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## HUMAN RIGHTS OF FOREIGNERS REFUSED ENTRY AND DETAINED AT AIRPORT TRANSIT ZONES: FROM NOVAK ĐOKOVIĆ SAGA TO THE ARBITRARY DETENTION OF H.G.D.

**Abstract:** *The right to liberty and security of persons, as well as individual's absolute right not to be ill-treated or sent to the territory of the State where one would face such risk, represent a cornerstone of refugee and migrant protection at all border crossings. However, regardless of the migration status of a foreigner arriving at the border control posts, an entire scope of human rights protects an individual from border police officers who exercise a State's sovereignty in controlling entry, stay and expulsion from its territory. This undisputable right of the State is not an absolute one, and it has to be performed in line with the international human rights law, but also international refugee law. Inspired by the case of Novak Đoković, this paper deals with the legal status of foreigners who have been refused entry and detained at the airport transit zones. The practice at Belgrade airport will serve as a case study. The status of foreigners at the transit zone of the Nikola Tesla airport will be examined from the perspective of the right to liberty and security and the standards which arose from the practice of the European Court of Human Rights.*

**Key words:** airport transit zone, right to liberty and security, rights of persons deprived of liberty, detention, deprivation of liberty.

### 1. INTRODUCTION

The case of Novak Đoković, which implied his two-week ordeal, and which finally resulted with his expulsion from Australia after 11-day detention, has reignited discussion in relation to an entire line of issues that migrants in general face at the borders of States who are, due to their wealth and decent refugee and migration systems, perceived as countries which can offer a brighter future.<sup>1</sup> Yet, there could be plenty

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1 Higgins, A., 2022, Novak Djokovic Through Australia's Pandemic Looking Glass: Denied Natural Justice, Faulted by Open Justice and Failed by a Legal System Unable to

of arguments which can prove that this perception in a significant number of cases is nothing but a misconception.<sup>2</sup> What is important to outline with regards to the case of Đoković, is the fact that all of his 11 days at the transit zone of the airport, or within a hotel in Melbourne, were based on the judicial detention order rendered for the purpose of examining the conditions for his stay in Australia and/or facilitating his forcible removal.<sup>3</sup>

Inspired by this case, this paper aims to examine the rights of persons refused entry and detained at the airport transit zones. For this purpose, we will use the example of Serbia and the manner in which refugees and migrants can be treated at Belgrade Nikola Tesla airport.<sup>4</sup> Accordingly, the main aim of this paper is to restart an old discussion, which started several decades ago, and which provided its first answers and conclusions in the Strasbourg's Court landmark case of *Amuur v. France*,<sup>5</sup> and which then continued to be developed in the jurisprudence of various bodies for the protection of human rights on universal and regional level.<sup>6</sup> This discussion is still relevant not only for the context of Serbia and Belgrade airport, but also for the context of many airports around the globe and other transit zone areas,<sup>7</sup> in which migrants and refugees, without anyone noticing, are being subjected to similar or far worse treatment than the one that Novak Đoković has experienced during his attempt to take part in the Australian Open.<sup>8</sup>

Firstly, the paper will address the status of foreigners whose entry is refused by border authorities, regardless of the grounds, and their placement in international transit zones pending their removal. The first

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Stop the Arbitrary Use of State Power; *Djokovic v. Minister for Immigration* [2022] FCAFC 3, *Civil Justice Quarterly*, Vol. 42, p. 12.

- 2 Let us just take for example the case of unaccompanied boy Mehdi Ali, who was detained for more than 9 years in the Melbourne Hotel, where Đoković spent 10 days during various court's proceedings, see more at: the Guardian, Iranian refugee Mehdi Ali released after nine years in Australian immigration detention, 3 March 2020, (<https://bit.ly/3vnxM72>).
- 3 Higgins, A., 2022, p. 12.
- 4 Detailed description of the treatment of refugees, asylum seekers and migrants at the Belgrade 'Nikola Tesla' airport see more in: Kovačević, N., 2021, *Country Report: Serbia-2021 Update*, ECRE, (<https://bit.ly/2VXwhim>), pp. 26–30.
- 5 ECtHR, *Amuur v. France*, no. 19776/92, Judgment of 25 June 1996.
- 6 Frigo, M., 2021, *Migration and International Human Rights Law. A Practitioners' Guide*, Third Edition, International Commission of Jurists, p. 216.
- 7 Stoyanova, V., 2019, The Grand Chamber Judgment in *Ilias and Ahmed v. Hungary: Immigration Detention and How the Ground beneath Our Feet Continues to Erode*, *Strasbourg Observers*, (<https://bit.ly/3OOzB5L>).
- 8 Higgins, A., 2022.

hypothesis is that these people, in the vast majority of cases, and especially if they might be in need of international protection, are deprived of their liberty and thus entitled to an entire set of rights which belong to this category of persons.<sup>9</sup> Secondly, the paper will discuss that their detention must be in line with general standards which are derived from different layers of the right to liberty and security. This part will mainly be presented through the general principles which arise from the Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>10</sup> And finally, after the legal status of foreigner refused entry and then placed in the transit zone is concluded, and which will be also accompanied with the relevant case law of the European Court of Human Rights,<sup>11</sup> the paper will dive into an analysis of the practice which is applied at Belgrade Nikola Tesla airport. The main objective is to prove that the current practice of Serbian border authorities is contrary to the requirements stemming from the legally binding standards which shape the right to liberty and security of foreigners refused entry at the airport.

The case to which special attention will be dedicated is the case *H.G.D. v. Serbia*, currently pending before the ECtHR. The case has been communicated to the ECtHR in June 2021, 6 months prior to Đoković's arrival at the Melbourne airport.<sup>12</sup> This case refers to an Iranian refugee who spent 26 days at the transit zone of the Belgrade airport, trying to access territory and asylum procedure. The hypothesis that this paper will strive to outline is that the current legal framework, or more precisely, the lack of relevant legal framework in Serbia, accompanied by the practice of Border Police Station Belgrade,<sup>13</sup> provides a fruitful ground for arbitrary detention of refugees and migrants at Belgrade Nikola Tesla airport's transit zone. The said practice is thus contrary to the Article 5 of the ECHR, but also Article 27 of the Constitution of the Republic of Serbia<sup>14</sup> which must be interpreted in line with the practice of the ECtHR.

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9 Right to attain lawyer, right to inform third persons on their whereabouts, etc. See for example: CPT, *Police Custody*, Extract from the 2<sup>nd</sup> General Report of the CPT, published in 1992, CPT/Inf(92)3-part 1, para. 36.

