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Contact: Zoe Bryanston-Cross
Tel: 03.90.21.59.62

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Meeting: 1419th meeting (December 2021) (DH)

Item reference: Addendum to an Action Plan (04/10/2021)

Communication from Ukraine concerning the case of Kebe and Others v. Ukraine (Application No. 12552/12)

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Réunion : 1419^e réunion (décembre 2021) (DH)

Référence du point : Addendum à un plan d'action (04/10/2021)

Communication de l'Ukraine concernant l'affaire Kebe et autres c. Ukraine (requête n° 12552/12) (**anglais uniquement**)



DGI

04 OCT. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

**МІНІСТЕРСТВО
ЮСТИЦІЇ
УКРАЇНИ**

вул. Архітектора Городецького, 13,
м. Київ, 01001, Україна
тел.: (044) 364-23-93
факс: (044) 271-17-83
E-mail: callcentre@minjust.gov.ua,
themis@minjust.gov.ua,
Web: <http://www.minjust.gov.ua>
код згідно з ЄДРПОУ 00015622

**MINISTRY
OF JUSTICE
OF UKRAINE**

13, Horodetskogo Arkhitektora St., Kyiv,
01001, Ukraine
tel.: (044) 364-23-93
fax: (044) 271-17-83
E-mail: callcentre@minjust.gov.ua,
themis@minjust.gov.ua,
Web: <http://www.minjust.gov.ua>
код згідно з ЄДРПОУ 00015622

Ms Clare Ovey

**Head of Department
Department for the execution of
judgments of the European Court of
Human Rights Directorate General 1 –
Human Rights and Rule of Law**

Council of Europe
F-67075 Strasbourg Cedex

*As to the execution of the Court's judgments
in the Kebe and Others group of cases*

Dear Madam,

Herewith please find enclosed the Government of Ukraine Addendum to the Action Plan for the execution of the European Court of Human Rights judgment in the *Kebe and Others* group of cases (application no. 12552/12).

This information has been sent by e-mail.

Encl: on 8 pages.

Yours faithfully,

Olga DAVYDCHUK
Acting Agent before
the European Court of Human Rights

СЕД АСКОД

Міністерство юстиції України

№ 88569/5.2.1/30-21 від 04.10.2021

Підписувач Давидчук Ольга Василівна

Сертифікат 58E2D9E7F900307B04000000D76B1700BB228A00

Дійсний з 23.10.2020 0:00:00 по 23.10.2022 0:00:00



Execution of Judgments of the European Court of Human Rights

DGI

04 OCT. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Addendum to the Updated and Consolidated Action Plan on measures to be taken for implementation of the Court's judgments in the cases of *Kebe and Others v. Ukraine*

(app. no. 12552/12, judgment of 12 January 2017,
final on 12 April 2017),

Nur Ahmed and Others v. Ukraine

(app. no. 42779/12 and 5 others, judgment final on 18 June 2020),

Nur and Others v. Ukraine

(app. no. 77647/11, judgment final on 16 July 2020)

M.S. v. Slovakia and Ukraine

(app. no. 17189/11, judgment of 11 June 2020, final on 11 September 2020)

The Government would like to submit additional information to the Updated and Consolidated Action Plan of 3 August 2021¹ regarding the measures taken for execution of the Court's judgments in the cases of *Kebe and Others* group.

The additional information below should be read jointly, with the information already presented by the Government of Ukraine to the Committee of Ministers.

I. INDIVIDUAL MEASURES

• As to *Nur and Others* case

As regards the second applicant (Ali Mohamed Ibrahim) the Government would like note the following. According to the national law, the person, who has been granted complementary [subsidiary] protection in Ukraine, shall apply to the State Migration Service of Ukraine (hereinafter – the “SMS”) for obtaining an identification card, which confirm the granted status. Despite the fact that the second applicant was granted complementary protection in Ukraine in 2012, he did not submit the application for the relevant identification card at the material time.

Meanwhile, the SMS took measures in order to establish the second applicant's whereabouts at the time in question, in particular, forwarded letters to the second applicant and his representative, but had no success in contacting him. As of today, the second applicant's whereabouts remains unknown.

It should be underlined that on 15 October 2020 the second applicant's awarded sum of just satisfaction was transferred to the Ministry of Justice special bank account and is still at his disposal.

