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Meeting: 1310th meeting (March 2018) (DH)

Item reference: Action plan (08/03/2018)

Communication from Serbia concerning the case of ZORICA JOVANOVIC v. Serbia (Application No. 21794/08)

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Réunion : 1310^e réunion (mars 2018) (DH)

Référence du point : Plan d'action

Communication de la Serbie concernant l'affaire ZORICA JOVANOVIC c. Serbie (Requête n° 21794/08)
(anglais uniquement)

Belgrade, 8 March 2018

REVISED ACTION PLAN
ZORICA JOVANOVIĆ v. SERBIA
Applications no. 21794/08
Judgment of
26 March 2013, final on 9 September 2013

I CASE DESCRIPTION

1. This case concerns a violation of the applicant's right to respect for her family life on the account of the Respondent State's continuing failure to provide her with credible information as to the fate of her son, who allegedly died three days after his birth in a maternity ward in 1983. His body has never been transferred to her and she has never been informed where he had allegedly been buried (violation of Article 8).

2. The European Court held that "the Respondent State must, [...], take all appropriate measures, preferably by means of a *lex specialis* [...] to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant's". According to the Court, "[t]his mechanism should be supervised by an independent body, with adequate powers, which would be capable of providing credible answers regarding the fate of each child and affording adequate compensation as appropriate".

II INDIVIDUAL MEASURES

3. The European Court awarded just satisfaction to the applicant in respect of non-pecuniary damage sustained in the amount of EUR 10,000. The amount awarded has been paid to the applicant within the time-frame set by the European Court. The Government therefore considers that the applicant has been redressed in respect of damage sustained.

4. As regards the measures aimed at establishing the fate of the applicant's child, the Government would like to indicate that these measures will be taken within the mechanism to be set up in compliance with the European Court's judgment (see below).

III GENERAL MEASURES

5. In response to the European Court's judgment the Serbian authorities prepared the draft law and subsequently revised it to take into account the concerns of the Committee of Ministers, civil society and parents.

A. Useful reminders

6. It is recalled that the Committee of Ministers positively assessed the draft law prepared by the Serbian authorities in response to the Court's indications and revised in line with Committee of Ministers' decisions.

7. In particular, in its decision adopted in March 2016, the Committee of Ministers noted with interest that the revised draft law took into consideration a number of questions identified by the Committee, as well as certain concerns raised by civil society, in particular as regards the eligibility criteria and procedure for obtaining evidence. (For details on the mechanism envisaged under the revised draft law see CM/Notes/1243-18 from December 2015).

8. In the above decision adopted in March 2016 the Committee of Ministers however noted that the revised draft law still leaves various issues outstanding, including that of the powers to be vested in the civil courts and the special police unit and the procedure for declassification of medical information; it encouraged therefore the Serbian authorities to address the outstanding issues and concerns of parents of "missing babies" in consultation with civil society.

9. In December 2016, the Committee of Ministers noted the detailed explanations given by the authorities on these outstanding issues (DH-DD(2016)1151 and CM/Notes/1273/H46-27). The Committee of Ministers therefore gave its green light for the adoption of the draft law given that no further outstanding issue has been signaled in any of the Committee's subsequent decisions.

10. In March 2017, the Committee of Ministers noted that, following the judgment of the European Court, the authorities prepared a draft law to introduce a mechanism in accordance with the Court's indications and that this draft law took into account the assessment made by the Committee of Ministers.

11. It is furthermore recalled that the draft law was approved by the Government and transmitted to Parliament for adoption in October 2016. However, the adoption of the draft law was delayed first as a consequence of the letter addressed by the parents of "missing babies" at the end of 2016 raising certain concerns on its content and objecting to the adoption of the draft law and second as a consequence of the suspension of parliamentary work due to the presidential elections held in April 2017.

12. Following the formation of the new Government after the elections and in line with applicable procedures, the draft laws which the former Government tabled to Parliament have been withdrawn from parliamentary procedure and returned to the new Government of Prime Minister Brnabić for approval. The draft law prepared to execute this judgment has also been withdrawn from Parliament and returned to the Government for approval.

13. In September 2017, the Committee of Ministers adopted a first interim resolution in respect of Serbia calling upon the authorities to take all necessary steps to ensure that the legislative process is brought to an end as a matter of utmost priority (CM/ResDH(2017)292).

14. At its last examination of this case in December 2017, the Committee of Ministers, in view of the humanitarian nature of the measures required and the time that has elapsed since babies allegedly went missing, strongly urged the authorities to take urgent action to ensure that the draft law is adopted without further delay and stressed that the adoption of the draft law is an absolute necessity.