10 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5 (hereinafter: ECHR).

11 Hereinafter: ECtHR.

12 ECtHR, *H.G.D. v. Serbia*, no. 3158/20, Communicated on 12 July 2021.

13 Hereinafter: BPSB.

14 *Official Gazette of the Republic of Serbia*, nos. 98/06 and 115/21.

## 2. WHAT DOES DEPRIVATION OF LIBERTY STAND FOR? THE STATUS OF FOREIGNERS REFUSED ENTRY AT THE AIRPORT TRANSIT ZONE

Before even assessing if certain detention is lawful or unlawful, arbitrary or not, and allow the standards arising from right to liberty and security to kick in, it is necessary to determine whether or not an individual in case is actually deprived of his or her liberty. It is not always easy to reach a conclusion if certain situation amounts to detention because this can often be a factual, not necessarily legal question,<sup>15</sup> as it was outlined by the Strasbourg Court on numerous occasions.<sup>16</sup> Still, to determine the existence of deprivation of liberty is nothing but a precondition for application of Article 5 of ECHR and an entire set of general principles developed in the Strasbourg's Court jurisprudence. Thus, in order to determine if somebody is detained or not, it is necessary to rely on the criteria for the assessment of the existence of deprivation of liberty which were designed in the rich practice of the ECtHR.<sup>17</sup> More precisely, the author of this paper will strive to guide himself with the help of objective and subjective criteria which have been gradually formulated through various judgments in which this body examined violations of the Article 5.

First of all, the subjective criteria can be considered as a fairly simple one, and its existence is based on the consent of an individual in question, and can be determined through an answer to a very simple question: "If you were able to choose, would you chose to remain, e.g. locked in the police cell, or you would rather walk free outside of the police station?"<sup>18</sup> Or, as it has been simply, but also vividly, put by Lazarus when analysing Assange's detention in Ecuadorian embassy, "liberty must be capable of being realized in actuality" and "where the exercise of such liberty would have coercive results, such as further deprivations of liberty or putting other rights at risk, this cannot be described as liberty in practice".<sup>19</sup>

15 For instance, many States detain individuals *de facto*, claiming that this restriction does not amount to detention, and in that way try to avoid safeguards which permeate the right to liberty and security.

16 ECtHR, *Khlaifia and Others v. Italy*, no. 16483/12, Judgment of 15 December 2016, para. 92.

17 But see also, *Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention*, 24 December 2011, UN Doc. A/HRC/22/44, (<https://bit.ly/3w-lgehA>), para. 38.

18 See also, ECtHR, *Gillan and Quinton v. The United Kingdom*, no. 4158/05, Judgment of 12 January 2010, para. 57.

19 Lazarus, L., 2016, The United Nations Working Group on Arbitrary Detention decision on Assange: 'ridiculous' or 'justifiable?', *EJIL: TALK*, (<https://bit.ly/39tud8a>).

Lazarus was referring to the UN Working Group on Arbitrary Detention Decision<sup>20</sup> in which this Special Procedure Body of the United Nations found that Assange's stay in the Ecuadorian Embassy constituted deprivation of liberty, even though the UK authorities claimed that his stay there was volitional and that he was free to leave at any time.<sup>21</sup>

On the other hand, the objective criteria are numerous, and the following will do just fine for the aims and hypothesis of this paper:

- person is confined in a restricted area for a not negligible length of time<sup>22</sup>
- limited or no possibility to leave this restricted area<sup>23</sup>
- intensity of supervision and degree of control over the person's movements<sup>24</sup>
- the extent of isolation and the availability of social contacts<sup>25</sup>
- the applicable legal regime and its purpose<sup>26</sup>
- the nature and degree of the actual restrictions imposed on or experienced by the applicants.<sup>27</sup>

Based on the above enlisted objective circumstances, it is clear that a person in police custody is deprived of his or her liberty.<sup>28</sup> The same can be said for a prisoner, person embarked in the back of the police van, or person who might abscond criminal persecution<sup>29</sup> and is imposed with the pre-trial detention.<sup>30</sup> All of them are confined in a restricted area and are surrounded with armed police officers and/or prison guards, very often subjected to the video surveillance, without a possibility to communicate when they want with their family and friends, and usually on the

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20 Hereinafter: WGA.

21 WGA, Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland), 22 January 2016, A/HRC/WGAD/2015, para. 37.

22 ECtHR, *Guzzardi v. Italy*, no. 7367/76, Judgment of 6 November 1980, para. 95.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 ECtHR, *Z. A. and Others v. Russia*, nos. 61411/15, 61420/15, 61427/15 and 3028/16, Judgment of 21 November 2019 [GC], para. 138.

27 ECtHR, *Z. A. and Others v. Russia*, App. nos. 61411/15, 61420/15, 61427/15 and 3028/16, Judgment of 21 November 2019 [GC], (<https://bit.ly/3KD7Rza>), para. 138

28 CoE, *Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security*, Updated on 31 December 2021, (<https://bit.ly/34vUQ9P>), para. 19.

29 Macken, C., 2006, Preventive detention and the right to personal liberty and security under Article 5 ECHR, *International Journal of Human Rights*, Vol. 10, No. 3.

30 *Ibid.*

basis of the legal framework which governs the field of criminal justice. Also, a person who is kidnapped by police forces in an informal manner, outside any legal proceeding, and who is taken to a secret location without anyone's knowledge is also deprived of liberty, but in a manner that can only be described as arbitrary and *incomunicado*.<sup>31</sup> But, it is important to note that, "liberty deprivation doesn't consist only in the easily recognizable conditions of state detention, where individuals are detained through the direct actions of the State against their will".<sup>32</sup> There are many other unconventional manners in which detention might occur, including those in cases which are related to refugees, asylum seekers and migrants.

Thus, if we transpose the above-described criterion to migrants or refugees, it is clear that a migrant is deprived of his liberty when placed in an immigration detention while waiting for his forcible removal to the country of origin.<sup>33</sup> In the immigration detention, a migrant cannot go out and usually he is under the supervision of armed immigration officers, restricted to his block within the facility and a walking area where he is allowed to spend certain period of time.<sup>34</sup> He cannot meet his friends and family, nor unconditionally communicate with the outside world in general.<sup>35</sup> Hathaway considers that persons in need of international protection who arrive irregularly to the country of asylum, and do not report to the State authorities as prescribed in the Article 31 of the 1951 Convention Relating to the Status of Refugees,<sup>36</sup> can be detained under international refugee law.<sup>37</sup>

In the practice of the vast majority of States, irregular migrants, but also refugees and asylum seekers, can be detained on various different places such as police stations, specialized detention centres, but also at the very entry in the so-called transit zones, where the above-described criteria can be crucial to determine the existence of deprivation of liberty.<sup>38</sup> They can be detained for the purpose of verification of identity, determination of the elements of the claim for asylum, protection of national

31 GC 35, para. 35.

32 Lazarus, L., 2016.

33 Frigo, M., 2021, p. 219.

34 See for example the Rulebook on House Rules and Rules of Stay in the Detention Center for Foreigners of the Republic of Serbia, *Official Gazette*, no. 42/18, Art. 5.

