

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

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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>.