B. Consultations with parents and revisiting the draft law

15. Following the Committee of Ministers' last examination of this case in December 2017 the following developments have taken place.

16. Being receptive to the plight of the parents concerned, the current Government of Prime Minister Brnabić made sure to maintain consultations with them on this delicate humanitarian

issue. To this end, on 16 January 2018, the authorities carried out bilateral consultations with parents on the revised draft law. At those consultations the parents of “missing babies” continued to express concerns with respect to the mechanism set out in the draft law. With a view to alleviating their concerns the authorities further revisited the draft law to take into account their comments.

17. At the outset, pursuant to the revisited draft law, parents who have taken steps to find out the fate of their babies *before the entry into force of the law* will be eligible to benefit from the mechanism to be introduced no matter when these steps have been taken. It is recalled that the draft law initially provided that only parents who have taken steps to find out the fate of their missing babies *before 9 September 2013* (the date when the Court’s judgment became final) would be eligible to start the proceedings envisaged. It is also recalled that NGOs also raised concerns as regards the temporal limitation which is now removed (DH-DD(2015)1378, §5). Thus, their concerns have now been addressed and as a result, the scope of parents eligible to avail themselves of the mechanism has been extended to a major extent.

18. Secondly, pursuant to the revisited draft law *courts shall have an obligation* to determine facts *ex officio* even if parents had not referred to them expressly in their motions. The draft law initially provided that the courts *might* take the above steps. The novelty introduced will therefore bolster up the efficiency of the mechanism and its ability to provide credible answers on the fate of missing babies. It is recalled that NGOs also raised concerns as to the previous provision (DH-DD(2016)219, §12). Thus, their concerns have now been addressed.

19. Thirdly, it is recalled that the NGOs called for a change of the provision of Article 19 of the draft law with a view to ensuring that that “the hearing is held whenever the proposer demands it in the proposal, or in any case, regardless of the contents of the proposal submitted to the court” (DH-DD(2016)219, §19). It is recalled that this provision initially stipulated that the court shall schedule a hearing *when it finds a hearing necessary or appropriate*. The NGOs’ concerns were taken into account. In particular, pursuant to the now revisited provision of Article 19, *the court shall schedule a hearing following an applicant’s motion*. If there is no such motion, the court shall schedule a hearing when it finds it necessary or appropriate.

20. Lastly, it is recalled that the NGOs indicated that the provision of Article 22 “which stipulates that by the decision granting the motion, *the court may award* the proposer a fair

monetary compensation for the non-pecuniary damages for the violation to the right of family life, should be changed in such manner that a clear obligation of the court to a fair compensation to the proposer is stipulated” (DH-DD(2016)219, §21). This proposal was granted and the draft law amended accordingly to stipulate that *courts shall have an obligation to award damages in case of finding a violation.*

21. Other provisions of the revised draft law were not amended. The mechanism envisaged to execute the present judgment, which was positively assessed by the Committee of Ministers and for which the Committee of Ministers repeatedly urged the Serbian authorities to introduce it without further delay, remained substantially the same.

22. The Government is confident that the mechanism envisaged meets the requirements of the European Court’s judgment in the present case for the following reasons:

- the mechanism shall be introduced by means of a *lex specialis*;
- the mechanism shall be capable of providing individual redress to parents of “missing babies”;
- the mechanism shall be supervised by an independent body, i.e. four high courts and their decisions shall be subject to the review of the Constitutional Court;
- the domestic courts shall be vested with adequate powers making them capable of providing credible answers regarding the fate of each missing babies;
- the mechanism shall be capable of affording adequate compensation as appropriate.

C. Approval of the text of the revisited draft law

23. Following the above-mentioned bilateral consultations with parents of “missing babies”, on 1 February 2018, the Minister of Justice Madam Kuburović signed the draft law and transmitted it to various authorities for their opinion in line with applicable procedures. After having obtained these opinions, the Minister of Justice transmitted the draft law to the Government for approval.

24. Today, on 8 March 2018, the Government of Republic of Serbia examined the draft law. It approved the draft law and transmitted it to Parliament for adoption without further delay. Pursuant to the applicable procedures, the draft law must now pass the muster of a parliamentary committee in charge (Committee on Human and Minority Rights) and then be tabled to plenary session for adoption.

