

Establishing an effective model for future investigations leads to resolving the fate of “missing babies” in Serbia - said Mr Fredrik Sundberg, Head of the Department for the Execution of Judgments of the European Court of Human Rights. He says that this can only be achieved through the adoption of a special law.

In an interview with *Radio Free Europe (RFE/RL)*, Mr Sundberg spoke about a draft law on “missing babies” which should be discussed in the Serbian Parliament soon. The draft law was prepared in line with the 2013 judgement of the Strasbourg court in the case of *Zorica Jovanović*, who took the state to the court claiming that the government had failed to offer credible answers about the fate of her baby. She was told the baby died shortly after the birth in 1983, but she suspects that it disappeared from the maternity ward in Čuprija. In its ruling, the European Court of Human Rights ordered Serbia to pay Ms Jovanović €10,000 euro in damages.

The parents, united in several associations in Serbia, believe that their children, who were declared dead in state hospitals, were stolen from the maternity wards shortly after birth.

"In order to finally resolve the issue, it is necessary to establish a functional DNA database as part of a new investigative mechanism in Serbia, which would allow to track down children that are believed to be missing. This idea stemmed from the consultation with parents after it turned out that in most cases criminal investigations are impossible due to the expiration of the statute of limitation and after much evidence has probably disappeared over the past few decades. The purpose of the database is to allow people in Serbia and across Europe, who believe they were stolen at birth, to confirm or dispel such doubts.

A laboratory under an independent supervision would be tasked to establish the truth through comparing samples of parents' DNA with those of their possible children. However, if more recent disappearances of babies are suspected, those that still fall within the statute of limitation, their fate should also be determined through prosecutorial action to investigate such criminal offenses. In cases where the statute of limitation has not yet expired, the mechanisms of regular criminal law protection are still at hand, including the protection under the Serbian Criminal Code. If dissatisfied, parents may seek all other remedies under national law, including the application to the Constitutional Court and can finally apply to the Strasbourg Court", says Mr Sundberg.

- ***How many “missing babies”-related applications are pending at the European Court of Human Rights?***

Mr Sundberg: There are currently fifteen applications joined in two cases at the Strasbourg court. Strasbourg's decision on these new cases is still pending. However, the decision in the *Zorica Jovanović* case already represents an obligation on the part of the Serbian state to take measures to tackle this several decades long problem, and to shed full light on the fate of all missing babies to the greatest extent possible today. It is the duty of the State to make every possible effort and to use all means at its disposal to shed light on the fate of these children.

However, this does not mean that it will be possible to resolve each individual case, for simple reason that an enormous amount of time has passed. But it means that the courts will need to take every step, to follow every lead and to produce all possible evidence in a fast and efficient procedure, for example, by obtaining existing written documentation, hearing witnesses, carrying out forensic evaluations and DNA analyses. However, it should be born in mind that 'missing babies', who are now adults of 40, 50 or more years, cannot be forced to participate and provide their DNA samples, as they might prefer to protect their right to family and private life. Their participation must be exclusively on a voluntary basis, otherwise their human rights would be violated.

- ***We heard that parents are completely dissatisfied with the draft law on missing babies and have accused Strasbourg and the Serbian authorities of working against them. Any comments?***

Mr Sundberg: During the debate at the Serbian Parliament we could see a lot of confusion. Many parents complained about child trafficking, which they said continues today. Some of their ideas, such as setting up a Special Prosecution Office for Trafficking in Human Beings, may be interesting. The same goes for proposals to remove the statute of limitation for abduction or trafficking of children. However, all those suggestions cannot solve the problem of 'missing babies', as any changes can only apply to future cases and cannot be implemented retroactively. It is not only the principle of the European Convention that, once adopted, criminal legislation can only be applied in the future and not retroactively, but also the constitutional principle in Serbia and all other democratic countries in Europe and around the world.

- ***But that wasn't included in the law on missing babies?***

Mr Sundberg: No. Because the purpose of that law is not to solve that problem. It is not a law on human trafficking, and it does not concern situations that might exist today. This law addresses the issue of parents, who have not received an answer from the authorities for decades, through proper criminal investigations about the fate of their children. In many cases, the statute of limitation has expired. I am not sure, but I think that under the Serbian criminal law, the longest statute of limitation in such cases is 20 years.

It means that after this period, it is no longer possible to conduct criminal proceedings, to bring perpetrators to justice and to put them in prison, on which parents insist for perfectly understandable emotional reasons. From this perspective, the proposed law is the only possible way to solve the issue because it allows the fate of missing children to be investigated despite the impossibility of conducting criminal proceedings where the statute of limitation has expired.

