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

SECOND SECTION

DECISION

Applications nos. 9291/14 and 63798/14
Ljubinka MIK against Serbia
and Svetlana JOVANOVIĆ against Serbia

The European Court of Human Rights (Second Section), sitting on 23 March 2021 as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Marko Bošnjak,
Valeriu Griţco,
Egidijus Kūris,
Branko Lubarda,
Carlo Ranzoni,
Pauliine Koskelo, *judges,*

and Stanley Naismith, *Section Registrar,*

Having regard to the above applications lodged on 10 January 2014 and 10 September 2014 respectively,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. The applicant in the first case (application no. 9291/14), Ms Ljubinka Mik, is a Serbian national who was born in 1956 and lives in Belgrade. She was represented before the Court by Ms N. Šolić, a lawyer practising in the same city.

2. The applicant in the second case (application no. 63798/14), Ms Svetlana Jovanović, is a Serbian national who was born in 1957 and lives in Kragujevac. She was represented before the Court by Mr A. Jordanovski, a lawyer practising in Kraljevo.

3. The Government were initially represented by their Agent at the time, Ms Vanja Rodić, and subsequently by their current Agent, Ms Zorana Jadrijević Mladar.

A. The circumstances of the case

4. The facts of the case, as submitted by the parties, may be summarised as follows.

1. As regards the first applicant (Ms Ljubinka Mik, application no. 9291/14)

5. On 26 January 1981 the applicant gave birth to a baby boy in a Belgrade State-run hospital. His birth was entered into the birth register.

6. On 28 January 1981, however, the applicant was informed that her baby had died. His death was also officially registered.

7. The applicant was never shown her son's body or allowed to bury it. The reason given by the hospital was that an autopsy needed to be performed. The applicant, however, maintained that she was not informed as to when and where her son had allegedly been buried, or provided with an autopsy report at the relevant time. In support of their written observations in the present case, the Government provided the Court with the autopsy report in question, which gave respiratory insufficiency as the cause of the child's death.

8. In 2002, having heard through the media of many other similar cases, the applicant started having doubts as to what had really happened to her baby.

9. Eventually, she obtained copies of a number of related official documents, apparently lacking stamps and/or containing erroneous personal or other data. She also obtained a certificate from the Public Funeral Services Company stating that no child with her surname had been buried in 1981.

10. In 2002 the applicant lodged a criminal complaint, maintaining that her child could still be alive and might have been taken from her unlawfully.

11. The investigating judge of the Belgrade Second Municipal Court (*Drugi opštinski sud u Beogradu*) subsequently agreed to take certain steps in order to explore the applicant's allegations. In particular, in 2003 and 2004 he apparently heard the applicant in person, as well as a number of witnesses.

12. By 21 March 2005, however, the Belgrade Second Municipal Public Prosecutor's Office (*Drugo opštinsko javno tužilaštvo u Beogradu* – "the prosecutor's office") rejected the criminal complaint since prosecution for the alleged crimes had become time-barred.

13. The applicant subsequently complained to various judicial and administrative authorities, but to no avail.

14. On 9 July 2012 the investigating judge of the Belgrade Court of First Instance (*Prvi osnovni sud u Beogradu*) apparently reaffirmed the prosecutor's office's earlier finding that prosecution for the alleged crimes had become time-barred.

15. On 28 May 2013 the applicant lodged an appeal with the Constitutional Court (*Ustavni sud*).

16. On 29 September 2016 it was rejected as inadmissible.

17. On 11 September 2020 the applicant lodged a request with the Belgrade High Court (*Viši sud u Beogradu*) in accordance with the newly enacted *Zorica Jovanović* Implementation Act (see paragraph 27 below, and in particular Articles 15 and 16 of that legislation).

2. As regards the second applicant (Ms Svetlana Jovanović, application no. 63798/14)

18. On 10 September 1987 the applicant gave birth to a baby boy in a Kragujevac State-run hospital.

19. On 11 September 1987, however, she was informed that her baby had died.

20. On 18 September 1987 the applicant was discharged from the hospital without having seen her child's body. It remains unclear, however, whether her husband at some point had an opportunity to claim his son's body.

21. In 2002, having heard through the media of many other similar cases, the applicant started having doubts as to what had really happened to her baby.

22. Eventually, she obtained copies of a number of official documents, apparently lacking proper information as to what had happened to her child, including when and where he had been buried. The official birth register apparently did not contain any information regarding her son's birth either.

23. In 2002 the applicant lodged a criminal complaint, maintaining that her child could still be alive and might have been taken from her unlawfully.