35 CPT, *Immigration detention*, Factsheet, March 2017, CoE Doc. CPT/Inf(2017)3.

36 UNGA, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137, Art. 31.

37 Hathaway, J., 2005, *The Rights of Refugees under International Law*, Cambridge University Press, p. 418.

38 CPT, *Foreign nationals detained under aliens' legislation*, CoE doc. CPT/Inf(97)10-part, para. 25.

security and public order.<sup>39</sup> The above-outlined criteria is then crucial, and should come into play anytime there is a dispute between the foreigner and the receiving state on the nature on the restriction of his or her movement. Moreover, adequate qualification of the scope and nature of limitation of a person's freedom of movement is crucial in times when many States are more and more prone to claim that people intercepted in the border areas are not detained because they can always go back to where they come from.<sup>40</sup> For that reason, it is impossible not to reflect on the landmark case *Amuur v. France*. In the said case, the ECtHR outlined the following:

*The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in.*

*Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees.*<sup>41</sup>

*Amuur* was a refugee, but another case, more similar to the case of *Đoković*, is reflected in the judgment *Nolan and K. v. Russia*.<sup>42</sup> In the said case, the Court took a stand that the starting point for determining the existence of an act of deprivation of liberty must be the specific situation in which the person concerned found itself and must take into account a number of criteria such as type, duration, effects and manner of implementation.<sup>43</sup> The Court stated that, despite the Government's allegations, the applicant was taken to a transit zone after border control had refused him entry into Russia, where he was locked in a small room overnight, and only in the morning allowed to use toilet, bar and telephone.<sup>44</sup> The

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39 Costello, C., 2017, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR – Division of International Protection, (<https://bit.ly/3KuC56c>), p. 46.

40 *Ibid.* See also: ECtHR, *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Judgment of 21 November 2019 [GC]; Stoyanova, V., 2019.

41 *Amuur v. France*, paras. 48–49 and see also: Krstić, I., Davinić, M., 2013, *Pravo na azil – međunarodni i domaći standardi*, Beograd, Pravni fakultet Univerziteta u Beogradu – Centar za izdavaštvo i informisanje, pp. 154–155.

42 ECtHR, *Nolan and K. v. Russia*, no. 2512/04, Judgment of 6 July 2009.

43 *Ibid.*, para. 93.

44 *Ibid.*, para. 94.

applicant was accompanied by officials until boarding a flight to Tallinn.<sup>45</sup> The Court noted that the Russian Government had pointed out that during his stay in the transit zone, the applicant had been under the jurisdiction of the Russian Federation, and the Court therefore found that the applicant had been under Russian jurisdiction at all times.<sup>46</sup> The Court emphasized that the fact that the applicant had not been subjected to any administrative or criminal proceedings was not relevant to the Court's assessment, nor was the fact of his *de facto* deprivation of liberty.<sup>47</sup> What the Court took into account was the fact that during the overnight stay at the airport, the applicant could not leave the room in which he was accommodated, because it was locked from the outside.<sup>48</sup> In addition, the Court noted that the applicant's departure had become possible only when he had purchased a ticket for a flight to Tallinn. In fact, the applicant's allegations are supported by the rules of the Border Crossing Guidelines, which require border controls to escort persons in the applicant's situation to "isolated premises" and to keep them "in custody" until they leave Russia. Accordingly, the Court found that the conditions of the applicant's stay in the transit zone of Moscow Sheremetyevo airport are equivalent to deprivation of liberty.<sup>49</sup>

If we closely look at the above-outlined cases, we can see that one of them refers to an asylum-seeker/refugee, while the other one is related to a father and his son who simply were not allowed to enter Russia – migrants. The father and son spent one night at Sheremetyevo airport, while Amur was placed in a hotel, which forms a part of the transit zone, for 20 days.<sup>50</sup> In both cases, applicants were exposed to different forms of restrictions, placed in restricted areas and under the supervisions of border police officers. Despite of the difference in their immigration status, as well as the length of their stay in the international transit zone, in both judgments the ECtHR has determined that applicants were deprived of their liberty and Article 5 of the ECHR came into play.<sup>51</sup> In both of these cases, the ECtHR applied its long-lasting standard which has been constantly repeated to this date, and with a sole aim to indicate to the

45 *Ibid.*

46 *Ibid.*, para. 95.

47 *Ibid.*, para. 96.

48 *Ibid.*

49 *Ibid.* See also: Frigo, M., 2021, pp. 187–188.

50 *Amurr v. France*, para. 44.

51 Moreno Lax, V., 2008, *Must EU Borders Have Doors for Refugees? On the Compatibility of Schengen Visas with EU Member States' Obligations to Provide International Protection to Refugees*, CRIDHO Working Paper 2008/03, (<https://bit.ly/3jOX8Fq>), p. 27.



States that the fact that someone is deprived of his or her liberty is not concluded on the basis of the relevant law or the assessment of relevant authorities of the given state, but on the basis of factual situation which is tested through objective and subjective criteria:

*The Court does not consider itself bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty and undertakes an autonomous assessment of the situation.*<sup>52</sup>

### 3. DEPRIVATION OF LIBERTY FOR THE PURPOSE OF PREVENTING ILLEGAL ENTRY: LAWFULNESS AND PROTECTION AGAINST ARBITRARINESS

The detention of migrants,<sup>53</sup> regardless of the root cause of their international movement,<sup>54</sup> usually implies different forms of administrative detention.<sup>55</sup> Regardless of the name and the form of such detention, this type of deprivation of liberty must be in line with the requirements stemming from *e.g.* ECHR, but also Article 9 of the International Covenant on Civil and Political Rights,<sup>56</sup> and it must be proportionate to the limited administrative aims established in law.<sup>57</sup>

There is no harm if we reiterate that all sovereign States are entitled to fully control all processes which are related to entering, staying, residing or forcibly removing foreigners from their territory.<sup>58</sup> The very fact that

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52 *Khlaifia and Others v. Italy*, para. 71.