25. To this end, it is recalled that in September 2017 members of the Committee on Human and Minority Rights and Gender Equality of the Parliament of Serbia participated in an information seminar at the Council of Europe in Strasbourg. As a part of this event, on 25 September 2017, the Department for the Execution of the European Court's judgment provided to members of that parliamentary committee extensive explanations on the Court's findings and execution requirements in respect of the judgment at issue. They have therefore been made aware on the absolute necessity to adopt a *lex specialis* to execute the present judgment and on the Committee of Ministers' decisions concerning this case.

26. Lastly, the Government would like to provide assurances to the Committee of Ministers that the draft law tabled to Parliament will be adopted before the June 2018 DH meeting.

D. Emerging case-law providing a remedy in transitional period

27. Pending the adoption of the law, the courts of Serbia gave full effect to the European Court's judgment operating a major change of the case-law.

28. In particular, in its decision dated 6 February 2018 (2 P. 490/17, not final yet), Kikinda First Instance Court awarded damages to a father of a "missing baby" in the amount of EUR 10,000 on account of the failure of the Serbian authorities to provide him credible answers on his missing baby's fate. The decision was taken in civil procedure.

29. In the decision, the domestic court referred expressly to Article 8 of the Convention and the European Court's judgment. Noting that Serbia had to take measures within a year to set up a mechanism capable of providing credible answers, it "*considered that the plaintiff [father of the*

missing baby] is not under an obligation to wait further for adoption of the law” and therefore awarded him compensation.

30. The relevant excerpts of this decision are set out below.

“The plaintiff has not reached the genuine truth so far, i.e. he does not know the exact reason for transferring a child from Kikinda to Belgrade, he does not know the real cause of his death, and he could not reach his child’s corpses that he intended to bury in Kikinda.”

“Since the birth of a child the plaintiff has suffered mental anguish as a consequence of the loss a child, uncertainty and the lack of true facts about all the circumstances surrounding the child's transfer, its treatment and burial, because he [father of the missing baby] was not given the child's body to bury him, as well due to the fact that his private and family life has been disturbed.”

*“**The European Convention** for the Protection of Human Rights and Fundamental Freedoms was ratified by our State and in Article 8 it guarantees the right to respect for private and family life while the international conventions **constitute a source of law prevailing over the domestic legislation.**”*

*“In the case at hand due to the unexplained circumstances i.e. the reasons for transferring a child, who was born on time, to the Institute of Neonatology without his mother, his alleged death and the parents’ inability to take over the child’s body and bury [him]; **the State authorities are responsible for this beginning from the Ministry of the Interior to the prosecution authorities in charge, which were under an obligation to examine and determine all the circumstances, the court considers that the respondent [Republic of Serbia] is responsible for the compensation of damages, i.e. the just satisfaction**”.*

*“As a parent, the plaintiff has been denied the enjoyment of the family life with his child, he has been deprived of this since his birth for 34 years [now] and has suffered mental anguish all this time since he has no knowledge as to what actually happened nor does he have any satisfaction that could at least mitigate it. Regardless of the fact that the European Court of Human Rights, when decided on the application of Zorica Jovanović from Čuprija whose baby also disappeared in 1983, ordered our State to take all appropriate measures, within one year from the date on which that judgment becomes final, to secure the establishment of a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant’s, **the court considers that the plaintiff is not under an obligation to wait further for adoption of the law and therefore grants his claim and awards him compensation in the amount of RSD 1,200,000**”.*

31. In view of the above, the Government considers that, pending the adoption of the draft law, the domestic courts gave full effect to the Court’s indications in the judgment at hand and ensured that appropriate, concrete and effective avenue is put in place to award compensation to parents of missing babies and declare the responsibility of the State for the facts leading to disappearance of “missing babies”, if any.

IV JUST SATISFACTION

32. The Government ensured that the just satisfaction awarded to the applicant in respect of non-pecuniary damage sustained has been disbursed within the time-limit set by the Court.

V CONCLUSIONS

33. The Government considers that the mechanism set out in the revisited draft law is in compliance with the European Court's indications. Being mindful to the plight of parents of "missing babies" the Government highlights that it highly appreciated the bilateral consultations on these issues with the civil sector and parents. These consultations were helpful to the Government in preparing the most recent version of the draft law and ensuring that the parents' concerns are taken on board to the extent possible under the Convention and the Constitution. The Government is grateful for friendly advice received from the Committee of Ministers. It is now of utmost importance to have constructive cooperation of the civil sector and parents with a view to not obstructing further the swift adoption of the draft law.

34. The efforts to find a comprehensive solution for this complex and sensitive matter will be intensified. Once the draft law is adopted, the Government of Serbia remains open for constructive suggestions from the civil society with a view to ensuring the proper functioning of the mechanism to be introduced.