24. The public prosecution service, the police and the investigating judge of the Kragujevac Municipal Court (*Opštinski sud u Kragujevcu*) subsequently took a number of steps in order to explore the applicant's allegations. They obtained relevant documentation, as well as the autopsy report, and interviewed a number of witnesses, including the applicant in person. In a statement given to the investigating judge, the applicant asked that DNA testing be conducted, since a sample of her child's DNA had been kept by the hospital. She refused, however, to have this procedure carried out in Serbia, citing the local authorities' "lack of objectivity".

25. Following several rejections of her criminal complaints, in May 2005 the Kragujevac Municipal Public Prosecutor's Office (*Opštinsko javno tužilaštvo u Kragujevcu*) rejected the applicant's criminal complaint as time-barred.

26. On 2 and 4 September 2020 the applicant and her husband lodged requests with the Kragujevac High Court (*Viši sud u Kragujevcu*) in accordance with the newly enacted *Zorica Jovanović* Implementation Act (see paragraph 27 below, and in particular Articles 15 and 16 of that legislation).

B. Relevant domestic law

1. *Law on establishing facts about the status of newborn children suspected to have disappeared from maternity wards in the Republic of Serbia (*Zakon o utvrđivanju činjenica o statusu novorođene dece za koju se sumnja da su nestala iz porodilišta u Republici Srbiji, *published in the Official Gazette of the Republic of Serbia – OG RS – no. 18/20 of 3 March 2020 – "the* Zorica Jovanović *Implementation Act")*

27. This legislation, enacted by the Serbian Parliament (*Narodna skupština*) in February 2020, provides as follows:

I. GENERAL PROVISIONS
Subject matter of this Act
Article 1

"This Act shall regulate the proceedings for establishing facts about the status of newborn children suspected to have disappeared from maternity wards or healthcare institutions (hereinafter 'maternity wards') in the Republic of Serbia, and the procedure by which just financial compensation for non-pecuniary damage shall be awarded."

Objective of this Act
Article 2

"The objective of this Act shall be to establish facts to determine the truth about the status of newborn children suspected to have disappeared from maternity wards in the Republic of Serbia, based on evidence presented and data obtained in court proceedings, from State bodies and other authorities, as well as from parents and other persons.

The objective of this Act shall also be to fulfil the obligations of the Republic of Serbia stemming from the European Court of Human Rights judgment in the case of *Jovanović v. Serbia* (application no. 21794/08).

All provisions of this Act shall be interpreted in order to determine the truth about the fate and status of newborn children suspected to have disappeared from maternity wards in the Republic of Serbia."

II. RELEVANT AUTHORITIES

Courts of first instance
Article 3

"The first-instance proceedings for establishing facts about the status of newborn children suspected to have disappeared from maternity wards in the Republic of Serbia (hereinafter 'the proceedings') shall be conducted by:

(1) the Belgrade High Court, for the territory of the Belgrade Appeals Court;

(2) the Kragujevac High Court, for the territory of the Kragujevac Appeals Court;

(3) the Niš High Court, for the territory of the Niš Appeals Court;

(4) the Novi Sad High Court, for the territory of the Novi Sad Appeals Court.

The territorial jurisdiction of a high court shall be determined according to the place where the maternity ward in question is or was located or the petitioner's temporary or permanent residence."

Composition of a court of first instance
Article 4

"At first-instance, the proceedings shall be conducted and decisions shall be made by a single judge."

Specialisation of judges
Article 5

"Judges of first and second-instance in the proceedings regulated under this Act shall undergo special training on [its] implementation, which shall be carried out by the Judicial Academy.

The Judicial Academy shall devise the special training programme referred to in paragraph 1 of this Article."

Ministry in charge of internal affairs
Article 6

"At the court's request, specially trained police officers of the Criminal Investigations Directorate shall conduct investigative actions during the proceedings.

The[se] police officers shall act in accordance with the legislation governing the powers of police officers."

III. PRINCIPLES IN THE PROCEEDINGS

Principle of disposition
Article 7

"The proceedings shall be initiated upon the petitioner's request."

Principle of investigation
Article 8

"The court shall also establish facts which have not been presented during the proceedings, and order the presentation of evidence which has not been submitted.

The court may request written evidence and data from State bodies and other authorities, as well as from natural persons and legal entities, which shall be submitted within [thirty] days of receipt of the request in question.

If the [requested] written evidence or data is not submitted ... within the prescribed period, the court shall issue a fine in the amount of 30,000-450,000 dinars [RSD – equivalent to approximately 255-3,810 euros (EUR)] to a natural person or the person responsible in the legal entity concerned, or a fine in the amount of [RSD] 90,000-3,000,000 [equivalent to approximately EUR 760-25,410] to the legal entity concerned."

