EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 161

March 2013

Zorica Jovanović v. Serbia - 21794/08

Judgment 26.3.2013 [Section II]

Article 8

Positive obligations

Article 8-1

Respect for family life

Continuing failure to provide information concerning fate of newborn baby in hospital care: *violation*

Article 46

Article 46-2

Execution of judgment

General measures

Respondent State required to take appropriate measures to establish a mechanism of redress for all parents of missing newborn children

Facts – On 28 October 1983 the applicant gave birth to a healthy baby boy in a State-run hospital. Three days later, when she and the baby were about to be discharged, she was informed that her son had died. The applicant attempted to access the hospital nursery where her son had spent the night but was restrained by hospital orderlies. The baby's body was never handed over to the applicant or her family and she has never been provided with an autopsy report or informed when and where her son was allegedly buried. No indication was given as to the cause of death and the death was not registered in municipal records. A criminal complaint filed by the applicant's husband against the hospital staff – following reports in the media about other similar cases – was rejected in October 2003 as unsubstantiated.

Between 2003 and 2010 the authorities took steps to improve procedures in hospitals in the event of the death of a newborn child and to investigate allegations made by hundreds of parents whose babies had gone missing following their supposed deaths in hospital wards, mostly between the 1970s and 1990s. Thus, since 2003 the parents, family or legal representatives of newborns who died in hospital have been obliged to sign a special form stating they have been informed of the death and will personally make funeral arrangements. Furthermore, reports were drawn up by the Ombudsman, the Parliament's investigation committee and a working group set up by the Parliament to assess the situation and propose legislative changes. The reports of the Ombudsman and investigation committee found serious shortcomings, both in the legislation

applicable in the 1980s and in the procedures and statutory regulations that applied when a newborn died in hospital (the prevailing medical opinion being that parents should be spared the pain of having to bury their child). They therefore considered that the parents' doubts as to what had really happened to their children were justified. The reports also found that the State's response to the situation had been inadequate. In December 2010, however, the Parliamentary working group concluded that no changes to the existing legislation, which by then had already been amended, were necessary (except as regards the collection and usage of medical data). It also noted that Article 34 of the Serbian Constitution made it impossible to extend the applicable prescription period for the prosecution of crimes committed in the past, or to introduce new, more serious, criminal offences and/or harsher penalties.

Law – Article 8

(a) *Admissibility*

(i) *Compatibility* ratione temporis: The applicant's son had allegedly died/gone missing on 31 October 1983, but the Convention had not entered into force in respect of Serbia until 3 March 2004. Nevertheless, the respondent State's alleged failure to provide the applicant with any definitive and/or credible information as to the fate of her son had continued to date. In such circumstances, the applicant's complaint concerned a continuing situation and the Government's objection of lack of jurisdiction *ratione temporis* had to be dismissed. The Court was thus competent to examine the applicant's complaint in so far as it related to the respondent State's alleged failure to fulfil its procedural obligations under the Convention since 3 March 2004, but could also have regard to the facts prior to the ratification inasmuch as they could be considered to have created a continuous situation extending beyond that date or may be relevant for the understanding of facts occurring thereafter.

(ii) *Six-month rule*: The Court reiterated that applicants could not wait indefinitely before lodging their application with the Court in disappearance cases. While allowances had to be made for the uncertainty and confusion which frequently marked the aftermath of a disappearance, applications could be rejected as out of time where there was excessive or unexplained delay on the part of the applicants once they had, or should have, become aware that either no investigation had been instigated or that it had lapsed into inaction or become ineffective and that there was no immediate, realistic prospect of an effective investigation in the future. In the very specific circumstances of the instant case, despite the overall passage of time, it could not be said that the applicant had been unreasonable in awaiting the outcome of developments which could have "resolved crucial factual or legal issues" regarding her complaint, at least not until the presentation of the working group's report in December 2010 when it became obvious that no redress would be forthcoming. Her application lodged in April 2008 was therefore within the six-month time-limit.

(iii) *Exhaustion of domestic remedies*:– The criminal complaint lodged by the applicant's husband on his own and the applicant's behalf was rejected by the public prosecutor's office without any indication as to whether any preliminary investigation had been carried out. In any event, any criminal proceedings would have become time-barred by October 2003 at the latest and so would have been incapable of providing any redress thereafter. A civil claim could not have remedied the situation either as, while the civil courts could have recognised the violation of the applicant's "personal rights" and awarded compensation, they could not effectively provide redress for the applicant's underlying need for information as to "the real fate of her son". The Government's preliminary objection concerning an alleged failure to exhaust domestic remedies was therefore rejected.

Conclusion: admissible (unanimously).

(b) *Merits*

Article 8: The considerations the Court had noted in *Varnava and Others v. Turkey* with respect to a State's positive obligations under Article 3 of the Convention to account for the whereabouts and fate of missing persons were broadly applicable, *mutatis mutandis*, to the very specific context of positive obligations under Article 8 in the instant case*.

The applicant still had no credible information as to what had happened to her son. His body had never been transferred to her or her family, and the cause of death was never determined. She had never been provided with an autopsy report or informed of when and where her son had allegedly been buried; his death had never been officially recorded. The criminal complaint filed by the applicant's husband appeared to have been rejected without adequate consideration.

The Serbian authorities had themselves acknowledged on various occasions that there had been serious shortcomings in the legislation and procedures concerning the death of newborn babies in hospital, and that the parents had legitimate concerns and were entitled to know the truth about their children's fate. However, despite several seemingly promising official initiatives, the working group report to the Parliament in December 2010 had concluded that no changes were necessary to the already amended legislation, except as regards the collection and usage of medical data. It was clear though that this only improved the situation for the future and effectively offered nothing to parents like the applicant who had endured the ordeal in the past. The applicant had thus suffered a continuing violation of her right to respect for her family life on account of the respondent State's continuing failure to provide her with credible information as to the fate of her son.

Conclusion: violation (unanimously).

Article 46: Given the significant number of potential applicants, the respondent State had to take within one year of the judgment becoming final appropriate measures, preferably by means of a *lex specialis*, to establish a mechanism providing individual redress to all parents in a situation similar to the applicant's. The mechanism was to be supervised by an independent body, with adequate powers, capable of providing credible answers regarding the fate of each missing child and affording adequate compensation. All similar applications already pending before the Court were adjourned for the one-year period without prejudice to the Court's powers to declare any such application inadmissible or strike it out of the list.

Article 41: EUR 10,000 in respect of non-pecuniary damage.

(See also: *Varnava and Others v. Turkey* [GC], nos. 16064/90 et al., 18 September 2009, Information Note no. 122)

* "The finding of such a violation is not limited to cases where the respondent State has been held responsible for the disappearance ... but can arise where the failure of the authorities to respond to the quest for information by the relatives or the obstacles placed in their way, leaving them to bear the brunt of the efforts to uncover any facts, may be regarded as disclosing a flagrant, continuous and callous disregard of an obligation to account for the whereabouts and fate of a missing person" (*Varnava and Others v. Turkey* [GC], § 200).
