

Deprivation of liberty of refugees, asylum seekers and migrants in the Republic of Serbia

through measures of restriction and
measures of derogation from human
and minority rights made under
auspices of the state of emergency



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1 Introductory considerations

Due to the spread of an infectious disease COVID-19 caused by the SARS-CoV-2 virus¹, and pursuant to the Article 6, Paragraph 1 of the Law on the Protection of the Population from Infectious Diseases², the Government of the Republic of Serbia³ adopted a Decision declaring the COVID-19 infectious disease by the SARS-CoV-2 virus⁴. Article 1 of the Decision states that coronavirus is an infectious disease whose prevention and control are of an interest to the Republic of Serbia. It was further stated that in order to prevent the occurrence, spread and control of coronavirus and to protect the population from the disease, the measures prescribed by the LPPID, Law on Health Care⁵, and Law on Public Health⁶, will be applied, as well as other measures required by the epidemiological situation.⁷

Article 6, paragraph 1 of the LPPID provides that, in the event of a threat of an infectious disease such as coronavirus, which without any doubt significantly threatens the population of Serbia, the Government, at the

1 Hereinafter referred to as: coronavirus.

2 The Official Gazette of RS, no. 15/2016, hereinafter referred to as: LPPID.

3 Hereinafter referred to as: Government.

4 The Official Gazette of RS, nos. 23/2020, 24/2020, 27/2020, 28/2020, 30/2020, 32/2020, 35/2020, 37/2020, 38/2020, 39/2020, 43/2020, 45/2020, 48/2020 and 49/2020, hereinafter referred to as: COVID decision.

5 The Official Gazette of RS, no. 25/2019.

6 The Official Gazette of RS, no. 15/2016.

7 Article 2 of LPPID.

proposal of the Minister responsible for health, may declare such disease infectious whose prevention and control is in the interest of the Republic of Serbia. Based on that decision, it is possible to determine “appropriate measures, conditions, manner of enforcement, executors and means of enforcement“. Pursuant to the above stated provision, on 16 March 2020, the Government adopted a Decision on Temporary Restriction of Movement of Asylum Seekers and Irregular Migrants Accommodated in Asylum Centres and Reception Centres in the Republic of Serbia.⁸ The Decision on Temporary Restriction of Movement as a whole reads as follows:

1. In order to protect against the spread of infectious diseases in the territory of the Republic of Serbia, to prevent the uncontrolled movement of persons who may be carriers of viruses and to arbitrarily leave asylum centres and reception centres, the movement of asylum seekers and irregular migrants accommodated in asylum centres and reception centres in the Republic of Serbia is temporarily restricted and enhanced supervision and security of these facilities is established.

2. Asylum seekers and irregular migrants, exceptionally and in duly justified cases (visiting a doctor or for other justified reasons), will be allowed to leave the facilities referred to in item 1 of this Decision, with the special permission of the Commissariat for Refugees and Migration of the Republic of Serbia, which will be limited for a time in line with the reason it is issued.

3. This Decision shall enter into force on the day of its publication in “The Official Gazette of the Republic of Serbia”.

05 No. 019-2536 / 2020

In Belgrade, 16 March 2020

The Government

President,

Ana Brnabić, sgd.

On 9 April 2019, the Decision on Temporary Restriction of Movement was put out of force and its provisions were transposed into the Decree on Emergency Measures⁹ in identical form. Thus, from the “regular legal regime”,¹⁰ the ban on leaving asylum centres and reception centres was moved into an “extraordinary legal framework”, which made the above stated ban derogable.

The goal of this analysis is to explain the consequences which both the regular and extraordinary legal framework that introduced the “temporary restriction of movement” of refugees, asylum seekers and migrants caused to the enjoyment of the basic human rights to these categories of people, and above all to the enjoyment of the right to liberty and security of person. In conclusion, it will be assessed whether the

8 The Official Gazette of RS, no. 32/2020, hereinafter referred to as: Decision of Temporary Restriction of Movement.

9 The Official Gazette of RS, nos. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020 and 53/2020, hereinafter referred to as: Decree.

10 Meaning that restrictions of the rights of refugees, migrants and asylum seekers were conducted on the basis of the legal framework applicable in regular circumstances.

stated restrictions and derogations are in accordance with international conventions, generally accepted rules of the international law and the Constitution of the Republic of Serbia.¹¹

The analysis is part of the A 11 Solidarity Program and refers to the period from 16 March 2020 to 27 April 2020.



Statistical overview of the number of refugees and migrants in asylum centres and reception centres during the state of emergency and validity of the Decision on Temporary Restriction of Movement

The number of foreigners accommodated in asylum centres and reception centres on 6 April 2020¹²

Asylum Centre	Capacity	Current situation	Overcrowding rate
Banja Koviljača	120	111	/
Bogovađa	200	261	131%
Tutin	200	209	105%
Sjenica	250	382	153%
Krnjača	1.000	909	/
Total	1.770	1.872	106%
Reception centre	Capacity	Current situation	Overcrowding rate
Preševo	900	1.501	167%
Vranje	220	230	105%
Bujanovac	220	260	119%
Sombor	120	537	448%
Principovac	150	665	439%
Obrenovac	900	1.063	118%
Adaševci	450	1.142	254%
Bela Palanka	280	284	101%
Dimitrovgrad	90	/	/
Bosilegrad	60	80	133%
Pirot	250	192	77%
Kikinda	240	660	275%

¹¹ The Official Gazette of RS, no. 98/2006.

¹² UNHCR's official data.

Šid	210	238	113%
Total	3.670	6.852	186%
Asylum centre	Capacity	Current situation	Overcrowding rate
Banja Koviljača	120	110	/
Bogovada	200	261	131%
Tutin	200	209	105%
Sjenica	250	382	153%
Krnjača	1.000	829	/
Total	1.770	1.872	106%
Reception centre	Capacity	Current situation	Overcrowding rate
Preševo	900	1.488	166%
Vranje	220	230	105%
Bujanovac	220	265	121%
Sombor	120	522	435%
Principovac	150	648	432%
Obrenovac	900	1.049	117%
Adaševci	450	1.123	250%
Bela Palanka	280	284	102%
Dimitrovgrad	90	/	/
Bosilegrad	60	80	133%
Pirot	250	185	/
Kikinda	240	649	270%
Subotica	130	62	/
Šid	210	238	113%
Morović	?	105	?
Miratovac	?	94	?
Total	3.800	7.022	180%¹³

As of 6 April, the Republic of Serbia had a total of 5 asylum centres and 13 reception centres, with accommodation capacities for 5,440 persons.¹⁴ It is important to immediately note that the accommodation capacity is measured by the number of beds¹⁵ that can be provided, not by the square footage available to the Commissariat for Refugees and Migration.¹⁶ In fact, most reception centres with a capacity of 3,670 beds were established in 2015 and 2016, when nearly one million refugees passed through Serbia. The reception centres were designed for the needs of a short stay of only a few days, during which it was necessary for persons in need of international protection to leave Serbia in the direction towards Hungary or Croatia. However, after March 2016 and the agreement reached between the European Union and Turkey, the average period in which refugees and migrants began to stay in Serbia extended from a few days to a few weeks, then months, and today it is common for refugees and migrants to stay in Serbia for more than a year or two. Consequently, reception centres have also become a place of regular and usual residence for refugees and migrants, although this was not their initial purpose. However, it can be concluded for sure that none of the reception centres that accommodate more than a

¹³ The estimate does not include Morović and Miratovac.