Principle of urgency
Article 9

"The court shall conduct the proceedings without delay.

When setting deadlines and scheduling hearings, the court shall take into account the urgency of the proceedings."

Principle of confidentiality
Article 10

"As a rule, the proceedings shall be closed to the public.

At the petitioner's request, the court may decide to make the proceedings fully or partially open to the public.

The court, the petitioner and all others involved in the proceedings shall keep data disclosed during the closed proceedings confidential.

Regulations concerning the confidentiality of data and personal data protection shall apply to these proceedings, unless otherwise prescribed by this Act."

Principle of the right to be heard
Article 11

"The court shall give the petitioner and all others involved in the proceedings the opportunity to respond to claims made during the proceedings, as well as to respond to the procedural steps taken or proposals put forth by the petitioner and all others involved in the proceedings."

IV. THE PROCEEDINGS
1. General Provisions
The petitioner and others involved in the proceedings
Article 12

"The petitioner is a participant in the proceedings.

State bodies and other authorities, organisations and institutions (ministries, healthcare institutions, social welfare centres, etc.) shall take part in the proceedings but not as participants within the meaning of the legislation governing non-contentious proceedings."

Exemption from court fees and legal aid
Article 13

"The petitioner shall be exempt from paying any court fees.

At the petitioner's request, the court may appoint, at its own expense, a [lawyer admitted to practise law] to represent the petitioner."

Rules of procedure
Article 14

"The court shall decide the petitioner's request ... pursuant to the legislation governing non-contentious proceedings, unless otherwise prescribed by this Act."

2. Institution of Proceedings
The petitioner
Article 15

"The proceedings are initiated by a petitioner requesting the court to establish facts about the status of a newborn child suspected to have disappeared from a maternity ward in the Republic of Serbia (hereinafter 'request').

The request may be lodged by a parent of a newborn child who, by the date of this Act's entry into force, has enquired with State bodies or a maternity ward in the Republic of Serbia about the status of the newborn suspected to have disappeared from such a ward.

If no parent is alive, a brother, sister, grandfather or grandmother of the missing newborn child may initiate the proceedings, irrespective of whether they have already enquired with State bodies or a maternity ward about the status of the newborn.

The request may also be lodged by a person who has doubts as to his or her origin, regardless of whether he or she has already enquired with State bodies about his or her family status.

The Ombudsman may also lodge requests on behalf of persons referred to in paragraphs 2 to 4 of this Article."

Content of the request
Article 16

"The request shall contain the petitioner's name and surname, the petitioner's temporary or permanent residence, the petitioner's family connection with the missing newborn child, the time of the newborn's birth, the name and address of the maternity ward where the newborn was delivered, the manner in which the death of the newborn was communicated (death certificate, birth registration and so forth), and other allegations relevant to the proceedings.

The request shall include a request to determine the status of the missing newborn, and may also include a claim for just compensation for non-pecuniary damage for the violation of the right to family life.

The petitioner shall submit, as an appendix to the request, evidence in support of the facts stated therein, or ask in the request itself that such evidence be obtained."

Deadlines for filing applications
Article 17

"Requests may be lodged with the court within six months of this Act's entry into force."

3. Course of the Proceedings
Evidence
Article 18

"The court may admit all forms of evidence provided for in the legislation governing the conduct of civil proceedings.

Public certificates attesting to death shall not, in themselves, be deemed as sufficient proof that a missing newborn child has in fact died."

DNA testing
Article 19

"In order to establish facts about the status of a missing newborn child, the court may order that a forensic genetic analysis of human biological samples (hereinafter 'DNA testing') be carried out.

For the purposes of DNA testing, the court may order the taking of biological samples from the petitioner and other persons who may be related to the missing newborn child, as well as from the bodies of deceased persons.

The petitioner may only refuse to have his or her biological sample taken for the purposes of DNA testing if this would be damaging to his or her health.

Should the petitioner unjustifiably refuse to have his or her biological sample taken for DNA testing, his or her request shall be considered withdrawn.

The taking of biological samples from other persons for the purposes of DNA testing may only be carried out with their written consent.

The court may request in writing that the authority responsible for the management of the national DNA register run a search ... in order to compare the DNA profile obtained as a result of the [above-mentioned] DNA testing with data already contained in the register.

The results of DNA testing carried out in accordance with this Act may only be used to establish facts regarding the status of the missing newborn in question."

Witnesses and expert witnesses
Article 20

"Witnesses and expert witnesses may not withhold their testimony or expert testimony, respectively, or their replies to specific questions.

