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SECRETARIAT OF THE COMMITTEE OF MINISTERS
SECRÉTARIAT DU COMITÉ DES MINISTRES

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Date: 24/11/2021

DH-DD(2021)1271

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

Communication from an NGO (16/11/2021) in the case of Kebe and Others v. Ukraine (Application No. 12552/12) and reply from the authorities (23/11/2021)

Information made available under Rules 9.2 and 9.6 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 : 1419e réunion (décembre 2021) (DH)

Communication d'une ONG (16/11/2021) relative à l'affaire Kebe et autres c. Ukraine (requête n° 12552/12) et réponse des autorités (23/11/2021) ***[anglais uniquement].***

Informations mises à disposition en vertu des Règles 9.2 et 9.6 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

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16 November 2021

Notre/Our code: HCR/ST/L/21/173

Re: **UNHCR Communication** in relation to the execution of the judgments of the European Court of Human Rights in the cases of ***Kebe and Others v. Ukraine* (Appl. No. 12552/12),**
***Nur Ahmed and Others v. Ukraine* (Appl. No. 42779/12),**
Nur and Others v. Ukraine* (Appl. No. 77647/11) *and
***M.S. v. Slovakia and Ukraine* (Appl. No. 17189/11).**

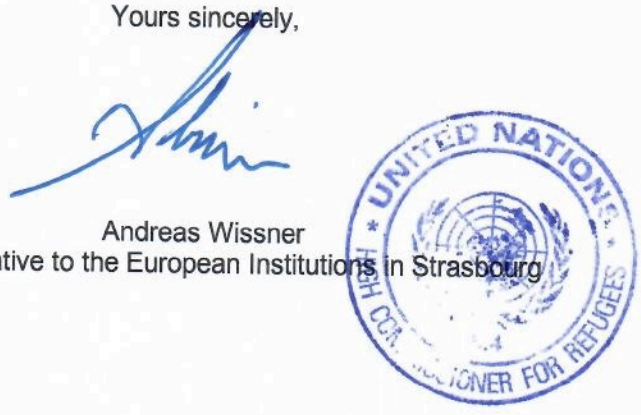
Dear Ms Ovey,

I would be grateful if you could bring the attached Recommendations by UNHCR concerning the execution of the judgments of the European Court of Human Rights in the cases of *Kebe and Others v. Ukraine* (Appl. No. 12552/12), *Nur Ahmed and Others v. Ukraine* (Appl. No. 42779/12), *Nur and Others v. Ukraine* (Appl. No. 77647/11) *and M.S. v. Slovakia and Ukraine* (Appl. No. 17189/11) to the attention of the Committee of Ministers ahead of its next meeting which will be held from 30 November to 02 December 2021 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,



Andreas Wissner
Representative to the European Institutions in Strasbourg

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

RECOMMENDATIONS BY UNHCR

regarding the execution of judgments of the European Court of Human Rights

in the cases of

Kebe and Others v. Ukraine (Appl. No. 12552/12),
Nur Ahmed and Others v. Ukraine (Appl. No. 42779/12),
Nur and Others v. Ukraine (Appl. No. 77647/11) and
M.S. v. Slovakia and Ukraine (Appl. No. 17189/11)

Introduction: These recommendations, addressed to the Ukrainian Government, are submitted in the context of the Council of Europe's Committee of Ministers supervision of the execution of judgments by the European Court of Human Rights ("the Court") in the cases of Kebe and Others v. Ukraine (Appl. No. 12552/12), Nur Ahmed and Others v. Ukraine (Appl. No. 42779/12), Nur and Others v. Ukraine (77647/11) and M.S. v. Slovakia and Ukraine (Appl. No. 17189/11). These cases are hereinafter referred to as the Kebe group of cases.

The United Nations High Commissioner for Refugees ("UNHCR") has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent 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 international law, as it pertains to refugee protection and solutions, UNHCR also seeks to assist the Council of Europe's Committee of Ministers in its assessment of the measures necessary for execution of these judgments.

[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, 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, http://www.unhcr.org/refworld/docid/3be01b964.html.