¹⁴ The official data of the Commissariat for Refugees and Migration.

¹⁵ See at: <https://bit.ly/2JE1LA2>

¹⁶ Article 2 of the Decision, hereinafter referred to as: CRM.

thousand people, or over 500, should be considered as centres where human dignity of foreigners who have been staying there for more than a few days is respected.

On April 6 2020, in the asylum centres with accommodation capacity of 1,170 beds, a total of 1,872 individuals were accommodated with the highest overcrowding rate in Sjenica (153%), then in Bogovadja and Tutin (105%). In Krnjača and Banja Koviljača, there was no overcrowding. Total overcrowding rate in asylum centres was 106%.

On the same day, a total of 6,852 people were accommodated in reception centres with a capacity of 3,670 beds, raising the total overcrowding rate to 186%. The most heavily overcrowded reception centre is in Sombor (448%), then in Principovac (439%), Kikinda (275%), Adaševci (254%), Preševo (167%), Bosilegrad (133%), Obrenovac (118%), Bujanovac (119%), Šid (113%) and Vranje (105%).

On 12 April, 2020, the same number of people was accommodated in the asylum centres, while there was an insignificant relief of the most overcrowded reception centres due to the displacement of several dozen of people in Morović and Miratovac.

Decision on Temporary Restriction of Movement—restriction of the right to freedom of movement or deprivation of liberty?

3.1 Criteria of the European Court of Human Rights

Article 1 of the once valid Decision on Temporary Restriction of Movement states that, in order to prevent the spread of coronavirus, “the movement of asylum seekers and irregular migrants accommodated in asylum centres and reception centres is temporarily restricted”. The term used indicates that the intention of the legislator was to restrict the right to freedom of movement¹⁷, and not to deprive the above stated categories of persons of their liberty.¹⁸ The question that remains open is whether the level and intensity¹⁹ of the restriction to which refugees, asylum seekers and migrants are subjected reaches the threshold of deprivation of liberty, or whether it is really a restriction of the right to freedom of movement, as stated in the Decision. In order to answer the question raised, the distinction between the right to liberty and security of person and the right to freedom of movement must be emphasized, that is, the difference between the restrictions of those rights.

17 Article 2 of the Protocol no. 2 to the European Convention.

18 Article 5 of the European Convention.

19 ECtHR, De Tomasso v. Italy, App. No. 43395/09, Judgment of 23 February 2017, par. 80.

The European Court of Human Rights ²⁰ continually reiterates that the distinction boils down to the level and intensity of restriction of individual freedom in a broad sense. ²¹ The right to liberty and security of person protects the physical freedom of the individual, that is, his/her freedom to decide without impediments how he/she will move in the space around himself/herself. ²² The right to freedom of movement encompasses a broader term, and it implies the right of an individual to move within the territory of the state in which he or she resides legally, to choose where to reside and to change the place of residence, to leave and return to the country and so on. ²³ **Which of these two rights is restricted to refugees, asylum seekers and migrants?**

The answer to this question will be given by applying the criteria for determining the existence of deprivation of liberty developed by the European Court of Human Rights in its practice. So, whether one is deprived of liberty or his/her right to freedom of movement is restricted shall be determined on the basis of the criteria given, regardless of the legal qualification of the acting bodies of a particular country. ²⁴ In the concrete case, the Government of the Republic of Serbia described the ban on leaving asylum centres and reception centres as a “temporary restriction of freedom of movement”. **Does the term reflect the real situation?**

In order to determine whether refugees, asylum seekers and migrants are deprived of liberty, it is necessary to determine the **types, duration, effects and manner of implementation of the measures in question.** ²⁵ In order to distinguish between the restriction of the right to freedom of movement and deprivation of liberty in the context of the detention of migrants and refugees in reception centres for the purpose of identification or determination of legal status, the European Court of Human Rights has taken into account the following criteria:

- 1. the applicant’s individual situation and choice;**
- 2. the legal regime applicable and its purpose;**
- 3. duration;**
- 4. the nature and extent of the specific restriction imposed or experienced by the applicant.** ²⁶

The European Court of Human Rights points out that, even if the restriction measures are intended to protect the individuals, and their purpose is not necessarily negative for them, this will not affect its de-

20 Hereinafter referred to as: European Court.

21 *Ibid.*

22 ECtHR, *Creangă v. Romania*, App. No. 29226/03, Judgment of 23 February 2012 [GC], par. 84.

23 Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 1 November 1999, CCPR/C/21/Rev.1/Add.9 **, par. 1, 4, 5 and 7-10.

24 ECtHR, *Khlaifia and Others v. Italy*, App. No. 16483/12, Judgment of 15 December 2016 [GC], par. 71.

25 ECtHR, *Guzzardi v. Italy*, App. No. 7367/76, Judgment of 6 November 1980, par. 92.

26 ECtHR, *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Judgment of 21 November 2019 [GC], par. 217.

cision to judge the restriction – deprivation of liberty or not.²⁷ The fact that the person in question is not handcuffed, put in a cell or otherwise physically confined does not constitute a decisive factor in determining the presence of a deprivation of liberty.²⁸

In addition, the presence of deprivation of liberty within the meaning of the Article 5 (1) of the European Convention on Human Rights contains an objective and subjective criterion. The objective criterion is determined on the basis of the person's confinement in a particularly restricted space, for a period that is not negligible, and on that person's ability to leave that restricted space. The level of supervision to which the person in question is subject is also taken into account, as well as the level of control of his/her movement, the extent of isolation and the possibility of social contacts.²⁹ The subjective criterion is determined on the basis of the fact whether the person in question agreed to be confined or not.³⁰

3.2

Application of the above stated criteria to refugees, asylum seekers and migrants who are prohibited from leaving asylum centres and reception centres

As already mentioned in the introductory part, since 16 March, no refugee, migrant or an asylum seeker has been allowed to leave the asylum centre or reception centre, except in exceptional circumstances estimated by CRM.³¹ All they are allowed to do is to move around the circle/yard of the centre of their residence.

Within all reception units, refugees, asylum seekers and migrants have the opportunity to use mobile phones, the internet and, therefore, social networks. It is also their only contact with the outside world. They are not allowed to have a direct contact with their legal representatives, psychologists or other persons providing other types of services. In fact, they are deprived of the right to legal aid.