If a witness who has been duly summoned fails to appear before the court and to provide justification for the non-appearance, or leaves the place of the hearing without permission or a justified reason, the court shall immediately order the witness to be brought before the court forcibly, for him or her to bear the [associated] costs, and fine him or her in the amount of [RSD] 30,000-450,000 [equivalent to approximately EUR 255-3,810]. If the witness appears before the court and, after being warned of the consequences, still refuses to testify or respond to specific questions, the court shall immediately fine him or her in the amount of [RSD] 30,000-450,000, and if the witness continues to refuse to testify or respond to specific questions, the court shall fine him or her again.

The court shall fine an expert witness who is a natural person or the person responsible in a legal entity giving expert testimony in the amount of [RSD] 30,000-450,000 and/or the legal entity itself in the amount of [RSD] 90,000-3,000,000,

[equivalent to approximately EUR 760-25,410] if they, despite having been duly summoned, fail to appear before the court and to provide justification for the non-appearance, or fail to submit their findings and opinions by a given deadline or simply refuse to give their expert testimony."

Hearings
Article 21

"The court shall schedule a hearing at the petitioner's request.

In absence of such a request, the court shall schedule a hearing when this is necessary in order to establish essential facts or obtain evidence, or when it considers it necessary to hold a hearing for other justified reasons."

Reporting criminal offences
Article 22

"If during the proceedings the court finds reasonable grounds to suspect that a criminal offence subject to public prosecution has been committed, it shall be obliged to immediately lodge a criminal complaint with the relevant public prosecutor."

4. Court Adjudication
Decision
Article 23

"The court shall issue a decision on whether or not the request has merit.

The decision on accepting the request shall define the status of the missing newborn child by establishing facts about the child's death and the location of the body or, if death cannot be determined, establishing facts explaining what happened to the missing newborn and his or her current whereabouts.

If facts explaining what happened to the missing newborn child cannot be established, the court shall acknowledge by a decision that the status of the missing newborn cannot be determined.

The final decision by which the court acknowledges that the status of the missing newborn child cannot be determined shall be without prejudice to the petitioner's right to reinitiate the proceedings concerning the same matter if he or she learns of new facts or discovers or gains the opportunity to use new evidence on the basis of which the decision referred to in paragraph 2 of this Article could have been adopted if those new facts or that new evidence had been used in the earlier proceedings.

The court shall determine which body, organisation or institution is responsible for the disappearance of the newborn child in question."

Just financial compensation
Article 24

"In its decision on accepting the request, the court shall award the petitioner just financial compensation for non-pecuniary damage suffered as a consequence of the violation of his or her right to family life.

Just financial compensation shall be awarded even if the court has issued a decision concluding that the status of the missing newborn child cannot be determined.

Just financial compensation may only be awarded if previously included in the request."

Amount of just compensation
Article 25

"The amount of just financial compensation for non-pecuniary damage shall be determined by the court at its own discretion, taking into account all the circumstances of the case, in particular the intensity of the mental anguish and fear endured, as well as other relevant criteria specified in the legislation governing civil obligations-related matters.

Just financial compensation shall not exceed [EUR] 10,000 in [RSD] as per the official average exchange rate of the National Bank of Serbia on the date of the court decision.

Just financial compensation shall be paid from the budget of the Republic of Serbia.

The award of just financial compensation [mentioned above] shall be without prejudice to the petitioner's right to compensation for any [additional] pecuniary damage [which he or she may have] suffered."

5. Appeals Procedure
Appeal
Article 26

"The petitioner may lodge an appeal against the high court's decision with the relevant appeals court, through the high court itself, within [fifteen] days of receipt of the decision.

An appeal may[, alternatively,] also only contest the amount of compensation awarded.

The appeals court ruling on the appeal shall sit in a chamber comprised of three judges."

Decision on appeal
Article 27

"The appeals court shall decide the appeal by a decision.

The decision on appeal shall not be amenable to a further appeal on points of law."

Effect of the decision in other proceedings
Article 28

"In criminal or other proceedings, the authorities conducting them shall be bound by the final decision issued pursuant to this Act as regards establishing facts about the death of the child in question."

V. COMMISSION
Commission for obtaining facts regarding the status of newborn children suspected to have disappeared from maternity wards in the Republic of Serbia
Article 29

"Within [thirty] days of this Act becoming applicable, the Government shall form a Commission for obtaining facts regarding the status of newborn children suspected

to have disappeared from maternity wards in the Republic of Serbia (hereinafter 'the Commission').