• As to *M.S.* case

The Government would like to note that the applicant was expelled from the territory of Ukraine on 14 March 2011. As of today he did not return to Ukraine and did not apply neither to the territorial bodies of the SMS nor to the State Border Guard Service of Ukraine (hereinafter – the SBGS) for granting him a refugee status or a subsidiary protection in Ukraine.

¹[https://hudoc.exec.coe.int/eng#%7B%22fulltext%22:%5B%22kebe%22%5D,%22display%22:%5B2%5D,%22EXECIdentifier%22:%5B%22DH-DD\(2021\)771E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22fulltext%22:%5B%22kebe%22%5D,%22display%22:%5B2%5D,%22EXECIdentifier%22:%5B%22DH-DD(2021)771E%22%5D%7D)

The Government would like to underline that in the present Judgment the Court did not conclude that the applicant would be at risk in case of return. Instead, the finding of a violation of Article 3 of the Convention was based on the failure of the domestic authorities to properly assess the risks: “[t]hese shortcomings were of a procedural nature. Had an appropriate examination of the applicant’s asylum claim been conducted by the Ukrainian authorities, they may well have concluded that his account of risk of ill-treatment in Afghanistan was not convincing, for example because he had not argued that internal relocation, to which he has successfully had recourse” (§128). In support of these findings, the Court noted that “the applicant has not actually suffered any ill-treatment in Afghanistan up until now” (ibid), that is, for almost ten years since he was expelled to Afghanistan in 2011.

In para. 6 of the Judgment in the *M.S. case* the Court noted that: “... [a]ccording to the applicant, his father used to work with the National Security Department of Afghanistan. Having arrested some drug smugglers, he was killed in about 2005 by unknown people, possibly associated with the Taliban. In 2010 the applicant’s maternal uncle received a threatening letter. The applicant was unaware of its precise contents, but his uncle deduced that the applicant “also faced a risk related to the killing of his father” and arranged for him to leave the country.”

It is worth noting that the applicant had been avoided the risk of persecution in Afghanistan due to the fact that he managed to leave the state in 2010, and the Afghanistan’s authorities were not aware of his whereabouts at the time in question.

In the view of the current situation in Afghanistan related to the establishment of the Taliban’s authority and that the applicant fled from Afghanistan given his fear to face a risk to be subjected to torture or to inhuman or degrading treatment or punishment there, the Government consider that it would not be reasoned action to contact Afghanistan’s authorities in order to obtain information as regard the current applicant’s situation.

Furthermore, the Government would like to note that they have contacted with the lawyers from the Charitable Foundation “The Right to Protection” that represented the applicant before the European Court. They informed that the contact with the applicant was lost, and at the present time they are not aware of his whereabouts.

It should be noted that the sum awarded by the Court to the applicant still remains at the Ministry of Justice of Ukraine special bank account and is available at the applicant’s disposal.

II. GENERAL MEASURES

The Government would like to note that according to the SMS Order “*On Introduction in Commercial Operation of the UIAS MPP*” No. 167/ar, dated 25 November 2019, the Unified Information and Analytical System for the Management of Migration Process (hereinafter – the “**UIAS MMP**”) was implemented in the SMS.

The UIAS MMP system facilitates the SMS’s cooperation with foreigners and stateless persons who stay in Ukraine both in regular and irregular manner.

The UIAS MMP includes subsystems “Administrative Offences” and “Registration of Foreigners and Refugees”.

The “Administrative Offenses” subsystem is used to process all cases of administrative offenses committed by foreigners and stateless persons that fall under the SMS’s authority, including upon protocols drawn up by the SBGS’ officers and other authorised bodies.

Within the “Registration of Foreigners and Refugees” subsystem, the SMS take control over issuance of documents confirming the Ukrainian citizenship, identity of a foreigner or a stateless person or his/her special status in Ukraine - to prevent documents forgery or their illegal use.

At the same time, in the UIAS MMP’s subsystems a number of pilot projects were introduced:

- within the “Illegal Migrants”, the SMS’s territorial bodies/units provide for the preparation, consideration, coordination and approval of materials on voluntary return, forced return, forced expulsion and entry ban in respect of foreigners and stateless persons who violated the legislation on the legal status of foreigners and stateless persons;
- in the framework of the “Centres of Temporary Stay of Foreigners and Stateless Persons” the SMS’s territorial bodies/units keep records of foreigners and stateless persons placed in the centres of temporary stay of foreigners and stateless persons who have no temporary residence permit to stay in Ukraine (hereinafter – the **PTPI**) , including those involved in the forcible expulsion or readmission;
- as a part of the “Temporary Accommodation Centres of Refugees”, the SMS’s territorial bodies/units keep records of asylum seekers placed in the temporary accommodation centres of refugees.