Armed members of the Ministry of Defence were deployed in front of the camps.³² It is practically impossible to get out of the camp for twenty-four hours, because the military is authorized to use firearms as the last resort.³³

Therefore, refugees, migrants and asylum seekers are unable to walk down the streets like other citizens of the Republic of Serbia. They cannot go to a store, post office, bank or pharmacy. The food they eat is given solely in the centres. On the other hand, other citizens of Serbia or foreigners staying outside asylum centres and reception centres have this opportunity on working days from 5 a.m. to 5 p.m., in accordance with the Decree.

27 *Khlaifia*, par. 71.

28 ECtHR, *M.A. v. Cyprus*, App. No. 41872/10, Judgment of 23 July 2013, par. 193.

29 ECtHR, *Strock v. Germany*, App. No. 61603/00, Judgment of 16 June 2005, par. 73, i *Guzzardi*, par. 95.

30 ECtHR, *Stanev v. Bulgaria*, App. No. 36760/06, Judgment of 17 January 2012, par. 117.

31 Article 2 of the Decision on Temporary Restriction of Movement.

32 Ministry of Defence, The military took control of the reception and asylum centres, 18 March 2020, available at: <https://bit.ly/2JDHLgX>

33 *Danas Daily*, *Vulin: "Broj obolelih vojnika tajna, nema zaraženih migranata"*, 11 April 2020, available at: <https://bit.ly/3b3jY6q>

In the event that a person succeeds in leaving the camp without a permit, that act carries the risk of misdemeanour and/or criminal liability.³⁴ The punishment for two offences – failure to comply with health regulations during the epidemic (Article 248 of the Criminal Code³⁵) and transmission of an infectious disease (Article 249 of the Criminal Code) is three years of imprisonment.

There is a night rest between 11 p.m. and 6 a.m., when everyone is required to be in their rooms. In most camps where refugees, migrants and asylum seekers are accommodated, the bedrooms are locked.³⁶

When it comes to the area around the facilities in which they reside, which they have at their disposal to move around, here are some examples. The Krnjača Asylum Centre, consisting of 16 barracks with a total of 240 four-bed rooms, is located on a plot of approximately 5.5 acres, or 0.02 km². People residing there can only move within the yard. As of 12 April 2020, 829 persons were staying at the Krnjača Asylum Centre. Due to the fact that asylum centres or reception centres are overcrowded, as well as that different religious and ethnic backgrounds are not separated, not all persons can move in every part of the yard. For example, since 16 March 2020, when the ban on leaving the Centre was introduced, there have been several clashes between Kurds and Afghans, some of which ended in grievous bodily harm that required hospitalization.³⁷ Police officers of the Ministry of Interior also intervened on several occasions, using unjustified or excessive force.³⁸



Output : Current Area

22668.77 m² | 0.02 km² | 5.60 acres | 2.27 hectares | 244004.56 feet² | 0.01 square miles | 0.01 square nautical miles

Current Perimeter

Area of the Krnjača Asylum Centre

The Asylum Centre in Banja Koviljača consists of one accommodation facility with the capacity of 120 beds. At one point, there were 327³⁹ people in Banja Koviljača, which means that the overcrowding rate was about 272%. The space in front of the accommodation facility is about 0.4 acres, or less than 0.01 km².

34 Nikola Kovačević, Analysis of measures derogating from human and minority rights during the state of emergency in the Republic of Serbia caused by the epidemic of infectious disease COVID-19, A 11 - Initiative for Economic and Social Rights, Belgrade, March 2020, available at: <https://bit.ly/2VMYH0b>, p. 9-11.

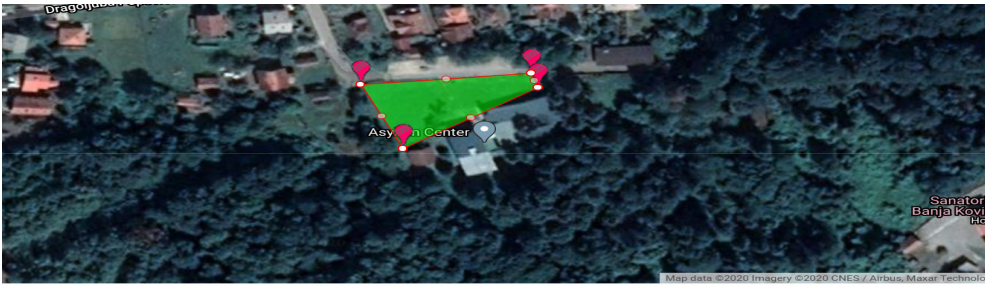
35 The Official Gazette of RS, no. 85/2005, 88/2005 - cor., 107/2005 - cor., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

36 Article 8 of the House rules in the asylum centre or other facility intended for accommodation of asylum seekers, The Official Gazette of RS, no. 96/2018.

37 More about the abuse of refugees, migrants and asylum seekers in the following analyses of A 11 - Initiative for Economic and Social Rights.

38 *Ibid.*

39 Later reduced to 110.



Output : Current Area

1466.66 m² | 0.00 km² | 0.36 acres | 0.15 hectares | 15787.01 feet² | 0.00 square miles | 0.00 square nautical miles
Current Perimeter

The accommodation capacity of the Adaševci Reception Centre amounts to 450 beds, while at the moment there are a total of 1,123 persons, which brings the overcrowding rate to about 250%. The total area occupied by the Reception Centre is about 4.5 acres, or 0.02 km². Even before the introduction of the ban on going out, the Adaševci Reception Centre was one of the worst, both in terms of conditions (overcrowding, hygiene) and safety. It consists of accommodation in the old Adaševci Resort building, as well as five large tent rooms housing dozens of refugees and migrants.⁴⁰ The author of this report dares to assess the current situation in that camp as inhuman and degrading towards any individual who resides there.

Area of Adaševci Reception Centre



Output : Current Area

198400.15 m² | 0.02 km² | 4.55 acres | 1.84 hectares | 198400.15 feet² | 0.01 square miles | 0.01 square nautical miles

One of five tent rooms in Adaševci Reception Centre



40 Nikola Kovačević, Serbia: Country Report, 2018 Update, Asylum Information Data Base, Brussels 2019, European Council for Refugees and Exiles, available at: <http://bit.ly/2nDIw1M>, str. 59 i 62.