The Commission's task shall be to obtain and process all facts and data in the possession of:

(1) the judicial authorities conducting or which have in the past conducted preliminary criminal investigations or criminal proceedings based on criminal complaints, submitted by parents or other persons, suggesting that newborn children have been abducted or trafficked;

(2) ... [the police who] ..., while exercising their powers or acting on the instructions of the judicial authorities responsible for carrying out the [said] preliminary criminal investigations or criminal proceedings, or otherwise, have come into the possession of facts, data and information concerning the abduction and trafficking of newborn children;

(3) all medical institutions which, in the course of their work or in any other way, have or could have been in contact with expectant mothers, newborn children, stillborn children or newborns who shortly after being delivered died in those medical institutions;

(4) local government registry offices, where the births and deaths of all children suspected to have been abducted or trafficked are registered;

(5) all public utility companies which had or still have the delegated public function of burying the remains of stillborn or newborn children who died shortly after being delivered in one of the [said] medical institutions;

(6) all social welfare centres which may have in their possession facts, data or information concerning the abduction and trafficking of newborn children;

(7) all other State and provincial bodies, as well as local government authorities, and all public companies and institutions which may have in their possession facts, data or information concerning the abduction and trafficking of newborn children.

All the entities referred to in paragraph 2 of this Article shall grant the Commission access to all data at their disposal and facilitate interviews with their staff, thereby enabling the Commission to perform its task.

The Commission may only process personal data with the prior consent of the Commissioner for Information of Public Importance and Personal Data Protection, who shall decide on the Commission's request in this regard within five days of its receipt.

The Commission shall consist of [fifteen] members, six of whom shall be appointed by the Government as representatives of the ministries in charge of judicial affairs, internal affairs, health, family care and State administration, as well as the Security Information Agency, and nine of whom shall be appointed from among the representatives of registered parents' associations dealing with the issue of missing newborn children, the latter on a joint proposal presented by them in this regard.

The Commission shall decide by a majority vote of all its members.

The Commission shall adopt its own rules of procedure.

The Commission shall elect a chair from among its members who are the representatives of registered parents' associations dealing with the issue of missing newborn children.

The Commission shall submit annual reports to the Government and the competent committee of Parliament.

The Commission shall be provided with professional, administrative and technical support by the General Secretariat of the Government."

VI. FINAL PROVISIONS
Article 30
Entry into Force and Application of the Act

"This Act shall enter into force ... [on 11 March 2020] ... and shall be applied three months after ... [that date] ... with the exception of Articles 3, 5, 15, 16 and 17, which shall be applied from ... [11 March 2020]."

2. *Decree on the application of deadlines in court-related proceedings during the state of emergency declared on 15 March 2020 (*Uredba o rokovima u sudskim postupcima za vreme vanrednog stanja proglašenog 15. marta 2020. godine*, published in OG RS no. 38/20 of 20 March 2020)*

28. This Decree provided, *inter alia*, that deadlines for instituting non-contentious proceedings (*rokovi za pokretanje vanparničnih postupaka*) before the courts of law, including the proceedings referred to in the *Zorica Jovanović* Implementation Act (see paragraph 27 above), were to be suspended during the state of emergency imposed as a consequence of the COVID-19 situation.

29. The Decree itself entered into force on 20 March 2020 and was repealed on 6 May 2020.

C. United Nations International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006

30. The relevant provisions of this Convention read as follows:

Article 1

"1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance."

Article 2

"For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

Article 3

"Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice."

Article 4

"Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law."

Article 5

"The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."

Article 8

"Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

(*a*) Is of long duration and is proportionate to the extreme seriousness of this offence;

(*b*) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation."

Article 12

"1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this article shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1 of this article:

(*a*) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

(*b*) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place

where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation."

Article 19

"1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual."

Article 24

"1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

(*a*) restitution;

(*b*) rehabilitation;

(*c*) satisfaction, including restoration of dignity and reputation;

(*d*) guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been

clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance."

Article 25

"1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(*a*) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(*b*) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (*a*) above.

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (*a*) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (*a*) of this article.

4. Given the need to protect the best interests of the children referred to in paragraph 1 (*a*) of this article and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child."

31. This Convention entered into force on 23 December 2010 and Serbia ratified it on 18 May 2011.

COMPLAINTS

32. The applicants complained that their children, respectively, had or could have been abducted and unlawfully adopted by another family. In any event, they claimed to be entitled to know the truth about their children's fate and maintained that they had had no effective domestic remedy at their disposal in this regard.

THE LAW

A. Joinder of the applications

33. Given their similar factual and legal background, the Court decides to order the joinder of the two applications, pursuant to Rule 42 § 1 of the Rules of Court.