Moreover, 7 training courses concerning the implementation of the UIAS MMP are available in the SMS’s distance education system; and about 1,000 employees of the SMS have already underwent the above training courses.

It should be underlined that the implementation of the UIAS MMP system and its subsystems ensure that all activities performed by the SMS’s officers related to foreigners and stateless persons are carried out in compliance with the national law, as well as help to prevent unlawful actions of the SMS’s officers with respect to foreigners and stateless persons.

The Government would like to provide additional information as regards free legal assistance available to detained foreigners and stateless persons.

It should be noted that a foreigner or a stateless person (including who is crossing or has crossed the Ukrainian border illegally) can obtain free legal aid in human rights protection, the asylum procedure, immigration issues, etc., by lawyers of the state centres for free legal aid provision or by human right organisations, including international ones.

As to the detained foreigners and stateless persons, according to the national law, they are entitled to *free secondary legal aid* that is exercised by lawyers of the state local centres for free legal aid provision (hereinafter – **the local centres**).

The local centres should be notified about the each case of detention of a foreigner or a stateless person *for more than three hours* without delay.

The authorised officer shall immediately, after detention of a foreigner or a stateless person, call: 0-800-213103 (call centre of the free legal aid system), and inform the local centre about such detention, indicating the name of the detained person, the time and grounds for his/her detention, the information about the place of detention, the address of the place for meeting with a lawyer, the personal data of the authorised officer.

Also, the authorised officer can notify the local centre about detention of a foreigner or a stateless person in written (by e-mail).

The local centres disseminate their telephone numbers and e-mails dedicated for notification about detention among the bodies concerned. Such information, also, is published on the official websites of the Ministry of Justice of Ukraine and its local departments, the Coordination Centre for Legal Aid and its local centres, the local departments of the SBGS, the SMS, the Security Service of Ukraine, etc.

The local centres, after receipt of information about the detention of a person by the authorised officer, shall register such notification. Within one hour from registration of the notification about the detention of a person, the local centres shall appoint a lawyer and inform the relevant authorised officer about such appointment.

If the authorised officer failed to comply with the obligation to inform the local centres about the detention of a foreigner or a stateless person, the detained person can call/write an email to the local centres by himself/herself.

The local centres, after receipt of information by the detained person (about his/her detention), shall, within one hour, verify such information and adopt a decision on the provision for free secondary legal aid to the detained person.

Moreover, the detainees in the SBGS's holding facilities and the PTPI can call/write an e-mail to the SMS, the Ukrainian Parliament Commissioner for Human Rights, the UNHCR, the International Organisation for Migration Mission in Ukraine, the Coordination Centre for Legal Aid, the non-governmental organisations (for example, Charitable Foundation "Right to Protection", the Kharkiv Human Rights Protection Group, the NEEKA), etc.

The SBGS' holding facilities and the PTPI are equipped with notice boards with the above-mentioned numbers and emails in different languages.

Given the fact that detainees in the SBGS's holding facilities and the PTPI are entitled to use telephone and other types of communication, they can avail themselves of the opportunity to seek for legal assistance both by lawyers of the free legal aid system and law experts of non-governmental organisations.

The detainees of the SBGS's holding facilities and PTPI are also entitled to meet lawyers, representatives from diplomatic (consulate) establishments and human right organisations, including international ones in order to obtain free legal assistance.

According to the *Instruction on the procedure for detention of foreigners and stateless persons in the centres of temporary stay of foreigners and stateless persons who have no temporary residence permit to stay in Ukraine*², lawyers, including lawyers of the free legal aid system, are allowed to freely visit meeting rooms in the PTPI, upon production of an identification document and a power of attorney or an legal service agreement. Other individuals are allowed to visit meeting rooms in the PTPI upon permission for a visit. The permission for a visit is issued by the head of the PTPI or his/her deputy after consideration of an application for a visit. The application for a visit shall be considered by the head of the PTPI or his/her deputy on the day of receipts of such application, and notified to the applicant about the decision adopted.

² <https://zakon.rada.gov.ua/laws/show/z0748-16?lang=en#Text>

Visits of foreigners and stateless persons in the PTPI are conducted *confidentially* with lawyers and representatives of human rights organisations on a “twenty-four seven” basis.