Given the above stated, the question that arises next is whether the restrictions described are sufficient to qualify the regime to which refugees, asylum-seekers and migrants are subject as deprivation of liberty. The judgment of the European Court of Human Rights in *Guzzardi v. Italy* might be a good example of an adequate assessment of whether or not there has been a deprivation of liberty. Mr Guzzardi was located on the island of Cala Reale, where he was prohibited from leaving a hamlet of about 2.5 km². The Court of Justice stated the following:

[...]Whilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier, it covered no more than a tiny fraction of an island to which access was difficult and about nine-tenths of which was occupied by a prison. Mr. Guzzardi was housed in part of the hamlet of Cala Reale which consisted mainly of the buildings of a former medical establishment which were in a state of disrepair or even dilapidation, a carabinieri station, a school and a chapel. He lived there principally in the company of other persons subjected to the same measure and of policemen. The permanent population of Asinara resided almost entirely at Cala d'Oliva, which Mr. Guzzardi could not visit, and would appear to have made hardly any use of its right to go to Cala Reale. Consequently, there were few opportunities for social contacts available to the applicant other than with his near family, his fellow "residents" and the supervisory staff. Supervision was carried out strictly and on an almost constant basis. Thus, Mr. Guzzardi was not able to leave his dwelling between 10 p.m. and 7 a.m. without giving prior notification to the authorities in due time. He had to report to the authorities twice a day and inform them of the name and number of his correspondent whenever he wished to use the telephone. He needed the consent of the authorities for each of his trips to Sardinia or the mainland, trips which were rare and, understandably, made under the strict supervision of the carabinieri. He was liable to punishment by "arrest" if he failed to comply with any of his obligations. Finally, more than sixteen months elapsed between his arrival at Cala Reale and his departure for Force.

It is admittedly not possible to speak of "deprivation of liberty" on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the viewpoint of Article 5 (art. 5). In certain respects the treatment complained of resembles detention in an "open prison" or committal to a disciplinary unit [...]

The Court considers on balance that the present case is to be regarded as one involving deprivation of liberty.⁴¹

Therefore, the type, duration, effects and manner of implementation of the measure of "temporary ban on leaving" asylum centres and reception centres for refugees, migrants and asylum seekers are reflected in:

→ prohibition of the abandonment of space in front of facilities that make up asylum centres and reception centres whose area does not reach up to 0.1 km²;

→ the level and intensity of surveillance by CRM workers and armed Ministry of Defence soldiers and Ministry of Interior police officers authorized to use force;

41 *Guzzardi*, par. 95.

→ Inability to make direct social contact with the outside world except by phone and social networks, including legal representatives and psychologists;

→ the risk of criminal and misdemeanour liability in the event of leaving the centre, which could ultimately result in imprisonment of up to three years;

→ a stay that for some of them lasts 35 days on the day of publication of this report.

Cumulatively, these measures cannot be considered a “temporary restriction of movement” but a deprivation of liberty. So, refugees, asylum seekers and migrants who are prohibited from leaving asylum centres and reception centres are deprived of liberty. The basis on which foreigners were deprived of the liberty for 25 days is the Decision on Temporary Restriction of Movement, which falls within the scope of the by-law, which was adopted on the basis of the LPPID.

4

Legality of deprivation of liberty

4.1

Criteria of the European Court of Human Rights

The right to liberty and security of person protects an individual from arbitrary or unjustifiable deprivation of liberty⁴² and represents one of the greatest values in a democratic society.⁴³ No deprivation of liberty will be lawful unless it is carried out based on one of the seven grounds set out in Article 5 (1) of the European Convention on Human Rights.⁴⁴ Only a deprivation of liberty which complies with the substantive and procedural national rules is lawful. So, the right to liberty and security of person will always be violated if the acting authorities do not apply domestic procedures governing the deprivation of liberty under one of the grounds set out in Article 5 of the European Convention on Human Rights. Therefore, when examining violations of Article 5, the European Court always reviews **whether, in a particular case, the authorities imposing a measure of deprivation of liberty have followed the procedures laid down by applicable laws.**⁴⁵

The requirement of legality does not imply that deprivation of liberty is only in accordance with domestic law, but also that domestic law must comply with the European Convention and its general principles such as legal certainty, the principle of proportionality and the principle of protection against arbitrariness, which is at the core of the Article 5.⁴⁶

42 ECtHR, *McKay v. the United Kingdom*, App. No. 543/03, Judgment of 3 October 2006 [GC], par. 30.

43 ECtHR, *Medvedyev and Others v. France*, App. No. 3394/03, Judgment of 29 March 2010 [GC], par. 76.

44 *Khlaifia*, par. 88.

45 *Creangă*, par. 101.

46 ECtHR, *Plesó v. Hungary*, App. No. 41242/08, Judgment of 2 October 2012, par. 59, i *Simons v. Belgium*, App. No. 71407/10, Decision of 28 August 2012, par. 32.

The principle of legal certainty implies that conditions for deprivation of liberty, according to the national regulations, must be clearly defined and that law itself must be predictable in terms of its implementation. This means that national regulation must be sufficiently precise to enable the person concerned to anticipate to the extent reasonable the circumstances, the duration and the consequences of the deprivation of liberty.⁴⁷ Therefore, the national law must meet certain conditions of “quality”, as this is the only way to ensure that an individual deprived of liberty is protected from arbitrary treatment. This is ensured if the law is foreseeable and precisely defined in terms of provisions concerning the determination and extension of deprivation of liberty and the existence of a remedy which an individual can use to challenge the lawfulness and length of detention.⁴⁸

When it comes to the term of arbitrariness, that is, unpredictability, which as a rule undermines the principle of legal certainty, it is very important to emphasize that deprivation of liberty may be lawful in terms of domestic procedures but still arbitrary within the meaning of Article 5 of the European Convention.⁴⁹ Therefore, unlawful deprivation of liberty is always arbitrary, but lawful deprivation of liberty can also be arbitrary, because the law itself is not tailored to the right to liberty and security of person.⁵⁰

Also, in order to avoid arbitrariness, any decision on deprivation of liberty must be reasoned and that reasoning must show what circumstances have been taken into account in order to resort to detention. Lack of reasoning almost always leads to arbitrariness⁵¹, and especially when no legal grounds are explicitly stated⁵² or the grounds are not stated at all.⁵³ Also, where the decision does not contain a wording indicating the duration of deprivation of liberty, such detention is always arbitrary because it is unpredictable.⁵⁴

As the deprivation of liberty of refugees, asylum seekers and migrants was carried out to prevent the spread of infectious disease COVID-19, the only basis for deprivation of liberty arising from the European Convention is the Article 5 (1), which provides that:

[...] No one shall be deprived of his liberty except in the following cases and in accordance with a procedure prescribed by law:

[...]

e) the lawful detention of persons for the prevention of the spreading of infectious diseases [...]

47 *Creangă*, par. 120.

48 ECtHR, *J.N. v. the United Kingdom*, App. No. 37289/12, Judgment of 19 May 2016, par. 77.

49 *Creangă*, par. 84.

50 *Creangă*, par. 164.