53 Migrant: An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students, *Glossary on Migration*, IOM, (<https://bit.ly/3x-vcGF>), p. 132.

54 *Ibid.*

55 CPT, *Immigration detention*, Factsheet, March 2017, CPT/Inf (2017)3, (<https://bit.ly/3Li4Xzd>), p. 1.

56 UNGA, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999.

57 Flynn, M., 2012, Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy, *Refugee Survey Quarterly*, University of Manitoba, Vol. 31, No. 3, pp. 40–41.

58 ECtHR, *Berrehab v. the Netherlands*, no. 10730/84, Judgment of 21 June 1988, para. 28 and Moreno Lax, V., 2008, p. 17.

the border control is being exercised implies that individual is under the jurisdiction of the State in question.<sup>59</sup> Frigo outlines that migration has become a highly charged and contested political issue and that the control of national borders is seen as an essential aspect of the sovereign State.<sup>60</sup> In other words, it does not matter if a foreigner in case has not officially entered the territory of the said state, in terms that he has successfully passed the passport control.<sup>61</sup> It is important that he has been subjected to an effective control of border authorities.<sup>62</sup> The jurisdiction implies that a state is legally permitted to exercise its legal authority and over a particular situation.<sup>63</sup> However, when practising it sovereignty through the border control, it is important to note that “various fragmented rules of international law on refugee and human rights protection limit such a right”.<sup>64</sup> Thus, the practising of the state sovereignty in immigration control, the State is obliged to strike a fair balance between two equally important interests.<sup>65</sup> On one side, there is a responsibility of respecting, protecting and fulfilling human rights of all individuals under its effective control.<sup>66</sup> And on the other hand, there is a legitimate interest to establish adequate protection and control of who is allowed to enter, stay, or who must be expelled from the territory of a sovereign State.<sup>67</sup>

In light of that, States are entitled to resort to various invasive measures which must be proportionate to the achievement of this legitimate goal.<sup>68</sup> It was a sovereign right of Australia to refuse entry to Novak Đoković, in the same way as it was the sovereign right of the UK Government to grant visa to a student who wants to pursue his or her LL.M in this

59 Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN doc. CCPR/C/21/Rev.1/Add.13, para. 11.

60 Frigo, M., 2021, p. 51.

61 Pijnenburg, A., 2017, *Is N.D. and N.T. v. Spain the new Hirsi?*, EJIL:TALK, (<https://bit.ly/3EZGBZf>).

62 *Ibid.*

63 Wilde, R., 2013, *The Extraterritorial Application of International Human Rights Law on Civil and Political Rights*, in: Sheeran, S., Rodley, Sir N. (eds.), *Routledge Handbook of International Human Rights Law*, Routledge, p. 640.

64 Beširević, V., Papić, T., *Immigration and Integration by Adjudication in Europe: State Sovereignty under Challenge*, with T. Papić, in: Varady, T. (ed.), 2017, *Migrants in 21<sup>st</sup> Century Europe*, Belgrade, Serbian Academy of Science and Art (SANU).

65 Peers, S., 2017, *Immigration and asylum*, in: Bernard, C., Peers, S. (eds.), *European Union Law*, Oxford University Press, p. 791.

66 Schutter, O. de, 2010, *International Human Rights Law: Cases, Materials, Commentary*, CUP, p. 256.

67 Frigo, M., 2021, p. 135.

68 Flynn, M., 2015, pp. 50–54.

country. At the same time, entry, exit, stay or expulsion from one country to another need to be governed by the legal framework which is in line with the human rights standards related to prohibition of discrimination, right to liberty and security, prohibition of torture and others. Thus, it is of utmost importance that every State, when practicing its sovereign right, does not resort to measures which will be disproportionate or in contradiction to the above-enlisted rights.

Accordingly, in the context of performing its sovereign right, especially in the context when the requirements for entry to a certain country are being examined, it is sometimes necessary to resort to immigration detention. The validity of visa, but also the validity of the entire travel document, Interpol arrest warrant, or determining if someone is in need of international protection, are just some of the reasons why border authorities sometimes need more time to render a decision on granting or refusing entry to a certain individual. On the other hand, while these circumstances are under the assessment, another human being, being faced with the immigration machinery of one State, must not be put in a situation of legal or any other uncertainty. He needs to be aware of all relevant aspects of the situations in which he found himself. They need to be aware of their rights, but also of responsibilities, and they need to be acquainted with different procedures which might be applied to them depending on the outcome of their assessment. In other words, when practicing its state sovereignty, the State is obliged to perform it in a way which embodies the proper balance with individual fundamental right and freedoms.

Thus, migrant or refugee can be deprived of his liberty when he is refused entry,<sup>69</sup> as outlined in the previous Chapter. Also, as it can be seen from the judgments in cases of *Amuur* and *Nolan and K.*, detention of foreigners refused entry at the airport is usually enforced in the international transit zones. When the existence of the deprivation of liberty is determined, and regardless of its place, the following step is to test this detention in relation to the standards and principles established in *Amuur*, *Nolan and K.* and many other judgments of the Strasbourg Court.<sup>70</sup>

We can safely assume that, when detention occurs, it must be in accordance with material and procedural rules of the domestic law.<sup>71</sup> Apart from that, it is important to note that the domestic law must also be in

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69 CPT, *Foreign nationals detained under aliens legislation*, Extract from the 7<sup>th</sup> General Report of the CPT, published in 1997, CPT/Inf(97)10-part, (<https://bit.ly/3J5GKe1>), para. 24.

70 See more in: Krstić, I., Marinković, T., 2016, *Evropsko pravo ljudskih prava*, Council of Europe, (<https://bit.ly/3zhkCfj>), p. 154.