All visits of lawyers of free legal aid system, non-governmental organisations to the PTPI in order to provide free legal assistance for detained foreigners and stateless persons, are recorded in the Registry Book of the PTPI.

Also, the *Instruction on the procedure for detention of individuals in custody of the state border guard bodied (units)*³ provides that in order to obtain legal assistance at a written request of a detained person in the SBGS’s holding facility, he/she is provided with a visit of a lawyer.

The permission for a visit is issued by the head of the SBGS’s body (unit). Such permission is the basis for a one-time visit of SBGS’ holding facility. Meanwhile, organisations, whose representatives regularly visit the SBGS’s holding facility, may obtain multiple-permission for visits, which is issued until the end of the year.

The procedure for access of the UNHCR’s partner organisations and representatives of international human right organisation to the SBGS’s holding facilities is defined in the *agreement (protocols) on cooperation* between the SBGS’s body and such organisation.

Lawyers, the UNHCR’s representatives, its partner organisations, and the SMS’ officers are provided with sufficient time for conducting all necessary procedures with foreigners and stateless persons during their visits to the SBGS’s holding facilities.

As regards the unaccompanied minors, it should be emphasised that the national law *prohibit* placing of the unaccompanied minors to the places of detention such as the PTPI.

Meanwhile, the Government would like to provide information regarding the plan of activity in case of accommodation/identification of unaccompanied minors at the places of detention, as follows.

In case of identification of an unaccompanied minor in the SBGS’ holding facility or the PTPI, a SBGS’ officer, a representative of the other executive authorities or local government, the police officer, other legal entity or individual, who revealed the unaccompanied minor, shall *immediately* notify the SMS’ territorial body and the Children's Affairs Service about such minor.

The representatives of the SMS and the Children's Affairs Service shall arrive at the place of detention of the unaccompanied minor, draw up the necessary documents and explain to the minor the possibility of applying for refugee status or person in need of complementary protection, and the procedure for such submission, taking into account his/her age and individual characteristics, in a language he/she understands, if necessary, with the assistance of an interpreter, including remotely.

Then, the Children's Affairs Service and the SMS’s territorial body shall ensure the transfer of the unaccompanied minor to the health care institution in order to undergo his/her medical examination and provision of emergency medical care, if necessary. The Children’s Affairs Service shall prepare necessary documents for further accommodation of the unaccompanied minor in medical/education institution dedicated for children, who are separated from their families, or in foster family.

It should be noted that due to the fact that minors do not have full legal capacity, the legal representative appointed by the Children's Affairs Service will help minors to apply for a refugee status or complementary protection, as well as participate in the activities held by the SMS within consideration of asylum application.

³ <https://zakon.rada.gov.ua/laws/show/z0462-15?lang=en#Text>

Moreover, it should be noted that in case of adoption of the decision on accommodation of a minor foreigner or a stateless person in the PTPI by the SMS's territorial body or the SBGS's body, the prosecutor shall be informed about such decision within 24 hours.

The regional prosecutor's offices monitor the compliance with the law in the places of detention. Thus, in case of identification of an unaccompanied minor in the PTPI, the prosecutor takes measures to release such individual from the PTPI; in particular, the prosecutor shall inform the SMS's territorial body and the Children's Affairs Service about such a minor.

The Government would like to provide statistical data regarding the monitoring visits aimed at verifying the lawfulness of detention in the PTPI conducted by the prosecutor's offices.

Place of detention	2020	2021
Year		
Volynskiy centre of temporary stay for foreigners and stateless persons	40	16
Chernihiv centre of temporary stay for foreigners and stateless persons	12	7
Mykolaivskiy centre of temporary stay for foreigners and stateless persons	3	4

Furthermore, the Government would like to provide information concerning access to interpreters by irregular migrants.

A foreigner or a stateless person, who is crossing/has crossed the state border in irregular manner, is subject to the administrative liability. The SBGS's officer, the SMS's officer or the police officer shall draw up a report on arrest (detention) of an irregular migrant. Such report shall be drawn up in the presence of an interpreter, as well as signed by such interpreter.

In case of consideration the case on detention (forcible expulsion) of a foreigner or a stateless person, the interpreter shall be engaged to the court proceedings upon the court's initiative or the foreigner's request. The court can oblige the SBGS, the SMS or the other body concerned, to engage the interpreter to the above court proceedings. Moreover, the foreigner or stateless person can apply to the court with a request to replace the interpreter engaged by the SBGS, the SMS or other body concerned by another one, if the interpreter did not provide an appropriate translation or due to other reasons.