UNHCR's cooperation with the Government of Ukraine and its institutions: UNHCR has taken note of the Updated Consolidated Action Plan submitted by Ukraine (Secretariat of the Committee of Ministers, 4 August 2021)[3] and its Addendum (Secretariat of the Committee of Ministers, 8 October 2021).[4]

At the outset, UNHCR greatly appreciates the transparent, regular and constructive cooperation with the State Migration Service (SMS) and the State Border Guard Service (SBGS) of Ukraine, notably in regard to the provision of legal and material assistance to asylum-seekers and refugees, the annual Participatory Consultations with asylum-seekers and refugees, the consultations on the *Draft Law on Granting Protection to Foreigners and Stateless Persons*, and in regard to the provision of training to staff members of the SMS and SGBS. UNHCR also welcomes the ongoing cooperation with the SMS in regard to the planning of the rehabilitation of the Temporary Accommodation Center (TAC) for asylum-seekers in Odesa and confirms its readiness to support the development of an integration plan for refugees together with the SMS and experts from European Union countries.

UNHCR also wishes to recall the close cooperation with the Ukrainian authorities under the UNHCR and EU-funded Quality Initiative Project in Eastern Europe and South Caucasus from 2013 to 2019. This cooperation resulted in notable developments, namely improved legislation regarding the granting of complementary protection and the recognition of indiscriminate violence in situations of international or internal armed conflict, and systematic violations of human rights. The State Migration Service's structure was also optimized among 12 regional offices in charge of processing asylum applications. Furthermore, the asylum procedure was improved with the introduction of a new Refugee Status Determination Induction Manual. In addition, The SMS put in place a Country of Origin Information (COI) section in charge of updating information on the countries of origin of asylum-seekers and responding to COI requests by the regional SMS asylum units, and a national network of SMS staff and judges trained on the EASO curriculum was established. As a result of the Quality Initiative Project, the recognition rate of refugees increased from 14 percent in 2016 to 20 percent in 2020.

However, a number of persistent gaps continue to affect access to international protection in Ukraine, as highlighted by the Court, notably in relation to access to the asylum procedure at border points.

In regard to the **protection framework**, UNHCR notes that there have been no changes adopted to the national legal framework or procedural standards since the Court issued its judgments in the Kebe group of cases. A *Draft law on Granting Protection to Foreigners and Stateless Persons* (the Draft Law), pending first reading in the Verkhovna Rada of Ukraine (Parliament), contains important changes from the current *Law on Refugees and Persons in Need of Complementary, Temporary Protection*. UNHCR has shared observation and recommendations on the Draft Law[5], aimed at further bringing the text in line with international and European standards, including as set out in the European Convention on Human Rights[6].

[3] Published on 04 August 2021 on the website of the Secretariat of the Committee of Ministers of the Council of Europe: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2021)771E%22]}.
[4] Published on 08 October 2021 on the website of the Secretariat of the Committee of Ministers of the Council of Europe:https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a4160b.
[5] January 2020: https://www.refworld.org/docid/5e60ec1c4.html; May 2020: https://www.unhcr.org/ua/wp-content/uploads/sites/38/2020/07/UNHCR-Observations-on-the-New-Version-of-the-Draft-Law-on-Granting-Protection-to-Foreigners-and-Stateless-Persons.pdf.
[6] January 2020: https://www.refworld.org/docid/5e60ec1c4.html; May 2020: https://www.unhcr.org/ua/wp-content/uploads/sites/38/2020/07/UNHCR-Observations-on-the-New-Version-of-the-Draft-Law-on-Granting-Protection-to-Foreigners-and-Stateless-Persons.pdf.

The legal and procedural obligations and safeguards outlined in the Action Plan and its Addendum are important and relevant but issued prior to the review of these cases by the Court and thus require further development, including through the adoption of the Draft Law.

Asylum application at border points: In 2018 and 2019, UNHCR and the SBGS cooperated to ensure the installation of 30 boards for Border Control Posts with the Russian Federation and Belarus, and 24 stands with leaflets at international airports with information for asylum-seekers on the asylum procedure in Ukraine. The boards contain brief information in English and Russian on asylum and a warning relating to the use of faked passports, as well as contact details of the SBGS, SMS and UNHCR hotlines. The boards hold leaflets which contain details about the asylum and appeals procedures in Arabic, English, Farsi and Russian.