51 ECtHR, *S., V. and A. v. Denmark*, App. Nos. 35553/12 36678/12 36711/12, Judgment of 22 October 2018 [GC], par. 92.

52 ECtHR, *Stašaitis v. Lithuania*, App. No. 47679/99, Judgment of 21 March 2002, par. 66-67.

53 ECtHR, *Khudoyorov v. Russia*, App. No. 6847/02, Judgment of 8 November 2005, par. 157.

54 *J.N.*, par. 90.

Therefore, detention aimed at preventing the spread of infectious diseases is tantamount to deprivation of liberty, which the European Court found in *Enhorn v. Sweden*.⁵⁵ In the concrete case, one of the measures taken against the applicant was compulsory home isolation which did not require strict supervision, that is, isolation from which Mr Enhorn could have come out at any time without risk of being imposed a more severe measure, which followed when he made a breach of home isolation (involuntary hospitalization at a healthcare facility).⁵⁶ In such cases, two additional conditions must be fulfilled in order to pass the test of legality and arbitrariness:

- 1. whether the spread of an infectious disease is dangerous to public health and safety;**
- 2. whether deprivation of liberty of an infected person is the ultimate measure that alone can prevent the spread of the infection, that is, whether other, more lenient measures were not sufficient to protect the public interest.**⁵⁷

In addition to the conditions required by the laws and procedures for deprivation of liberty, every person deprived of liberty must be informed of the reasons for detention.⁵⁸ Therefore, notification of the reasons for deprivation of liberty is a basic safeguard against arbitrariness⁵⁹ and enables a person to find out why he or she is in such a situation and what are the arguments that he or she can challenge in order to examine the lawfulness of the deprivation of liberty before a court⁶⁰, envisaged by the Article 5 (4) of the European Convention. Unless informed of the reasons for his or her deprivation of liberty, the person cannot effectively use the right to appeal to the judicial body⁶¹, and that notice must be given within a few hours⁶², in a language that the person understands.⁶³

When it comes to the aforementioned right to review a decision by a judicial body, that right represents one of the greatest civilizational values, established as early as in XV century – habeas corpus. The Constitution of the Republic of Serbia stipulates that a person deprived of liberty without a court decision must be delivered without delay, and within 48 hours at the latest, to the competent court, otherwise he/she shall be released.⁶⁴

55 ECtHR, *Enhorn v. Sweden*, App. No. 56529/00, Judgment of 25 January 2005, par. 33.

56 *Ibid.*

57 *Ibid.*, par. 44.

58 Article 5 (2) of the European Convention.

59 *Khlaifia*, par. 115.

60 ECtHR, *Čonka v. Belgium*, App. No. 51564/99, Judgment of 5 February 2002, par. 50.

61 ECtHR, *Shamayev and Others v. Georgia and Russia*, App. No. 36378/02, Judgment of 12 April 2005, par. 413.

62 ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, App. Nos. 12244/86 12245/86 12383/86, Judgment of 30 August 1990, par. 42.

63 *Shamayev and Others*, par. 425.

64 Article 29, Par. 2 of the Constitution.

4.2

Application of the above stated criteria to refugees, asylum seekers and migrants deprived of liberty in asylum centres and reception centres

Given the enumerated criteria that a particular measure of deprivation of liberty must meet in order to be considered lawful and not arbitrary, it is first necessary to map the legal framework on the basis of which refugees, asylum seekers and migrants in asylum centres and reception centres were deprived of liberty.

The umbrella regulation on the basis of which the deprivation of liberty of the listed categories of foreigners was carried out is LPPID, Article 6, Paragraph 1; LPPID provides that:

In case of a threat of an infectious disease that is not specified in Article 5 of this Law and which may endanger the population of the Republic of Serbia to a greater extent, the Government, at the proposal of the Minister responsible for health [...] may declare such a disease an infectious disease whose prevention and control is in the interest of the Republic of Serbia, as well as to determine appropriate measures, conditions, manner of implementation, executors and means of implementation.

On the basis of the above stated provision, the Government issued a COVID decision and stated in points 1 and 2 that:

1. The COVID-19 disease caused by the SARS-CoV-2 virus is declared an infectious disease whose prevention and control is in the interest of the Republic of Serbia.

2. In order to prevent the occurrence, spread and control of COVID-19 infectious disease and to protect the population from that disease, the measures prescribed by the Law on the Protection of the Population from Infectious Diseases, the Law on Health Care, the Law on Public Health, will be applied, as well as other measures in accordance with the epidemiological situation.

Since Decision on COVID has been reached, and based on the Article 6, Paragraph 1 of the LPPID, the Government, at the proposal of the Minister responsible for health, may determine “appropriate measures, conditions, manner of enforcement, executors and means of enforcement”. Pursuant to the above stated provision, the Government adopted a Decision on Temporary Restriction of Movement, which in Items 1 and 2 envisages as follows:

1. In order to protect against the spread of infectious diseases in the territory of the Republic of Serbia, to prevent the uncontrolled movement of persons who may be carriers of viruses and to arbitrarily leave asylum centres and reception centres, the movement of asylum seekers and irregular migrants accommodated in asylum centres and reception centres in the Republic of Serbia is temporarily restricted and enhanced supervision and security of these facilities is established.

2. Asylum seekers and irregular migrants, exceptionally and in duly justified cases (visiting a doctor or for other justified reasons), will be allowed to leave the facilities referred to in the item 1 of this Decision, with the special permission of the Commissariat for Refugees and Migration of the Republic of Serbia, which will be limited for a time in line with the reason it is issued.

Starting with the criteria for assessing the legality and non-arbitrariness of deprivation of liberty summarized in the previous section, **a whole set of controversial questions arise regarding the legal regime imposed on refugees, asylum seekers and migrants.**

First of all, their deprivation of liberty was carried out on the basis of a by-law issued on the basis of Article 6, Paragraph 1 of the LPPID, which is too broad. Taking into account the formulation referred to in the said Article, the Government, at the proposal of the Minister of Health, may determine “appropriate measures, conditions, method of implementation, executors and means of implementation”. Thus, the Decision can be taken under some kind of “measure” against the spread of the infectious disease COVID-19. That measure, i.e. the Decision, has the ultimate consequence of deprivation of liberty.

As already stated, the Decision is by its nature a by-law, and as such cannot be a ground for deprivation of liberty. Both the Article 5 of the European Convention and the Article 27 of the Constitution of the Republic of Serbia provide that no one shall be deprived of liberty except for **the reasons and within the procedure provided for by law**. Therefore, it is not possible to enforce deprivation of liberty on the basis of a by-law and the Decision is prima facie contrary to the Constitution.

