March 2013. Free Legal Aid Centres participate in the procedure upon providing legal assistance in accordance with the Law of Ukraine "On Free Legal Aid". Moreover, on the basis of the provisions of the Law of Ukraine "On the Legal Status of Foreigners and Stateless Persons", the Cabinet of Ministers of Ukraine adopted a Regulation "On Certain Issues of Involving Translators (sign language interpreters) to provide free secondary legal aid No. 401 on 24 June 2016. As specified in the provisions of the abovementioned resolution, interpreters



(sign language interpreters) are involved in the activity of the free secondary legal aid centres in order to ensure the provision of free secondary legal aid for people who need it (foreign speaking persons; are deaf or dumb). Such cooperation takes place on the basis of concluded agreements on the provision of the relevant services in accordance with the requirements of civil law.

It is important to emphasise that on 12 October 2018, a Memorandum of Understanding (MOU) was signed between the Coordination Centre for Free Legal Aid and the Office of the UNHCR in Ukraine. This Memorandum of Understanding sets for further consolidation of efforts aimed at ensuring the right to free legal assistance for stateless persons, asylum seekers and refugees, persons in need of complementary or temporary protection, and internally displaced persons; preparation of professional personnel and capacity-building programmes for free legal aid system and lawyers, who grant legal aid. Thus, through the UNHCR mediation the points of access to free legal aid were arranged along the red line. The persons will receive legal information, consultation and explanation of legal issues, assistance in individuals' access to the secondary legal aid and intermediation. Among the areas of cooperation of the Coordination Centre for Free Legal Aid and UNHCR in Ukraine is an exchange of information about stateless persons, asylum seekers and refugees, persons in need of complementary or temporary protection, and internally displaced persons who seek legal aid free of charge.

Moreover, with the assistance of the UNHCR in Ukraine, Belarus and Moldova guidelines for the procedure for obtaining refugee status in Ukraine are made in Ukrainian, English, Arabic, Vietnamese, Russian, Farsi (in the amount of 3,200 copies), as well as information banners on the procedure of application for asylum in Ukraine located in the temporary holding facilities and the regime zones of the international points of passage through the state border of Ukraine. Additional 51 information banners for potential asylum seekers will be placed at international airports and border crossing points across Ukraine's state border by the end of 2018.

As regards the lack of access to an effective judicial remedy, the Government of Ukraine would like to note that filing an appeal to the administrative court is not the only measure aimed at protection of the refugees' and asylum seekers' rights. As to the domestic law a person who is denied entry has the right to appeal the decision in accordance with the Law of Ukraine "On Applications of Citizens". Moreover, a refugee or/and asylum seeker can also file an appeal to the Parliament Commissioner for Human Rights without any restriction and hindrance under the procedure envisaged by law. The relevant applications to the Parliament Commissioner for Human Rights may be submitted in writing, by e-mail or in person.

The Government of Ukraine would like to note that the UNHCR's comments and recommendations provided in accordance with Rule 9 (2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements relating to measures which are necessary to be taken for implementation of the Court's judgment in *Kebe and Others* case will be translated into Ukrainian and disseminated among all competent domestic authorities.

Finally, it should be stressed that the Ukrainian authorities continue intensive work to avoid similar violations in the future.

The Government of Ukraine will keep the Committee of Ministers informed about further developments and measures taken.

Yours sincerely

**Deputy Minister – Agent
before the European Court of Human Rights**


Ivan LISHCHYNA