The judgment from Strasbourg

- ***In 2013, did the Strasbourg Court rule that Serbia must pass a law on missing babies and settle other lawsuits according to the case of Zorica Jovanović?***

Mr Sundberg: The ruling said that Serbia should establish an independent mechanism to provide parents with two things: first, credible answers about the fate of their newborns and, if necessary, financial compensation. Serbia is the only European country that has such a problem. The allegations of missing babies, as we learn from the media, exist in other countries of the former Yugoslavia, but Serbia is the only country that has been condemned by the Strasbourg over that.

- ***In the opinion of parents, the missing babies' law does not do justice because it only secures financial compensation after which they would have to ask for their babies to be found?***

Mr Sundberg: That is inaccurate. The draft law on missing babies, above all, provides for a mechanism to seek answers about the fate of children who allegedly disappeared from state maternity wards 40 or 50 years ago. That is its primary role and it is in line with what Strasbourg court has ruled.

Public prosecutors cannot spend taxpayer's money to investigate criminal cases whose statute of limitation has expired, the ones whose perpetrators can no longer be punished for. A new system of investigations must therefore be put in place. The one which has been chosen is based on what we insist on in Strasbourg, which is that investigations are based on decision of a court as an independent body. In addition to this mechanism of investigation, the draft law also provides for the possibility of financial compensation that is consistent with the caselaw of the Strasbourg court.

- ***Once the law has been passed in Serbia, when can these cases be resolved?***

Mr Sundberg: This cannot be predicted and depends on the circumstances of each individual case, the availability of documentation and witnesses. The Council of Europe, in particular the Committee of Ministers in the context of monitoring the execution of this judgment, can insist on putting in place a well-functioning institutional framework. The basic idea is to verify the level of national capacity and whether it functions in practice, and once this has been confirmed, the supervision of the Committee of Ministers ends.

- ***Does Serbia have the capacity to deal with this problem?***

Mr Sundberg: Serbia is a member of the Council of Europe and is committed to upholding its standards. Which is not to say that there are no problems, like in many other countries, but we also see Serbia has made important progress in adhering to the European Convention on Human Rights. These days, the Committee of Ministers is examining a group of cases relating to extremely sensitive issue of state reaction to hate crimes. We shall see what they will decide, but Serbia has repeatedly demonstrated that it is moving forward in this regard and that its institutions have become more efficient.

Serbia and human rights

- ***What is the level of human rights in Serbia? Does the state apply the laws?***

Mr Sundberg: The situation in Serbia, from an overall human rights perspective, is no different from the other countries in the region. This does not mean that there are no problems in Serbia, but there are many that have been solved. One of them is the *Grudić* case, which concerned people who had received pensions in Kosovo¹ and who at some point were denied payments. The case was closed after measures were taken to address this sensitive issue. In the *Grudić* case, Serbia has put in place the necessary procedures to secure pension rights of the people who have earned them in Kosovo, as ordered by Strasbourg. It is a good achievement and a signal from Serbia that it is committed to meeting its obligations, even those in the most delicate situations.

“Serbia is among the top ten countries in Europe by the number of complaints filed by its citizens to court in Strasbourg”

There are still problems that need to be tackled. Serbia is among the top ten countries in Europe by the number of applications filed by its citizens with the court in Strasbourg. There is also the issue of covering the debt of some socially-owned companies, in line with decisions of the domestic courts. This means that decisions have been made to compensate individuals but that companies have not met that obligation. Many such applications against Serbia are pending at the Court of Human Rights. It takes a lot of money and planning to solve this.

- ***It could also be heard that there is another problem which involves payments of large sums of money?***

Mr Sundberg: This concerns an old issue from the time of the socialist Yugoslavia regarding hard currency savings in the banks of its former republics. The European Court has concluded that Serbia is responsible for a significant amount of such deposits, such as those in Investbanka and other Serbian banks in the former republics, worth some €300 million. Up until today, most payment requests submitted concern an amount of around €100 million, so it is estimated that the final payment to savers will be less than initially expected.

The payment is expected to begin early next year, and the Committee of Ministers will follow it. There are some technical problems, such as how to determine amounts spent, for example, for the purchase of socially-owned apartments in Bosnia and Herzegovina, which need to be deducted. Also, in some cases it is difficult to determine whether some people had saving accounts, because bank records have simply disappeared. However, I hope all this will be worked out during 2020.

There is also the problem of the extensive length of the judicial proceedings in Serbia. The European Convention on Human Rights requires states to compensate all those who have received justice too late or not at all. There is a standard fee that should be paid depending on the length of the proceedings. When it comes to that, the courts in Serbia are at the bottom of the scale, but the European Court has not accepted the proposed level of compensation. The Committee of Ministers will re-examine the issue next year and we hope that a practice will be introduced that the amount of the compensation for judicial proceedings that take unreasonable time to complete will be aligned with the amounts awarded by the Strasbourg court.

¹ All reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.