Nonetheless, UNHCR continued to receive reports in 2020 and 2021 of asylum-seekers denied access to the procedure by the SBGS, and who were consequently returned to the country of departure. One asylum-seeker from Iraq was returned to the country of departure on 23 December 2020 even though he had informed the SBGS officers, orally in Arabic and in writing in Arabic and English, that he was seeking asylum. Also, on 13 July 2021, an asylum-seeker from Tajikistan, who informed the SBGS of his intention to apply for asylum, was denied entry by the SBG at Boryspil International Airport outside Kyiv. Upon a monitoring visit to the airport by UNHCR partner and the Office of the Ombudsperson for Human Rights, the asylum-seeker was allowed to enter Ukraine and submit an application for asylum.

UNHCR observes that only small numbers of persons are admitted to the asylum procedure upon arrival at international borders, which raises concerns about the effectiveness of access to asylum at the border points. Upon UNHCR's bi-annual request, the SBGS provides data about the number of persons who have approached them to apply for asylum, and a breakdown of persons who applied upon regular entry at the border. In 2020, of a total of 80 persons who submitted asylum applications through the SBGS, 19 applied upon regular entry. In 2018, of 62 persons who submitted asylum applications, 14 applied upon regular entry. At the same time, persons from refugee-producing countries are prohibited entry to Ukraine in large numbers. This has been the case of, for example, Syrian nationals, of whom 181 were prohibited in entry in 2020, and 291 in 2019.

Under the current legal framework or procedural instructions, the SBGS has no obligation to admit an individual to the territory if he or she solely expresses a fear of being subjected to serious harm if returned to his or her country of origin. Article 1(8) of the current *Law on Refugees and Persons in Need of Complementary, Temporary Protection* stipulates that an asylum application shall consist of an application-questionnaire in a standardized form. Completing such an elaborate application often requires the asylum-seeker to have access to an interpreter and legal aid when filling in the form in the transit zone (see below). UNHCR thus recommends that the national legal framework include an obligation for the competent authorities to inform about the right to seek international protection, in a language that the person concerned understands, and to provide information on the possibility to obtain legal assistance to prepare an asylum application. This recommendation has also been shared by UNHCR with regard to the Draft Law.

Access to UNHCR and its partners: UNHCR appreciates the access granted to its staff and NGO partners through the Office of the Ombudsperson for Human Rights, both at border points and at detention facilities. Nonetheless, access of UNHCR and its NGO partners to transit zones at points of entry still requires improvements. Requests made by our partners to access the transit zone at Boryspil International Airport outside Kyiv are not always processed on time, and responses are often received after the person

has already been sent back to the country of departure. In 2020 and 2021, UNHCR partner has unsuccessfully sent 16 requests for access to the transit zone at Boryspil International Airport for the purpose of providing legal assistance to persons seeking international protection. UNHCR reaffirms its readiness to cooperate with the competent authorities in reviewing current conditions of access for UNHCR and NGO lawyers at international borders, and in particular in ports and airport transit zones.

Interpretation: To apply for asylum, an applicant must complete an eight-page long questionnaire, in Ukrainian. Currently, the SBGS has no legal obligation to provide interpretation to persons who wish to make an asylum application at an international border. Article 5(2) of the *Law on Refugees and Persons in Need of Complementary, Temporary Protection* provides that the SBGS officer must provide an interpreter competent in the language spoken by the applicant to help him or her explain the lack of identify document or the possession of false document. However, this does not include an obligation for the SBGS to assist the asylum-seeker in filling out the application form with the interpreter.

Access to a judicial remedy: The absence of an effective judicial remedy against decision by the SBGS on prohibiting entry to the territory remains a gap, given the above-mentioned practical obstacles faced by asylum seekers for accessing the asylum procedure in airport transit zones and in ports, and the vulnerability of asylum seekers stranded in transit zones or arriving in a port and not being allowed to disembark. As acknowledged by the Government of Ukraine in its Consolidated Action Plan[7], the lack of an effective appeal against decisions to deny entry (due to the lack of suspensive effect and the absence of guarantees for speedy examination) remains unresolved. Appeal to courts against decisions of denied entry are enshrined in the domestic law, but can only be a real option if the claimant has effective access to a lawyer and an interpreter in transit areas.