Even if it is not unconstitutional, the Decision on Temporary Restriction of Movement by its content does not meet any of the criteria listed in the section 4. 1, which protect an individual from unlawful and arbitrary deprivation of liberty. It does not provide for:

- 1.** procedure for deprivation of liberty;
- 2.** the reasons and conditions for determining, extending and ending the detention;
- 3.** the duration of detention;
- 4.** making individual and reasoned decision on deprivation of liberty;
- 5.** the obligation to communicate the reasons for deprivation of liberty in a language that the person concerned understands;
- 6.** the possibility of appealing to the judicial body or filing any other legal remedy that could initiate the process of challenging the legality of deprivation of liberty;
- 7.** the possibility of engaging a legal representative by a person deprived of liberty and potentially other rights such as the right to medical examination and the right to be informed by a third party of his/her own choice.

In fact, the measure implemented by the Government at the proposal of the Minister of Health introduced a collective deprivation of liberty for all refugees, migrants and asylum seekers and *de facto* suspended any aspect of the right to liberty and security of person in relation to them. That decision is unpredictable, lacks the quality of law, has introduced legal uncertainty and has deprived foreigners of all procedural guarantees against arbitrariness.

It is also important to mention the reasons that can be defined by a comprehensive interpretation of the poor legal framework that illegally and arbitrarily deprives refugees, asylum seekers and migrants of liberty. To reiterate: their deprivation of liberty was carried out on the basis of one provision of the Government's Decision. The aim of the decision was formulated as **“preventing the uncontrolled movement of persons who may be carriers of the virus”**. So, there are two assumptions made in this formulation. The first is that refugees, migrants and asylum seekers can be carriers of the virus. The second is that people in that category tend to move uncontrollably, and therefore can spread the virus.

When it comes to the first assumption, namely that refugees, asylum seekers and migrants can be carriers of the virus, it is difficult to find an argument against it. In fact, every human being, including foreigners deprived of liberty in asylum centres and reception centres can be carriers of coronavirus. However, coronavirus carriers may also be Serbian nationals or other foreigners residing in the territory of Serbia, as confirmed by official data.⁶⁵ According to official data, **no person currently carrying the virus in Serbia comes from a population of refugees, migrants and asylum seekers**. Therefore, the question that arises is why “freedom of movement is not temporarily restricted” to all persons in the territory of the Republic of Serbia, or why refugees, asylum seekers and migrants cannot have the same regime of movement as Serbian nationals, foreigners residing in Serbia on a different basis, but also refugees or asylum seekers residing at private addresses.⁶⁶

When it comes to uncontrolled movement, the Government's Decision does not provide for a clear explanation of what is meant by uncontrolled movement. However, it can be assumed that this is a movement that would be contrary to the regulations made under the umbrella of the state of emergency, and above all to the Decree and the Order. So, ban on movement between 5 a.m. and 5 p.m. on weekdays.⁶⁷ However, the question that remains open is whether uncontrolled movement is inherent only to refugees, migrants and asylum seekers, or it is possible in other persons. According to data published periodically by the MoI, more than 6,500 citizens have so far been found guilty of misdemeanour or criminal responsibility for violating the Order.⁶⁸ Almost all people who were fined or prosecuted for violating the Order or other regulations on suppression of epidemic were domestic citizens, with the exception of migrants who forcibly attempted to leave the Obrenovac Reception Centre.⁶⁹ Therefore, “uncontrolled movement” is not specific only for foreigners

65 On 6 April 2020, a total of 2,200 people residing in the territory of the Republic of Serbia were infected with coronavirus, N1, “Coronavirus in Serbia: interactive display of the number of infected by cities”, 6 April 2020, available at: <https://bit.ly/34jb0nD>

66 Article 50, Par. 8 of the Law on Asylum and Temporary Protection.

67 Item 2 of the Decree.

68 *Novi Magazin*, Rebić: “Rebić: Od početka vanrednog stanja 21 žrtva saobraćajnih nezgoda” 26 April 2020, available at: <https://bit.ly/2YhRP8c>: (available only in Serbian).

69 *Telegraf Daily*, “Incidenti sa migrantima u Obrenovcu: digli pobunu jer ne smeju da izadu napolje, nervoza zbog korone”, 6 April 2020, available at: <https://bit.ly/3bYozGU> (available only in Serbian).

deprived of liberty in reception and asylum centres, and the question arises as to why all persons in the territory of Serbia are not subject to the same regime, or why refugees, asylum seekers and migrants not belonging to the vulnerable category do not have the opportunity to move within the time allowed.

Such a distinction falls under the breach of the principle of equal rights and obligations laid down in the Article 8 of the Law on Prohibition of Discrimination⁷⁰ and constitutes direct discrimination.⁷¹ Specifically, the contents of the Decision do not show why this group of people with a common personal capacity was singled out. Therefore, it is not explained if and why they are an endangered category or a category more prone to virus transmission and uncontrolled movement. As already mentioned, according to the available data on the sick and infected in the territory of Serbia, there is no recorded case of infection in the asylum centres and reception centres. In addition, comparing the data available in other countries on the route of refugees, migrants and asylum seekers, we cannot conclude that this group of people is labelled as particularly at risk for coronavirus disease.⁷² Therefore, it is unjustified that one group is separated and its rights are restricted and violated on the basis of its personal capacity.

Having in mind that there is no information that this group is particularly at risk of the disease or spread of the disease, it is not clear why it was singled out. Would this mean that any group without an indication of being particularly endangered could be restricted from the right to liberty and security of person without any justification? For example, would the reaction be the same if people with disabilities were prohibited from leaving their apartments solely because they have a disability without being associated with coronavirus disease?

In addition, if the authorities consider that this group is at risk because these people come from outside the country and are suspected of having a virus, it would be more appropriate and proportionate to treat them as Serbian citizens who have returned from abroad, that is to apply the health surveillance or quarantine measure provided for by the LPPID. The absolute prohibition of movement resulting in deprivation of liberty is not justified and proportionate and is contrary to the Constitution and the anti-discrimination legal framework.

Therefore, refugees, migrants and asylum seekers who did not reside at a private address prior to the declaration of the state of emergency were discriminated against by the Decision on Temporary Restriction of Movement. Discrimination was conducted on the basis of their status (refugee, asylum seeker or migrant), origin and place of temporary residence (asylum centres and reception centres).

In view of all the above stated, refugees, migrants and asylum seekers who were prohibited from leaving asylum centres and reception centres under the Decision were unlawfully and arbitrarily deprived of liberty on the basis of discriminatory criteria based on their legal status, origin and temporary residence.

70 The Official Gazette of RS, br. 22/2009, hereinafter referred to as: Law of Prohibition of Discrimination in the Republic of Serbia.