B. The applicants' complaints

34. The Court, being the master of the characterisation to be given in law to the facts of any case before it (see, among many other authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), considers that the above complaints fall to be examined under Article 8 and Article 13 read in conjunction with Article 8 of the Convention (see *Zorica Jovanović v. Serbia*, no. 21794/08, §§ 43 and 78, ECHR 2013). The relevant parts of those provisions read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

1. The parties' submissions

(a) The Government

35. The Government argued that it had not been easy to prepare and enact the *Zorica Jovanović* Implementation Act, particularly given the different expectations of the parents concerned and the objective challenges in providing an adequate legal framework aimed at comprehensively addressing the issue of missing babies, in accordance with the Court's own instructions (see paragraphs 43-45 below). Eventually, however, following a public discussion in which various professional associations, non-governmental actors and experts from the Council of Europe had taken part, the Serbian Parliament had done exactly that when it had enacted the legislation concerned in February 2020 (see paragraph 27 above).

36. As regards the operation in practice of the *Zorica Jovanović* Implementation Act, the Government submitted that the Commission referred to in Article 29 thereof had been formed on 10 July 2020 and, furthermore, that on 16 July 2020 one of its members had been replaced. The Government provided the Court with copies of their decisions to this effect.

37. According to the Government, extensive training had been provided to the judges and police officers concerned. Responsibility for the former lay with the Judicial Academy (*Pravosudna akademija*). This institution had devised a detailed training plan and programme regarding the newly enacted legislation and relevant Convention standards. As of 30 March 2020, given the state of emergency declared in the meantime with respect to the COVID-19 situation, the Judicial Academy had set up online training courses. As part of that effort, video training sessions, interactive content and relevant materials had all been made available. In April and May 2020 the Judicial Academy had prepared additional material for the special training of the judges involved. By July 2020 seventy-six of the eighty-eight judges registered to deal with the subject matter in question had taken part in online training. Furthermore, four workshops for judges had likewise been held, although the fifth had been postponed owing to the worsening situation regarding the COVID-19 pandemic. Online training courses, however, had remained available to everyone throughout this time. Additional in-person or online training events and activities, depending on the situation, as well as round tables, had been planned to take place between September and December 2020, the latter not just for judges but also for parents and members of the Commission. Videos and other material had been uploaded to existing online platforms. One of them had concerned various aspects of the *Zorica Jovanović* judgment (cited above), while another had concerned more general issues related to the right to a fair trial and the right to respect for one's private and family life under the Convention.

38. The Government submitted that as of September 2020 a total of 101 requests had been lodged with the relevant courts pursuant to the *Zorica Jovanović* Implementation Act, that is to say, requests to have the status of the newborn children in question determined. At that time, however, the relevant documentation and other evidence was still being obtained.

39. Lastly, the Government maintained, quite apart from the above, that the applicants had failed to make use or properly make use of the existing constitutional and/or criminal remedies and had not lodged their respective applications with the Court within the six-month time-limit as required under Article 35 § 1 of the Convention.

(b) The applicants

40. As regards the *Zorica Jovanović* Implementation Act (see paragraph 27 above), the applicants were of the opinion that the Serbian authorities had been too slow and ultimately ineffective in terms of complying with the requirements of the *Zorica Jovanović* judgment (cited above; see also paragraph 45 below).

41. In this connection, the first applicant pointed out that domestic non-governmental actors had in fact come up with their own model legislation on the issue much sooner. Moreover, the *Zorica Jovanović* Implementation Act had not envisaged a role for the public prosecution service, even though in the context of the Serbian legal system it should have been the one to spearhead any investigations. There had also been concern among the parents of the missing children that in most situations the outcome of proceedings brought on the basis of the newly enacted legislation would be that the courts would simply be unable to determine the actual status of the latter. As regards the implementation of the legislation, by September 2020 approximately 200 requests had been lodged with the Belgrade High Court. Even though the deadlines for the submission of those requests had been extended because of the COVID-19 related state of emergency, the Government had not launched any public awareness campaign in this regard. Also, some high court judges had received online training, but it had focused mostly on the application of general human rights standards rather than on how to effectively conduct investigations based on the *Zorica Jovanović* Implementation Act. As of September 2020, according to the first applicant, no request lodged by a parent had been successfully adjudicated in terms of having the true fate of the child in question determined.

42. Lastly, the applicants maintained, quite apart from the above, that they had fulfilled the requirement to exhaust domestic remedies, even though in real terms none of the constitutional or criminal remedies referred to by the Government could be considered truly effective. The applicants further submitted that they had also complied with the six-month time-limit within the meaning of Article 35 § 1 of the Convention.