Detention and access to the appeal procedure: Regarding the detention of foreigners and their expulsion, UNHCR NGO partners continue to identify instances when border guards give documents on detention and expulsion in Ukrainian to detainees for their signature, while the persons do not understand their content. Local courts usually consider the case of detention and expulsion in writing. Thus, the detainees are deprived of opportunity to present their statement before the court on the risk they can be subjected to upon return to their country of origin. UNHCR therefore recommends that asylum-seekers should be provided with a written translation of a detention or expulsion decision, in a language they understand, as well as with a detailed legal counseling on the appeal procedure, including deadlines for submission. UNHCR also recommends that the Draft Law pending in Parliament is amended to ensure that the detention of asylum-seekers is only based on explicit grounds and in pursuit of a legitimate purpose, so as to make sure that it remains an exception rather than common practice, as required by international law.

[7] See Section 2 *Measures to respond to the violation of Article 13 on account of the absence of a remedy against the decision of border guards (Kebe and Others)* - https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2021)771E%22]}.

In **conclusion**, UNHCR stands ready to continue cooperating and contributing to the ongoing reform of the asylum procedure in Ukraine, and the finalization of the *Draft law on Granting Protection to Foreigners and Stateless Persons.* UNHCR's comments on the Draft Law and the related recommendations can help the Ukrainian authorities to address the shortcomings highlighted in this note and enshrine the good practices already in place.

UNHCR Representation in Ukraine
15 November 2021

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Mr Pavlo Pushkar

Head of Division
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Application no. 12552/12
Kebe and Others v. Ukraine

Dear Mr Pushkar,

As to the execution of the Court's judgments in the group of cases "*Kebe and Others v. Ukraine"* the Government of Ukraine would like to comment some issues in response to the United Nations High Commissioner for Refugees ("**UNHCR**") communication 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.

The Government of Ukraine would like to express appreciation to the UNHCR for their recommendations, given in order to eliminate the practical shortcomings in the access of the

international protection in Ukraine which is a key point within the execution of the Court's judgments in the *Kebe and Others* group of cases.

As regards detention and expulsion of foreigners, the Government would like to note that according to Article 289 *"Peculiarities of proceedings on cases upon administrative claims regarding the detention of foreigners or stateless persons"* of the Code of Administrative Procedure of Ukraine, consideration of issues concerning detention of a foreigner or stateless person for the purpose of identifying or forcible expulsion shall be carried out by the court with the obligatory participation of the parties. Consideration of cases on the extension of the detention of a foreigner or stateless person may be conducted via videoconference. The court of appeal shall consider the case within ten days after the expiry of the term of appeal with notification of the parties of the case.

Moreover, the administrative courts shall provide a foreigner or stateless person, who does not speak the state language and is not unable to pay for an interpreter, with an interpreter, since the failure to comply with the above requirements of the procedural law is a violation of the right to judicial protection guaranteed by the Constitution of Ukraine and is a ground for dismissing the court decision.

Therefore, the administrative courts shall examine cases on detention and forcible expulsion of a foreigner or stateless person with the mandatory participation of such foreigner or stateless person in court proceedings, as well as engage an interpreter where necessary, in order to provide the foreigner or stateless person concerned the explanations of the reasons of detention and the content of the expulsion decision.

In order to prepare comprehensive information for the authorities' further submission in the *Kebe and Others* group of cases the Government of Ukraine would like to note that the UNHCR's recommendations submitted under Rule 9 (2) of the above Rules regarding measures necessary for execution of these judgments, will be translated into Ukrainian and disseminated among all authorities concerned. The Government of Ukraine will provide the Committee of Ministers with up-to-date information on all the remaining issues upon collecting the necessary information from the competent authorities.

The Government would like to reiterate that they will continue working on improvement of the national legislation and administrative practice regarding granting international protection to the asylum-seekers and keep the Committee of Ministers informed about subsequent developments and measures taken.

Yours sincerely,

Olga DAVYDCHUK
Acting Agent before
the European Court of Human Rights