71 *Creanga v. Romania*, para. 84; Frigo, M., 2021, pp. 219–220.

accordance with standards arising from general principles of ECtHR<sup>72</sup> which are related to the principles of legal certainty, the principle of proportionality and the principle of protection against arbitrariness.<sup>73</sup> The Human Rights Committee outlines similar standards and highlights that the detention which is lawful can still be arbitrary if it contains elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.<sup>74</sup>

The principle of legal certainty requires that the law which allows detention is “clearly defined” in terms of the grounds for imposing measures of deprivation of liberty.<sup>75</sup> A clearly defined law means that application of the law is foreseeable and precise enough to allow a detainee “to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”.<sup>76</sup> Moreover, the law needs to fulfil the criteria of “quality”, which is another key safeguard against arbitrariness. This implies that the law is sufficiently accessible, precise and foreseeable in its application.<sup>77</sup> This can only be achieved if the law contains clear legal provisions for ordering detention, extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the “lawfulness” and “length” of his continuing detention.<sup>78</sup>

Moreover, decisions imposing detention should always contain a proper reasoning which, among others, refers to the specific law and the grounds set for detention.<sup>79</sup> The absence of any grounds for a prolonged period of time almost always violates the principle of the protection from arbitrariness,<sup>80</sup> as well as the absence of reference to any legal provision.<sup>81</sup>

The ECtHR further outlines that immigration detention for persons refused entry must be imposed in good faith, that it should be closely connected to the purpose of preventing unauthorized entry and that the length of the detention should not exceed that reasonably required for the purpose

72 ECtHR, *Plesó v. Hungary*, no. 4 1242/08, Judgment of 2 October 2012, para. 59.

73 CoE, *Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security*, Updated on 31 December 2021, (<https://bit.ly/34vUQ9P>), para. 32.

74 GC 35, para. 12 and Flynn, M., 2015, pp. 40–41; Frigo, M., 2021, pp. 227–228.

75 *Creangă*, para. 120.

76 *Khlaifia and Others v. Italy*, para. 92.

77 Frigo, M., 2021, p. 221.

78 ECtHR, *J. N. v. the United Kingdom*, no. 38289/12, Judgment of 19 May 2016, para. 77.

79 ECtHR, *S., V. and A. v. Denmark*, nos. 35553/12, 36678/12, 36711/12, Judgment of 22 October 2018, para. 92.

80 ECtHR, *Stašaitis v. Lithuania*, no. 47679/99, Judgment of 21 March 2002, paras. 66–67.

81 ECtHR, *Khudoyorov v. Russia*, no. 6847/02, Judgment of 8 November 2005, para. 157.

pursued.<sup>82</sup> In the latest judgment *Z.A. v. Russia*, the ECtHR clearly outlined that the protection against arbitrariness can be achieved if law which governs the detention of grants refused entry contains the following:

- the authority competent to impose detention
- the form of detention order
- the grounds for detention
- the length of detention
- the possibility of judicial appeal.<sup>83</sup>

The laws which do not have time-limits for detention nor the availability of a judicial remedy are always arbitrary, but the ECtHR does not require the States to establish a maximum period of detention imposed for the purpose of forcible removal.<sup>84</sup> Finally, detaining authority should keep a single and comprehensive custody record for every detained migrant, recording all aspects of his/her custody and all actions taken in connection with it.<sup>85</sup>

Accordingly, it is clear that the laws and regulations allowing for the detention in the transit zones of international airports must reach a certain level of quality, and that their application must be predictable enough, so a migrant is not put in a situation of total arbitrariness. The lack of legal framework governing the detention in the airport transit zone will most likely raise serious issues under the Article 5 of the ECHR.

#### 4. INFORMATION ON RIGHTS AND RESPONSIBILITIES AND JUDICIAL REVIEW

The ECHR stipulates that everyone who is arrested shall be informed promptly, in a language which he/she understands, of the reasons for his/her arrest and of any charge against him or her.<sup>86</sup> In other words, any person deprived of liberty should be informed of the reasons for such intrusive acts promptly, at very moment of arrest<sup>87</sup> or within few hours at latest.<sup>88</sup> Being informed about the reasons of detention allows one to

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82 ECtHR, *Saadi v. the United Kingdom*, no. 13229/03, Judgment of 29 January 2008, para. 74.

83 *Z. A. and Others*, para. 162.

84 *Guide on Article 5*, para. 153.

85 CPT, *Immigration detention*, p. 2.

86 Art. 5 (2) of the ECHR and GC 35, para. 24.

87 *Khlaifia*, para. 115.

88 ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, nos. 12244/86, 12245/86, 12383/86, Judgment of 30 August 1990, para. 42.

challenge the lawfulness of deprivation of liberty<sup>89</sup> before the judicial body,<sup>90</sup> or as the HRC outlines, to enable a person in question to seek release if he or she believes that the reasons given are invalid or unfounded.<sup>91</sup> For a detained migrant or a refugee, the CPT outlines that they should be systematically provided with a document setting out their rights and responsibilities and this document should be available in the languages most commonly spoken by those concerned and, if necessary, the services of an interpreter should be made available.<sup>92</sup> Finally, detained migrants and refugees should, from the very outset of their deprivation of liberty, enjoy three basic rights: (1) to have access to a lawyer, (2) to have access to a medical doctor, and (3) to be able to inform a relative or third party of one's choice about the detention measure.<sup>93</sup> They should be also provided with the opportunity to contact diplomatic and consular authorities of their respective states.<sup>94</sup>

As already mentioned, every migrant deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention will be decided speedily by a court and his release ordered if the detention is not lawful,<sup>95</sup> and in the procedure in which they will have the right on legal assistance, provided free of charge if necessary.<sup>96</sup> The court should examine both procedural and substantive conditions for detention.<sup>97</sup> Thus, migrants are also entitled to *habeas corpus* safeguards.

In cases where migrants had not been informed of the reasons for their deprivation of liberty, the Court found that their right to appeal against their detention was deprived of all effective substance.<sup>98</sup> Article 5 (4) of ECHR cannot come into play where the impugned detention is short-term, and the detainee is released speedily before any judicial review of the lawfulness of his or her detention could take place.<sup>99</sup> However, where there is no judicial remedy at all available to individuals to challenge the lawfulness of their detention, judicial review rights become effective regardless of the length of the detention.<sup>100</sup>

89 *Khlaifia*, para. 132 and *Frigo*, M., 2021, p. 219.

90 ECtHR, *Čonka v. Belgium*, no. 51564/99, Judgment of 5 February 2002, para. 50.

91 GC 35, para. 25.

92 CPT, *Immigration detention*, p. 2.

93 *Ibid.*

94 *Ibid.*

95 Art. 5 (4) of the ECHR.

96 CPT, *Immigration detention*, p. 3.

97 *Khlaifia and Others v. Italy*, para. 128.

98 *Khlaifia and Others v. Italy*, para. 132.

99 ECtHR, *Slivenko v. Latvia*, no. 48321/99, Judgment of 9 October 2010 [GC], para. 159.

100 ECtHR, *Moustahi v. France*, no. 9347/14, Judgment of 25 June 2020, para. 103–104 and *A.M. v. France*, no. 56324/13, Judgment of 12 July 2016, paras. 36–42.