2. The Court's assessment

43. On 26 March 2013 the Court delivered a leading judgment concerning issues essentially identical or very similar to those raised by the applicants in the present case, finding, *inter alia*, a breach of Article 8 of the Convention (see *Zorica Jovanović*, cited above).

44. The relevant parts of this judgment read as follows:

> "71. ... [T]turning to the present case, it is noted that the body of the applicant's son was never released to the applicant or her family, and that the cause of death was never determined ... Furthermore, the applicant was never provided with an autopsy report or informed of when and where her son had allegedly been buried, and his

death was never officially recorded ... The criminal complaint lodged by the applicant's husband would also appear to have been rejected without adequate consideration ... and the applicant herself still has no credible information as to what happened to her son.

72. Moreover, the Court observes that the respondent State authorities have themselves affirmed, on various occasions following the Serbian ratification of the Convention, that (a) in the 1980s there were serious shortcomings in the applicable legislation and in the procedures before various State bodies and health authorities; (b) there were no coherent statutory regulations as to what should happen in situations where a newborn baby died in hospital; (c) the prevailing medical opinion was that parents should be spared the mental pain of having to bury their newborn baby, which is why it was quite possible that certain couples were deliberately deprived of the opportunity to do so; (d) this situation justified the parents' doubts or concerns as to what had really happened to their children, and it could not therefore be ruled out that the babies in question were indeed removed from their families unlawfully; (e) the respondent State's response between 2006 and 2010 was itself inadequate; and (f) the parents therefore remain entitled to know the truth as to the real fate of their children ...

73. Lastly, despite several seemingly promising official initiatives between 2003 and 2010, the working group's report submitted to the Serbian Parliament on 28 December 2010 concluded that no changes to the existing, already amended, legislation were necessary, except as regards the collection and use of medical data. In these circumstances, it is clear that this has only improved the situation for the future, and has effectively offered nothing to those parents, including the applicant, who have endured the ordeal in the past ...

74. The foregoing considerations are sufficient to enable the Court to conclude that the applicant has suffered a continuing violation of the 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.

75. There has accordingly been a violation of Article 8 of the Convention."

45. Furthermore, under Article 46 of the Convention, the Court opined as follows:

"92. In view of the above, as well as the significant number of potential applicants, the respondent State must, within one year from the date on which the present judgment becomes final in accordance with Article 44 § 2 of the Convention, 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 ... This 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 awarding adequate compensation as appropriate."

46. On 9 September 2013 this judgment became final. The one year referred to under Article 46 of the Convention hence expired on 9 September 2014.

47. In this connection, the Court notes that the Serbian Parliament passed the *Zorica Jovanović* Implementation Act in February 2020 (see paragraph 27 above). While this legislation was enacted after a significant

delay, the Court cannot but acknowledge that the issues which required regulation were themselves of great sensitivity and considerable complexity. Furthermore, the Act, as finally passed, provides for both judicial and extrajudicial procedures with respect to the situation faced by the applicants and others and is aimed at discovering the true "status of newborn children suspected to have disappeared from maternity wards in the Republic of Serbia" (see Article 2). It is also specifically designed to give effect to the requirements of the *Zorica Jovanović* judgment referred to above (ibid.).

48. In terms of judicial redress, the Court observes that the Act provides, *inter alia*, for a system in which the domestic courts shall have the power to investigate and obtain evidence not only at the request of the petitioner but also *proprio motu* in order to establish all the relevant facts of the case, as well as the power to award compensation where appropriate (see Article 8 § 1 and Articles 23, 24 and 25). The Act provides that, in addition to being brought by parents who have already complained in the past about their "missing babies" to various State bodies or maternity wards, proceedings can also be brought, under certain conditions, by other interested parties, as well as the Ombudsman and any person who has doubts as to his or her purported origin (see Article 15). All petitioners are exempt from paying court fees and have the benefit of legal aid (see Article 13). The six-month deadline as of the date of the Act's entry into force for the institution of proceedings (see Articles 17 and 30), further extended by regulations adopted as a consequence of the COVID-19 pandemic (see paragraph 28 above), also seems reasonable. The Act provides for measures which can be used to secure the cooperation of witnesses, expert witnesses, other persons, various institutions and State bodies, and sets out the conditions in which DNA testing may be carried out (see Article 8 §§ 2 and 3 and Articles 19 and 20). Review proceedings can be instituted before the relevant appellate courts and any and all authorities conducting other proceedings are formally bound by the final decision issued pursuant to the Act as regards "establishing facts about the death of the child in question" (see Articles 26 to 28).