It should be noted that the national law provide for the possibility for interpreter's participation in court proceedings via videoconference.

The Government would like to emphasise that the SMS widely apply the practice of engagement of the interpreters remotely by videoconference in order to provide detained foreigners and stateless persons in the PTPI with interpretation at different issue in a native/understandable language. Please be informed on statistical data at the issue.

Place of detention Year	2020	2021
Volynskiy center of temporary stay for foreigners and stateless persons	13	9
Chernihiv center of temporary stay for foreigners and stateless persons	175	50
Mykolaivskiy center of temporary stay for foreigners and stateless persons	103	178

The Government would like to note that the national legislation provides for alternative measures of detention of foreigners and stateless persons in cases of administrative violations related to migration.

The *Code of Administrative Procedure of Ukraine* (hereinafter – the **CAP**) envisages that a foreigner or stateless person, who violated the national law on border issue/on legal status of foreigners and stateless persons, can be imposed one of the following measures: 1) the detention of a foreigner or a stateless person for the purpose of his/her identification or forcible expulsion; 2) the personal guarantee of an enterprise, institution or organization on a foreigner or a stateless person; 3) the obligation of a foreigner or a stateless person to remand on bail.

The application of the above provisions is confirmed by existing judicial practice as follows:

- on 12 November 2018, the Mykachevskiy City District Court of Zakarpattia Region considered the case on the detention of the citizen of Tajikistan for the purpose of his identification and forcible expulsion from Ukraine. The Court found that the defendant was arrested by the SBGS' officers while attempting to cross the state border outside the checkpoint and was detained up to 3 days as the administrative offence. Within the court proceedings the defendant filed the request to be remand on bail. The court upheld the defendant's request and obliged him to put up bail⁴;
- on 3 October 2019, the Luchakivskiy District Court of Lviv considered the case on the extension of detention of the citizen of Tajikistan for the purpose of identification. The Court established that the defendant was found guilty for illegally crossing of the state border and was detained for the purpose of identification. During the trial the defendant filed the request for bail. The court granted bail to the citizen of Tajikistan⁵;
- on 9 March 2021, the Kivertsivskiy District Court of Volynskiy Region considered the case on the extension of detention of the citizen of Russia Federation pending the decision on the asylum application. The court found that the defendant appealed against the migration authorities' refusal to consider his asylum application and the final decision on his appeal had

⁴ <https://reyestr.court.gov.ua/Review/77759289>

⁵ <https://reyestr.court.gov.ua/Review/84718870>

not been adopted at that time. The court considered the defendant's request for bail and granted it⁶.

In addition, the Government would like to provide judicial practice regarding *suspension of execution of decisions adopted by the SBGS and the SMS with respect to irregular migrants* (enshrined in Chapter X "Injunction" of the CAP).

In case No. 810/1809/18⁷, on 11 July 2018, the Kyiv Administrative Court of Appeal quashed the first instance court's decision denying the citizen of Turkmenistan application for suspension of the execution of the SBGS's entry refusal decision to Ukraine. The appellate court noted that the failure to suspend such SBGS's decision could exclude the possibility of effective protection of the foreigner's rights, in particular with consideration of the administrative case against him. The court of appeal upheld the citizen of Turkmenistan application and suspended the SBGS' entry refusal decision until the decision in the administrative case with respect to foreigner was adopted.

In case, No. 212/1750/18⁸, on 21 November 2018, the Cassation Administrative Court within the Supreme Court upheld the first and the appellate instances courts' decisions granting the citizen of Uzbekistan request to suspend the SMS's decision on foreigner's forcible return and entry ban. The cassation court found that in case of non-suspension of the SMS's decision on forcible return of the citizen of Uzbekistan pending the administrative proceedings in her case, she would be deported and could not effectively protect her rights before the court.

III. STATE OF EXECUTION OF JUDGMENT

The Government would like to note that they understand the importance of protection of the rights of refugees, asylum seekers, foreigners and stateless persons in Ukraine. In this regard the Government will continue their efforts to take all necessary measures with a view to execution of the Court's judgments in these cases.

⁶ <https://reyestr.court.gov.ua/Review/95409626>

⁷ <https://reyestr.court.gov.ua/Review/75281031>

⁸ <https://reyestr.court.gov.ua/Review/78022780>