71 Article 6 on the Law of Prohibition of Discrimination in the Republic of Serbia.

72 This is the case with, for instance, persons older than 65 years of age, diabetics or heart patients.



Decree on Emergency Measures

As already stated, on 9 April 2019, the Decision on Temporary Deprivation of Liberty was put out of force and its provisions were moved into the Decree, making it indisputable that the right to liberty and security of refugees, asylum seekers and migrants was derogated. Therefore, below is an analysis of the derogatory measures applied to that category of persons with regard to their right to liberty and security. The criteria and rules for derogations arising from the case-law of the European Court of Justice and the Human Rights Committee have already been summarized in one of the publications of Initiative A 11⁷³, and, with modifications characteristic for the right to liberty, will be applied to the derogation in question. The steps that the analysis will take will be based on the following questions:

1. Is there a state of emergency in Serbia that threatens the life of the nation?
2. Has the state of emergency been officially and publicly declared?
3. Could a regular legal framework have led to a “collective” deprivation of liberty of refugees, asylum seekers and migrants?
4. Was it necessary and was the derogation of the right to liberty and security of person of refugees, asylum seekers and migrants proportionate?
5. Is the derogation of the right to liberty and security of person of refugees, asylum seekers and migrants consistent with the principle of non-discrimination?
6. Have the Secretaries-General of the Council of Europe and the United Nations been informed of the derogation of their right to liberty and security of person?

1) Is there a state of emergency in Serbia that threatens the survival of the nation?

As stated in the Analysis, the threat posed by COVID-19 infectious disease may threaten the survival of the nation⁷⁴, but the question that remains open is whether the fight against that disease can be led by a regular legal framework, including the umbrella regulation of the LPPID, which provides for a range of preventative and reactive measures.

⁷³ Nikola Kovačević, *Analysis of measures derogating from human and minority rights during the state of emergency in the Republic of Serbia caused by the epidemic of infectious disease COVID-19*, A11 – Initiative for Economic and Social Rights, Belgrade, March 2020, available at: <https://bit.ly/2VMY-H0b>, section 2, hereinafter referred to as: Analysis.

⁷⁴ Analysis, section 3. 1.

2) Has the state of emergency been officialy and publicly declared?

The state of emergency was introduced on 15 March 2020.⁷⁵

3) Could a regular legal framework have led to a “collective” deprivation of liberty of refugees, asylum seekers and migrants?

No regulation applied in regular circumstances provides for the possibility of the collective deprivation of liberty of any category of persons under the effective control of Serbia. The Law on the Protection of Population from Infectious Diseases has certain provisions governing deprivation of liberty aimed at preventing the spread of infectious diseases, but it is generally applicable to persons suspected of being infected, in contact with an infected person, or residing at an area in which an infectious disease is present. In relation to that, a decision can be made on placing them under medical supervision⁷⁶ or quarantine.⁷⁷ So, there is no regulation within the regular legal framework that allows a certain category to be deprived of liberty and all accompanying guarantees such as an individual decision explaining and stating the duration of the measure, court protection, pre-prescribed criteria, the possibility of appealing to the court and hiring legal representative, and so on.

4) Was it necessary and was the derogation of the right to liberty and security of person of refugees, asylum seekers and migrants proportionate?

When it comes to necessity, it is difficult to assess this without referring to the regime to which the citizens of Serbia under 65 years of age are subjected. The right to freedom of movement is restricted to this category of population⁷⁸ and members of that category have the possibility to move freely outside their homes on weekdays from 5 a.m. to 5 p.m. Therefore, it was not considered necessary to deprive them of liberty. On the other hand, one of the assumptions first in the Decision, and now in the Decree, is that refugees, asylum seekers and migrants “are moving uncontrollably”. Probably the legislator meant at their aspiration to continue on their way to the EU countries through irregular crossings to Hungary, Romania or Croatia. This argument must, to some extent, be taken into account, but the complexity of the right to liberty and security of person requires the fulfilment of necessity in relation to its various aspects.

So, it may have been necessary to deprive of liberty a number of foreigners for irregular movement, but in no way may it be necessary to do so without an individual and reasoned decision made by a specific authority and in a procedure that has clear criteria that are predictable in terms of the conditions for making a decision on deprivation of liberty, its duration, extension and termination. It may never be necessary to deny a person deprived of liberty the right to be informed on their right to lodge an appeal to a judicial body (habeas corpus) or the right to an interpreter for a language he/she understands and to a legal representative. The exclusion of these guarantees can never be necessary, and at its very core it undermines the right to liberty and security of person,

⁷⁵ Analysis, p. 4.

⁷⁶ Article 30, Par. 6 of the LPPID.

⁷⁷ Article 31 of the LPPID.

⁷⁸ Analysis, p. 16.

that is, annuls it completely. Therefore, this level of encroachment on the right to liberty and security of person is worryingly disproportionate, especially considering the fact that it applies only to foreigners staying in reception centres and asylum centres.

In fact, in the case-law of the European Court of Human Rights, when considering violations of Article 5, Article 5-2 and Article 5-4 in the context of derogations made under Article 15, it was not noted that the applicants were denied to:

- receive an individual decision on deprivation of liberty based on a clearly defined procedure in which it is made, a clearly prescribed authority empowered to make that decision, the precise conditions under which that decision must be made, extended or revoked, and generally the duration of deprivation of liberty;
- have the opportunity, in a language they understand, to be aware of clear and individualized reasons for deprivation of liberty;
- submit a legal remedy to review the legality and justification of the decision made;
- have a legal representative.⁷⁹

5) Is the derogation of the right to liberty and security of person of refugees, asylum seekers and migrants consistent with the principle of non-discrimination?

Just as the previously valid Decision was not in line with the principle of non-discrimination⁸⁰, the Decree is not either, since it contains identical provisions.⁸¹

6) Have the Secretaries-General of the Council of Europe and the United Nations been informed of the derogation of their right to liberty and security of person?

On 7 April 2020, the Republic of Serbia officially informed the Secretary General of the Council of Europe that it had waived certain human rights guaranteed by the European Convention on Human Rights. However, the letter of only two pages did not specify which human rights were specifically departed from, nor with respect to each human right, or the specific reasons. Instead, the letter provided a link to the legal information system where changes to the Decree that is the subject of this Analysis are posted⁸². In addition, at the time of notification, the deprivation of liberty of refugees, migrants and asylum seekers was carried out solely on the basis of the Decision and not on the basis of the Decree, since the provisions of the Decision were moved into the Decree on 9 April 2020. Therefore, the Government of the Republic of Serbia has not fulfilled its obligation to inform the Council of Europe regarding the total

79 *Baş v. Turkey*, App. No. 66448/17, Judgment of 3 March 2020, par. 230 and 231, and *Kavala v. Turkey*, App. No. 28749/18, Judgment of 10 December 2019, par. 194-196.

80 For more details, see the section 4. 2.

81 *A. and Other v. the United Kingdom*, App. No. 3455/05, Judgment of 19 February 2009 [GC], par. 190.

82 Available at: <https://bit.ly/3beJju9> [visited on 18 April 2020].

derogation of the right to liberty and security of person of refugees, asylum seekers and migrants.