## 5. H.G.D. AT BELGRADE NIKOLA TESLA AIRPORT: DETAINEED OR NOT DETAINEED?

Let us go back to the state of affairs at Belgrade airport and the manner in which all of the outlined standards are applied with regards to foreigners refused entry. While everyone in Serbia was closely following the developments at Melbourne airport when Đoković was refused entry, at the same time, several citizens of Burundi were facing *refoulement* to their country of origin, while one of them was sent back after being placed in closed premises of the transit zone for several days.<sup>101</sup> Even though their cases deserve special attention and are currently the subject of different legal inquiries, it is important to go back to the findings of the UN Special Rapporteur on Torture in 2017,<sup>102</sup> and, most importantly, to the case of H.G.D. whose treatment at Belgrade airport can be compared to the one which Tom Hanks was subjected to in the blockbuster movie “The Terminal”.

First of all, SRT outlined during his 2017 visit to Serbia that he interviewed individuals held in the transit zone of Nikola Tesla airport for more than 24 hours and that the individuals concerned reported that they had not had the opportunity to contact their embassy or a lawyer and that they had not had access to a translator.<sup>103</sup> Moreover, border police officers who had refused their entry reportedly had not informed them of their right to seek asylum and had not taken any active measure to identify any potential risk or threat they could face upon the return in accordance with the principle of non-refoulement.<sup>104</sup>

One-year prior to SRT’s visit, H.G.D., a refugee from Iran, arrived in Serbia and during the border check expressed his intention to apply for asylum.<sup>105</sup> The treatment to which he was subjected in the next 26 days is currently being examined by the ECtHR.<sup>106</sup>

### 5.1. FROM LANDING AND PASSPORT CONTROL TO THE TRANSIT ZONE ‘HOLDING PREMISES’

On 31 October 2016, H.G.D. landed on Nikola Tesla airport from Turkiye. The BPSB officers did not allow H.G.D. to enter the Republic of Serbia because they had determined that the travel document that he

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101 Kovačević, N., 2022, Novak Djokovic, X. and Y., *Peščanik*, (<https://bit.ly/3MG3vHB>).

102 Hereinafter: SRT.

103 Special Rapporteur on Torture, *Visit to Serbia and Kosovo\**, 25 January 2019, UN Doc. A/HRC/40/59/Add.1, (<http://bit.ly/2P5PIU1>), paras. 47–51.

104 *Ibid.*, paras. 47–51.

105 Law on Asylum, *Official Gazette of the Republic of Serbia*, no. 109/07, Art. 35.

106 ECtHR, *H.G.D. v. Serbia*, no. 3158/20, Communicated on 12 July 2021.

had used was forged. Indeed, the travel document was forged, but what is also important to mention is the fact that H.G.D. tried to explain to border police in a very poor English<sup>107</sup> that he was fleeing persecution in his country of origin on religious grounds and that he wants to apply for asylum. Thus, even if he wanted it, he was not able to go back to where he came from.<sup>108</sup>

Since his allegations on the risks of being returned to Iran were ignored, which is a regular practice of the BPSB,<sup>109</sup> the applicant was taken at the end of the gates, in premises which are used for ‘accommodation’ of foreigners refused entry into Serbia. More precisely, H.G.D. was escorted by armed police officers of the BPSB to the detention premises in the transit zone where all foreigners who, according to the assessment of BPSB, do not meet the requirements to enter Serbia, are placed. They can remain there from several days to several weeks, and as long as the air company which these people used to travel does not secure the place for the flight back, and in line with Articles 11 and 13 of the Foreigners Act which was in force at that time.<sup>110</sup> After several minutes, H.G.D. found himself locked up in the room, between 25 and 30 square meters, surrounded by metal bars, covered with video surveillance and guarded by airport security and police officers of the BPSB. In this situation, he was not allowed to leave this room for the following 26 days and he did not have access to fresh air at all, and the place was assessed as a place not recommended for the longer stay.<sup>111</sup>

What is important to mention in this particular case is that H.G.D. fought on several occasions not to be boarded on the plane for Istanbul, and that this fact should also be taken in consideration when assessing the existence of subjective criteria.<sup>112</sup> He did not want to go back, nor did he want to remain in the transit zone because the sole purpose of his stay there was his forcible removal which he opposed. His clear wish was to apply for asylum in Serbia.

In the following days, H.G.D. went through an ordeal, especially after he managed to get in touch with the legal representative who instantly

107 The applicant did not speak English and was not able to explain in detail the problems that he faced in Iran, but his English was good enough to say the word asylum.

108 The first objective criteria following the reasoning of the ECtHR in *Amuur v. France*.

109 Kovačević, N. 2021, *Country Report: Serbia-2021 Update*, ECRE, (<https://bit.ly/2VX-whim>), pp. 26–30.

110 *Official Gazette of the Republic of Serbia*, no. 97/08.

111 Zaštitnik građana – NPM, *Izveštaj o poseti Aerodromu „Nikola Tesla“*, jun 2015. godine, (<https://bit.ly/3EkjAQI>).

112 Extracted from the Official Note of MoI no. 230–312 sent to the Air Serbia company.



requested access to the transit zone.<sup>113</sup> This request was denied on multiple occasions, and legal representative decided to address the ECtHR with the request for interim measures which was granted on 16 November 2016. Instead of being allowed to access territory, the BPSB continued to keep H.G.D. in the detention room, threatening him with criminal persecution for the forged passport,<sup>114</sup> which can also open a question of the Article 31 of the Convention Relating to the Status of Refugees.<sup>115</sup>

## 5.2. SUBJECTIVE AND OBJECTIVE CRITERIA OF THE STRASBOURG COURT

The above-described treatment of H.G.D. irresistibly resembles the entire set of objective criteria outlined in the Chapter 2 of this paper. In other words, it can be concluded that H.G.D. attempted to access asylum procedure, but this was probably denied to him. Additionally, the fact that he fought not to be returned back is the fact that should also be taken in consideration when assessing the existence of subjective criteria. Also, and in order to determine the nature and extent of H.G.D.'s restriction of liberty in the transit zone, I will go back to ECtHR's objective criteria and applicant's individual circumstances.