49. If during the proceedings the court finds reasonable grounds to suspect that a criminal offence subject to public prosecution has been committed, it is obliged, based on the Act itself, to lodge a criminal complaint with the public prosecution service (see Article 22). On 13 February 2020, hence prior to the enactment of the Act and according to a media report, the Novi Sad Appellate Public Prosecutor's Office (*Apelaciono javno tužilaštvo u Novom Sadu*) also issued a binding instruction (*obavezno uputstvo*) explaining that the criminal investigations involving the missing babies in question would not be deemed as statute-barred in view of the relevant standards contained in the United Nations International Convention for the Protection of All Persons from Enforced

Disappearance (see paragraph 30 above and Article 8 of the Convention in particular).[1]

50. Turning to extrajudicial redress, the Court notes that the Act provides for a Commission with extensive investigatory, data collection and reporting powers. Of the fifteen members of the Commission, nine are to be appointed from among the representatives of registered parents' associations dealing with the issue of missing babies. Moreover, the Commission must decide by a majority vote of all of its members and is to be chaired by one of the parents' representatives (see Article 29). All this, in the Court's view, despite the Government's role in the appointment procedure and the official status of the remaining six members of the Commission, would appear to offer adequate guarantees that the body in question will be sufficiently independent.

51. Lastly, as regards the implementation of the Act, the Court notes that extensive training of judges, under the auspices of the Judicial Academy and based on a detailed training programme, took place in 2020 (see paragraph 37 above and Article 5 of the Act so requiring) and that more was planned for the future, not only for judges but also for parents, police officers and Commission members (see paragraph 37 above). Given the situation relating to the COVID-19 pandemic and the state of emergency declared in response, this training was, understandably, mainly provided through various online activities and projects. Otherwise, according to the Government, as of September 2020 a total of 101 requests had been lodged by petitioners and the courts were still in the process of securing the relevant evidence and/or obtaining the necessary documentation (see paragraph 38 above). At the same time, the first applicant maintained that a total of 200 requests had been lodged with the Belgrade High Court alone (see paragraph 41 above). By 10 July 2020 the members of the Commission had also all been appointed, while on 16 July 2020 one of them was replaced by another member (see paragraph 36 above). In their action plans dated 30 September 2020 (DH-DD(2020)866) and 25 January 2021 (DH-DD(2021)98, the Serbian authorities informed the Committee of Ministers of the Council of Europe that, *inter alia*, as of 3 November 2020 a total of 694 requests had been lodged with the domestic courts, almost half of which before the Belgrade High Court (see at http://hudoc.exec.coe.int/eng?i=004-7011, accessed on 19 March 2021).

52. In view of the foregoing, the Court concludes that it is no longer justified to continue the examination of the applications within the meaning of Article 37 § 1 (c) of the Convention, it being noted that the applicants themselves have also opted in favour of making use of the new legal

[1] *Novosti* daily newspaper, 24 February 2020, https://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:849365-Nova-potraga-za-nestalom-decom-U-Skupstini-zakon-koji-se-bavi-ukradenim-bebama-tuzilastvo-nalozilo-otvaranje-starih-predmeta, accessed on 1 March 2021.

framework put in place on the basis of the *Zorica Jovanović* Implementation Act (see paragraphs 17 and 26 above). Furthermore, there are no particular reasons regarding respect for human rights as defined in the Convention which would require the Court to continue its examination of the case under Article 37 § 1 *in fine*. Accordingly, the applications should be struck out of the Court's list of cases. While the setting up and functioning of the DNA database remains to be fully implemented any issues which could arise in that respect cannot be considered *in abstracto* but rather in the particular circumstances of a possible future application.

53. The above conclusion to strike out the applications in the present case is, however, without prejudice to the Court's power to restore, pursuant to Article 37 § 2 of the Convention, the present or any other similar applications to its list of cases if the relevant circumstances, including any subsequent developments or indeed a lack thereof, justify such a course of action (see, *mutatis mutandis, Akeljić v. Bosnia and Herzegovina* (dec.), no. 8039/19, § 32, 13 October 2020, and *Muhović and Others v. Bosnia and Herzegovina* (dec.), no. 40841/13, § 37, 15 September 2020).

54. In view of the above conclusion, it is not necessary for the Court to examine separately the inadmissibility objections raised by the Government (see paragraph 39 above; see also, *mutatis mutandis, Akeljić*, cited above, § 33).

For these reasons, the Court, unanimously,

Decides to join the applications;

Decides to strike the applications out of its list of cases.

Done in English and notified in writing on 15 April 2021.

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President