As regards the notification to the Secretary-General of the United Nations, the Republic of Serbia has not fulfilled its obligation in this regard by the date of the conclusion of this report.⁸³



Consequences of unlawful, arbitrary and collective deprivation of liberty of refugees, asylum seekers and migrants and lack of reaction of the Protector of Citizens and the National Mechanism for the Prevention of Torture

The World Health Organization has issued Interim Guidelines for Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention.⁸⁴

The Guidelines state:

Persons deprived of their liberty, such as people in prison, are likely to be more susceptible to various diseases and conditions. The very fact that they are deprived of their liberty generally implies that people in prisons and other facilities where people deprived of liberty are placed live in close proximity to one another, which is likely to lead to an increased risk of a person-to-person drop in pathogens such as COVID-19.⁸⁵

[...]

Widespread transmission of an infectious pathogen affecting the community at large poses a threat of introduction of the infectious agent into prisons and other places of detention; the risk of rapidly increasing transmission of the disease within prisons or other places of detention is likely to have an amplifying effect on

83 Available at: <https://bit.ly/2XWNh75> [visited on 18 April 2020].

84 World Health Organization (WHO), Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance, 15 March 2020, available at: <https://bit.ly/34h5du5>, hereinafter referred to as: WHO Guidelines.

85 *Ibid.*, p. 2.

the epidemic, swiftly multiplying the number of people affected.

Efforts to control COVID-19 in the community are likely to fail if strong infection prevention and control (IPC) measures, adequate testing, treatment and care are not carried out in prisons and other places of detention as well.⁸⁶

The Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁸⁷ promulgated its principles⁸⁸ that all states are required to take all possible measures to protect the health and safety of all persons deprived of their liberty, which will contribute to the protection of the health and safety of staff, with the application on WHO Guidelines.

The most important CPT principles are as follows:

WHO guidelines on fighting the pandemic as well as national health and clinical guidelines consistent with international standards must be respected and implemented fully in all places of deprivation of liberty.⁸⁹

Staff availability should be reinforced, and staff should receive all professional support, health and safety protection as well as training necessary in order to be able to continue to fulfil their tasks in places of deprivation of liberty.⁹⁰

Any restrictive measures taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time. Persons deprived of their liberty should receive comprehensive information, in a language they understand, about any such measures.⁹¹

As close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation; reassess the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate, residents of social care homes; and refrain, to the maximum extent possible, from detaining migrants.⁹²

As regards the provision of health care, special attention will be required to the specific needs of detained persons with particular regard to vulnerable groups and/or at-risk groups, such as

86 *Ibid.*, p. 1.

87 Hereinafter referred to as: CPT.

88 *CPT, Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic, 20 March 2020, CPT/Inf(2020)13, hereinafter referred to as: CPT principles.*

89 CPT principles, principle no. 2.

90 *Ibid.*, principle no. 3.

91 *Ibid.*, principle no. 4.

92 *Ibid.*, princip br. 5.

older persons and persons with pre-existing medical conditions. This includes, inter alia, screening for COVID-19 and pathways to intensive care as required. Further, detained persons should receive additional psychological support from staff at this time.⁹³

Due to the fact that no independent body, such as the National Mechanism for the Prevention of Torture (NPM), visited the obviously overcrowded reception centres and described living conditions and the perceived consequences of overcrowding, it is difficult to give a precise estimate of the extent to which stay in these camps affected the exercise and protection of the human rights of foreigners. However, there is a strong and hard-fought assumption that living conditions, combined with unlawful and arbitrary deprivation of liberty, have reached the threshold of inhuman and degrading treatment at the Sjenica Asylum Centre, accommodating mainly separated and unaccompanied children, as well as in detention centres in Adaševci, Preševo, Obrenovac, Sombor, Bosilegrad and Kikinda. In addition, living conditions in these facilities are in direct contradiction with guidelines of the World Health Organization, the principles of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as with the guidelines of local medical experts, who have recommended a range of preventive measures based on prohibition of gatherings of a large number of people in a small place. Without protective equipment and adequate hygienic conditions that undoubtedly cannot be maintained in places where the overcrowding rate goes above 200%, it is clear that refugees, migrants and asylum seekers are at high risk of coronavirus.

Therefore, it is necessary that the conditions and lifestyle in these facilities be adapted to World Health Organization guidelines without delay, in order to prevent, first and foremost, situations at risk of coronavirus infection and its uncontrolled spread, which in the current conditions could hit thousands of foreigners and employees in the CRM, the Ministry of Defence and the MoI.

In addition, the Protector of Citizens of the Republic of Serbia should immediately initiate the process of controlling the legality and regularity of the operation of all accommodation capacities and make recommendations to the competent authorities of the Republic of Serbia and draw attention to the fact that the Decision on Temporary Restriction of Movement has consequently led to a violation of the prohibition of ill-treatment, right to health and right to liberty and security of person, and that the same consequences continued to exist after the amendment of the Government's Decree. Unfortunately, until the conclusion of this report there has been no reaction.

93 *Ibid.*, principle no. 6.



Conclusion

On the basis of all above stated, we conclude the following: in the period from 16 March 2020 to 9 April 2020, all refugees, asylum seekers and migrants who had been staying in asylum centres and reception centres before the state of emergency were unlawfully and arbitrary deprived of their liberty by virtue of a by-law, thus violating all international instruments guaranteeing the right to liberty and security of person and the Constitution of the Republic of Serbia. In addition, this category of foreigners was denied the right that an appropriate judicial body decide on the lawfulness and grounds of deprivation of liberty in an emergency procedure, thereby depriving them from one of the basic principles on which civilization rests – the *habeas corpus* principle.

On the other hand, from 9 April 2020 to 27 April 2020, refugees, migrants and asylum seekers were disproportionately derogated from the right to liberty and security of person, so that there was virtually nothing left but a potential opportunity to demand a fair compensation one day for arbitrary deprivation of liberty one day.⁹⁴ The Decree deprives that category of foreigners of a reasoned decision on deprivation of liberty by a legally established body competent to decide on it, and on the basis of a law which clearly prescribes the procedure for deprivation of liberty, the duration and conditions under which it can be determined, extended and abolished. They were also denied the right to *habeas corpus* as well as the right to a legal representative.

What is common to both the Decree and the Decision is that they are based on discriminatory grounds, which makes the violations described above significantly more serious and practically indisputable. In addition, the lack of response of the Protector of Citizens – both to the very nature of the violation of the right to liberty and security of person, and to the consequences that collective deprivation of liberty has produced – is extremely worrying. Above all, the lack of response of the Protector of Citizens to the described legal regime to which refugees, migrants and asylum seekers are subject points to the lack of adequate legal means that could be used to protect the rights of these categories of persons under the jurisdiction of the Republic of Serbia.

94 Article 5 (5) of the European Convention.



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