The first thing which should be taken in consideration is the fact that H.D.G. was locked up for 26 days in the transit zone room not bigger than 30m<sup>2</sup>. This length of time can without any doubt fall under the formulation of "not negligible length of time",<sup>116</sup> while the size and the regime of life in the transit zone room can be considered as "particularly restricted space" or "area" which he could not leave for almost a month.<sup>117</sup> The room was guarded by armed border police officers, airport security and was covered with video surveillance.<sup>118</sup>

Accordingly, several objective criteria established by the Strasbourg Court and outlined in the Chapter on general principles of this paper were obviously met. For all of the above-mentioned, it is not possible to derive a different conclusion, but the one which implies that H.G.D. was deprived of his liberty and that he was entitled to enjoy all the layers and

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113 On the importance on access to legal aid while in immigration detention, see more in: Lindley, A., 2022, 'Hit and Miss'? Access to Legal Assistance in Immigration Detention, *Journal of Human Rights Practice*, pp. 634–639.

114 Kovačević, N. 2021, pp. 26–30.

115 Costello, C., 2017, p. 29.

116 *Guzzardi v. Italy*, para. 95.

117 *Ibid.*

118 *Ibid.*

segments of the Article 5 of the Convention which were in details outlined in the initial chapters of this paper.

### 5.3. LAWFULNESS AND PROTECTION AGAINST ARBITRARINESS

At the time of H.G.D.'s detention, but also at the time of Đoković's struggle with the immigration authorities, the Foreigners Act of Serbia did not envisage that persons refused entry to Serbia can be detained at the airport. At the same time, the detention of such foreigners was *de facto* occurring.<sup>119</sup> Accordingly, after H.G.D. was denied access to territory and asylum procedure, and then refused entry in line with Articles 11 and 13 of the Foreigners Act which was in force at that time, he was detained in the above described conditions but was not issued with a decision on deprivation of liberty which had its grounds in relevant legal framework which was in force at that time. Again, the sole reason for such state of affairs is the fact that the Foreigners Act has never envisaged such possibility. This legal loophole automatically meant that there was no authority entitled to render detention order, there was no procedure and criteria for rendering such order and it was impossible to anticipate the length of detention, conditions for extension or termination of detention and finally, the remedy which can be used to challenge the lawfulness of such decision and others.<sup>120</sup>

As it was the case with persons interviewed by the SRT, H.G.D. was also not informed in a language that he understands on the reasons for his deprivation of liberty and the procedures which could have been applied to him<sup>121</sup> nor he was allowed to obtain legal representation, inform third persons on his whereabouts, and ask for independent medical examination.<sup>122</sup> The length of applicant detention can also be reflected in the relevant jurisprudence of the ECtHR which stipulates that the laws which do not have time-limits for detention as well as the availability of a judicial remedy are always arbitrary.<sup>123</sup>

After 26 days of being cut off from the outside world, without being able to predict the length of his *de facto* detention and without having any legal avenues to challenge the lawfulness of his situation, the applicant was allowed to access territory and asylum procedure. It is important to reiterate that the destiny of H.G.D. is the one shared by thousands of

119 Kilibarda, P., Kovačević, N., 2017, *Country Report: Serbia*, ECRE, (<https://bit.ly/3lD-JUMk>), p. 16.

120 Z.A. and Others, para. 162.

121 Art. 5 (2) ECHR; *Khlaifia*, para. 115, ECtHR, *Čonka v. Belgium*, no. 51564/99, Judgment of 5 February 2002, para. 50.

122 CPT, *Immigration detention*, p. 2.

123 *J. N. v. the United Kingdom*, paras. 83–96

persons who were refused entry in the past several decades and returned back to the departing state from Belgrade airport.

#### 5.4. THE UNHELPFUL INTERVENTION OF THE CONSTITUTIONAL COURT

In June 2019, the Constitutional Court of Serbia dismissed as manifestly unfounded the constitutional appeal submitted on behalf of H.G.D.<sup>124</sup> The applicant outlined in his constitutional appeal that the treatment to which he was subjected to in the period of 26 days at the transit zone of Belgrade airport, and which is in details described in the previous chapters, constituted deprivation of liberty in terms of the Article 27 of the Constitution of the Republic of Serbia and Article 5 of the ECHR. He further outlined that his detention was arbitrary.

Before diving deeper into the reasoning of the Constitutional Court in the said decision, it is important to highlight that Serbian Constitution clearly imposes an obligation on this body to directly apply international standards related to the exercise and protection of human rights, which derive from generally accepted rules of international law and ratified international treaties.<sup>125</sup> The Constitution further provides that human rights shall be interpreted in favour of promoting the values of a democratic society, in accordance with applicable international human rights standards, as well as the jurisprudence of international bodies that oversee their implementation. Regarding certain rights, and in proceedings on constitutional complaints, the Constitutional Court confirmed this in its practice, referring directly to Article 18 (3) of the Constitution.<sup>126</sup> Accordingly, the rights incorporated in the constitutional system by ratified international treaties have the same rank as rights guaranteed by the Constitution which allows Serbian judges to directly enforce the rights and freedoms envisaged in the ECHR.<sup>127</sup>

Keeping this in mind, the author of this paper considers that the Constitutional Court of Serbia has missed the opportunity to apply relevant standards of the Strasbourg Court. The reasoning of the said decision

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124 Constitutional Court, Decision No. UŽ 9440–2016, Delivered on 13 June 2019.

125 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, nos. 98/06 and 115/21, Art. 16 (2) and Art. 18 (2) (hereinafter: Constitution).

126 Constitutional Court, Decision No. UŽ 7936/2013, Delivered on 29 October 2015, paras. 8.1. and 8.3.

127 Beširević, V., 2020, Constitutional Court of the Republic of Serbia (Ustavni sud Republike Srbije), in: Grote, R., Lachenmann, F., Wolfrum, R., (eds.), 2021, *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, Oxford University Press, paras. 29–30, (<https://bit.ly/3NkH4bP>).

contains an entire set of contentious arguments and qualifications, but most importantly, this Decision embodies the lack of effort of this body to implement the test of deprivation of liberty thoroughly analysed in previous chapters of this article.

