YUCOM
Lawyers' Committee
for Human Rights

ZORICA JOVANOVIC v SERBIA

(21794/08)

Execution status

Dear Chair, dear Committee of Ministers representatives, dear colleagues,

It is a great pleasure to have this opportunity to present you Serbia's progress on the execution of the European Court for Human Rights judgment in the Zorica Jovanovic v Serbia case, from the 26th of March 2013.

YUCOM – The Lawyers' Committee for Human Rights, founded in 1997, is a professional, voluntary, non-governmental association of citizens, established to protect and promote human rights in accordance with universally accepted civilized standards, international conventions and national law. Since the establishment, YUCOM is providing free legal aid to victims of human rights violation, as well as developing cooperation with national and international organizations involved in human rights protection and promotion. YUCOM has profiled itself and gained much recognition as human rights defenders' organization. As such, YUCOM is monitoring the execution of ECHR judgments and advocating for their successful implementation on national level.

In Zorica Jovanovic v Serbia judgment, the ECHR holds that there has been a violation of Article 8 of the Convention – Respect for family life, by the continuing failure to provide information concerning the fate of newborn babies in maternity wards. The Court also ordered remediation. Given the significant number of potential applicants, Serbian authorities had to take appropriate measures to establish a mechanism to provide individual redress to all parents in a similar situation, within one year of the judgment becoming final, which was on the 9th of September 2013.

Currently, Serbia is approaching fifth year without and concrete steps being taken by the State Authorities aimed at proper execution of the aforementioned judgment, about which we have already informed Committee of Ministers several times. In this regard, the Republic of Serbia received numerous Decisions, as well as an Interim resolution, and in the last document from December 2017, it was stated as follows:

"It is noted with profound regret that, in response to the interim resolution adopted at the September 2017 meeting, the authorities have not updated the Committee on the state of play regarding the adoption of the draft law. The absence of any response to the Committee's repeated calls to adopt the draft law is a source of serious concern also in view of the fact that the deadline set by the European Court for the adoption of the measures expired on 9 September 2014."

Lawyers' Committee for Human Rights – YUCOM
Kneza Milosa 4, 11103 Beograd, PAK 106915, Serbia
+381-11-3344235, 3344425 | office@yucom.org.rs | www.yucom.org.rs

In addition, this decision stresses absolute necessity to ensure that the parents of "missing" babies are provided with information on their fate as well as with individual redress.

The Republic of Serbia has not yet enacted the special law, *lex specialis,* which should establish the mechanism capable of investigating the "missing babies" cases upon parents' complaints (applications), which means that there is currently no effective mechanism for successful implementation of this ECHR judgment.

We have to repeat our concerns about previous version of Draft Law that was created and now withdrawn from the Parliamentary procedure, as we strongly believe that it would not lead to full execution of Zorica Jovanovic judgment. On contrary, we find that Serbian State Authorities by adopting that Draft Law would only present their efforts in execution of this judgment, but would not implement the core of it - to establish an effective mechanism that would be capable of providing credible answers regarding the fate of each child.

In addition, we have to stress our concern regarding Decisions of Committee of Ministers in which State Authorities are urged to adopt this Draft law. We strongly believe that the Draft Law that State Authorities proposed is inadequate and will not allow investigations of "missing babies" cases.

This Draft law prescribed that investigation should be done using non-litigation Court procedure which does not empower the Court to conduct adequate investigations needed in all those cases, for example: obtaining biometric and biological samples. The Court would have to delegate this activity to the special police unit that would be established, with no defined model of operation to secure the true and holistic investigation to be carried out.

The absence of special investigatory powers which this non-litigation Court lacks, will not in any way create the conditions needed to determine the truth about each and every case with circumstances consistent with those from the case of Zorica Jovanovic v Serbia.

Apart from this substantial issue regarding this Draft law, other weaknesses of the proposed solution are as follows:

1. The decision by which a court concludes that it cannot determine the status of a child – in our opinion it is completely inappropriate to have this kind of decision in a procedure where the obligation of the State is to determine the truth and all facts regarding the specific missing child.

2. The circle of possible applicants – according to the Draft law, only parents (and if they are not alive, brothers, sisters, grandparents) who previously officially contacted State authorities, are eligible for this proceeding.

    - It is necessary to expend the circle of possible applicants in a manner that even a child who believes he/she is a "missing baby" is eligible, but also other close family members even if the parents are alive;

    - It is necessary to allow even those applicants who did not previously contact the State authorities, or those who did but do not have any written document to prove this, to use the procedure. This follows from the opinion of the ECHR, that an ineffective legal remedy cannot be the requirement for the exercise of rights in other proceedings.

3. Legal remedy – according to the Draft law, the applicant would not have the right to appeal to the Supreme Court of Cassation, even when the Higher Court over turns the judgement which is legally questionable.

4. The principle of hearing the parties – Draft Law prescribes it as such, but it also prescribes that the Court may organize hearings IF it is necessary. This is *contradictio in adjecto*.

5. Non-pecuniary damage – Draft law prescribes that 10.000 EUR is the maximum award for non-pecuniary damage. According to the standards of a fair trial and the principle of the free judicial opinion, it is not possible to determine in advance the highest amount of damages. This limitation is explained by the possibilities of budgetary funds of the Republic of Serbia. In our opinion, these arguments in no way influence the amount of non-pecuniary damages to be awarded to the applicants in those cases. If such an argument were to be enforced, it would imply that no State in a poor economic situation could be fully responsible for addressing human rights violations or be responsible for awarding damages.

The opinion of civil society organizations, academics, the Ombudsman of the Republic of Serbia and parents, is that it is necessary to establish one *sui generis* mechanism, a special court, with a mandate to perform a special procedure to fully investigate the status of newborns suspected to be missing from the maternity wards in the Republic of Serbia.

In this regard, our recommendations for Committee of Ministers are:

- to remind the State Authorities about their obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms regarding the implementation of ECHR judgments,

- to remind the State Authorities on the core elements of Zorica Jovanovic v Serbia judgment,

- to call for serious and efficient approach of Serbian State Authorities in complying with Committee of Ministers Decisions and Interim Resolution and

- as the most important, to call for urgent execution of ECHR ruling in this case with establishment of proper investigative mechanism capable of determining the truth about each and every case similar to Zorica Jovanovic, as recommended by ECHR judgment.

Strasbourg - March 5, 2018.

Ana Jankovic Jovanovic
Legal adviser
Lawyers' Committee for Human Rights - YUCOM