First of all, the Constitutional Court has failed to take in consideration the nature of limitations on applicant's physical liberty and to put them through the test of subjective and objective criteria from ECtHR's jurisprudence. From the reasoning of the decision, it cannot be seen that the Court even took in consideration detailed descriptions on applicant's treatment supported by relevant reports such as the Committee against Torture Concluding Observations<sup>128</sup> or the findings of the Special Rapporteur.<sup>129</sup> It is also impossible to observe what was the response of the Ministry of Interior – Border Police Department which acted as the second party in this proceeding and the position of this body as some sort of defendant with regards to H.G.D.'s 26 day detention. Thus, it can be claimed with certainty that there are not traces of application of any of the above criteria which is necessary for the autonomous assessment of the situation.<sup>130</sup>

What the Constitutional Court did is a simple ascertainment that the legal framework that had been in force at the time of the applicant's stay at the airport did not envisage the procedure in which a foreigner can be deprived of his liberty in the transit zone of the airport. For that reason, applicant's claims about unlawful and arbitrary detention could not have been considered as well founded. In other words, the Constitutional Court has failed to conduct independent and autonomous factual assessment.<sup>131</sup>

This kind of reasoning of the Constitutional Court gives serious reasons for concern in the sense that situations which imply *de facto* detention cannot be treated as a violation of the right to liberty and security enshrined in the Article 27 of the Constitution. To put it in simpler words, the Court took a stand that if the law does not provide for a possibility of detention in certain situation, this body will tolerate different forms of arbitrary deprivation of liberty and solely rely on the existing legal framework. In practice, if this approach of the Court remains valid, the state authorities could potentially be allowed to detain individuals outside situations which are envisaged by existing laws and regulations, regardless of the substance of the Article 5 of ECHR and ECtHR jurisprudence which is legally binding for the Constitutional Court as well.

128 CAT, *Concluding observations on the second periodic report of Serbia* \* \*, 3 June 2015, UN Doc. CAT/C/SRB/CO/2\*, (<https://bit.ly/2RKVB8J>), para. 14.

129 Special Rapporteur on Torture, *Visit to Serbia and Kosovo*\*, 25 January 2019, UN Doc. A/HRC/40/59/Add.1, (<http://bit.ly/2P5PIU1>), paras. 47–51.

130 *Khlaifia and Others v. Italy*, para. 71.

131 *Ibid.*

Another negative consequence of this standing is the fact that this decision has provided justification for the continuation of the practice at Belgrade airport, and which has been applied to this date.<sup>132</sup> This can further negatively affect all the foreigners whose entry was refused, but particularly foreigners who are in need of international protection, and who can, from the situation of arbitrary detention, be denied access to territory, access to asylum procedure and then summarily returned to the departing state where they might face the risk of *refoulement*,<sup>133</sup> which represents a cornerstone of refugee protection.<sup>134</sup>

## 6. CONCLUSION

It is undisputable that persons refused entry into the territory of a State, including airports, and who cannot go back to their country of origin or third country, are persons deprived of their liberty. Moreover, even if refusal of entry practice is applied to an individual who does not face any risk of *refoulement*, his or her treatment, regime of life and status in the transit zone should always be assessed on individual basis and in line with the subjective and objective criteria designed in the jurisprudence of the Strasbourg Court. For instance, Novak Đoković, as well as Nolan and his son, was deprived of his liberty. The first one's detention was based on the decision of the Court, it was lawful and not arbitrary, while other two were *de facto*, and thus, arbitrarily detained. Still, it cannot be disputed that all three of them were deprived of their liberty. Furthermore, the moment a foreigner refused entry is detained, an entire set of standards and other layers of the Article 5 of the ECHR come into play, introducing principles of legal certainty, proportionality and protection of arbitrariness. These principles can only be achieved if the legal framework, governing the status of foreigners in international transit zones, is carved in the spirit of the Article 5 of the ECHR and Article 9 of the ICCPR.

To conclude, the practice of the BPSB has been challenged and criticized on numerous occasions in the past. This practice has also been the subject of examination of different international bodies for the protection of human rights. All of these bodies have indicated that the regime of life to which foreigners refused entry into Serbia are subjected to reach the threshold necessary for the existence of detention. The case of Iranian refugee

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132 Kovačević, N., 2021, pp. 26–30.

133 Kovačević, N., 2022, Novak Djokovic, X. and Y., *Peščanik*, (<https://bit.ly/3MG3vHB>).

134 See more in: Wouters, C., 2013, *International Refugee and Human Rights Law: Partners in Ensuring International Protection and Asylum*, in: Sheeran, S., Rodley, Sir N., 2013, *Routledge Handbook of International Human Rights Law*, pp. 232–236, Routledge.

H.G.D. perfectly describes the practice which has been applied at Belgrade airport for decades. This practice implies arbitrary deprivation of liberty and embodies the long-lasting relict of the past in which foreigners have been subjected to practices which, in certain instances, might even amount to *incommunicado* detention. The root cause for such a state of affairs in the Republic of Serbia mainly lies in the non-existing legal framework which governs the status and the regime of life of foreigners refused entry into Serbia. The 2019 decision of the Constitutional Court further indicates that persons who are the victims of such practice are not able to obtain redress on the domestic level, which further implies that the resolution of this arbitrary practice has so far been justified and that there is no end in sight to this practice. It remains to be seen if H.G.D.'s pending case before ECtHR could shift the approach of Serbian institutions to another direction.

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LJUDSKA PRAVA STRANACA KOJIMA JE ODBIJEN ULAZAK  
I KOJI SU PRITVORENI U TRANZITNOJ ZONI AERODROMA:  
OD SAGE NOVAKA ĐOKOVIĆA DO ARBITRARNOG  
PRITVARANJA H. G. D.

Nikola Kovačević

APSTRAKT

Pravo na slobodu i bezbednost ličnosti, kao i apsolutno pravo pojedinca da ne bude zlostavljan ili proteran na teritoriju države u kojoj bi se suočio sa takvim rizikom, predstavljaju kamen temeljac zaštite izbeglica i migranata na svim graničnim prelazima. Međutim, bez obzira na migracioni status stranca koji dolazi na granične kontrolne punktove, čitav obim ljudskih prava štiti pojedinca od službenika granične policije koji vrše suverenitet države prilikom kontrolisanja ulaska, boravka ili proterivanja stranaca sa njene teritorije. Ovo neosporno pravo države nije apsolutno i mora se sprovoditi u skladu sa međunarodnim pravom ljudskih prava, ali i međunarodnim izbegličkim pravom. Inspirisan slučajem Novaka Đokovića, ovaj članak se bavi pravnim statusom stranaca kojima je odbijen ulazak na teritoriju određene zemlje i koji su zadržani u tranzitnim zonama aerodroma. Praksa na beogradskom aerodromu služi kao studija slučaja. Status stranaca u tranzitnoj zoni aerodroma „Nikola Tesla” sagledan je iz ugla prava na slobodu i bezbednost ličnosti i standarda koji su proizašli iz prakse Evropskog suda za ljudska prava.

**Ključne reči:** tranzitna zona aerodroma, pravo na slobodu i bezbednost ličnosti, prava osoba lišenih slobode, pritvor, lišenje slobode.

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