



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

SECOND SECTION

**CASE OF ZORICA JOVANOVIĆ v. SERBIA**

*(Application no. 21794/08)*

JUDGMENT

STRASBOURG

26 March 2013

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*





**In the case of Zorica Jovanović v. Serbia,**

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

Guido Raimondi, *President*,

Danutė Jočienė,

Peer Lorenzen,

Dragoljub Popović,

İşıl Karakaş,

Nebojša Vučinić,

Paulo Pinto de Albuquerque, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 5 March 2013,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 21794/08) against Serbia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Serbian national, Ms Zorica Jovanović (“the applicant”), on 22 April 2008.

2. The applicant, who had been granted legal aid, was represented by Ms D. Govedarica, a lawyer practising in Batočina. The Serbian Government (“the Government”) were represented by their Agent, Mr S. Carić.

3. The applicant complained about the Serbian authorities’ continuing failure to provide her with any information as to the real fate of her son, who had allegedly died whilst still in a State-run hospital, or indeed with any other redress in this respect.

4. On 12 April 2011 the application was communicated to the Government. It was also decided to rule on its admissibility and merits at the same time (Article 29 § 1).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953 and lives in Batočina.

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

### A. The specific facts of the applicant's case

7. On 28 October 1983, in the Ćuprija Medical Centre ("the ĆMC"), a State-run institution, the applicant gave birth to a healthy boy.

8. Between 28 and 30 October 1983, while still in the ĆMC, the applicant had regular contact with her son.

9. On 30 October 1983 the applicant was informed by the doctors that both she and her son would be released the next day.

10. On the evening of 30 October 1983 the applicant was with her son until approximately 11 p.m., when he was taken to a separate room for newborn babies. This was standard procedure and the applicant's son experienced no medical problems up to this point.

11. On 31 October 1983, at around 6.30 a.m., the on-duty doctor informed the applicant that "her baby had died". Upon hearing this information, the applicant immediately ran down the corridor, towards the room where her son had spent the night. She was, however, physically restrained by two orderlies. A nurse even tried to inject the applicant with a sedative, but the applicant successfully resisted this attempt. Ultimately, having no other option and in a state of haze, the applicant checked out of the ĆMC. Her family members were subsequently told that the autopsy of the infant would be performed in Belgrade, which is why his body could not yet be transferred to the parents. The applicant and her family remained confused as to why the autopsy would have to be carried out in Belgrade, as this was clearly a departure from the ĆMC's normal practice.

12. As of 2001, and particularly as of 2002, the Serbian media started extensively reporting on numerous cases such as the applicant's (see, for example, at <http://www.kradjabebe.org>, accessed on 29 January 2013).

13. On 24 October 2002 the applicant sent a request to the ĆMC, seeking all relevant documentation relating to her son's death.

14. On 12 November 2002 the applicant was informed by the ĆMC that her son had died on 31 October 1983, at 7.15 a.m., and that his death was classified as "*exitus non sigmata*", i.e. a death without indication as to the cause. The ĆMC maintained that no other information was available since its archives had in the meantime been flooded and many documents had been destroyed.

15. On 22 November 2002 and in response to the applicant's request, the Municipality of Ćupruja informed the applicant that her son's birth had been registered in the municipal records but that his death had not.

16. On 10 January 2003 the applicant's husband, and the child's father, filed a criminal complaint with the Municipal Public Prosecutor's Office in Ćuprija. The complaint was filed against the medical staff of the ĆMC whom the applicant deemed responsible for "her son's abduction".

17. On 15 October 2003 the said office rejected the applicant's complaint as unsubstantiated, since "there was evidence that her son had

died on 31 October 1983". No further reasoning was offered and there was no indication as to whether any preliminary investigation had been carried out.

18. In March 2004 the Municipality of Ćuprija reaffirmed the content of its letter of 22 November 2002.

19. On 29 April 2004 the ĆMC provided the applicant with its internal records in support of its letter dated 12 November 2002.

20. On 19 September 2007 the Municipality of Ćuprija confirmed that the death of the applicant's son had never been formally registered.

21. On 28 December 2007, in response to her prior demand, the Municipality of Ćuprija provided the applicant with copies of her son's birth certificate, as well as the ĆMC's request for the registration thereof.

22. The body of the applicant's son was never transferred to the applicant or her family. They were also never provided with an autopsy report or informed as to when and where he was allegedly buried.

23. Between 12 June 2009 and 20 July 2011 the Kragujevac Clinical Centre repeatedly treated the applicant for, *inter alia*, various depression-related symptoms dating back to 1999 and especially 2001.

## **B. Other relevant facts**

### *1. The adoption of new procedures*

24. At a meeting organised by the Ministry of Health on 17 June 2003, concerning the burial of newborn babies who had died in hospital, it was decided, *inter alia*, that the bodies could only be handed over to the parents if the latter signed a special form designed for this purpose.

25. In response to a specific request addressed to them by the Public Funeral Company (*JKP Pogrebne usluge*), on 17 October 2003, all Belgrade-based public health care institutions additionally accepted, *inter alia*, to implement a procedure whereby a special declaration would have to be signed: (a) by the parents, or other family members, stating that they had been informed of the death by the hospital and that they would personally be making arrangements for the funeral; or (b) by a legal entity, or its representative, to the effect that it would be making these arrangements since others had refused or were unable to do so. In the absence of such declarations, the Public Funeral Company would refuse to take the bodies from the hospitals.

### *2. The Parliamentary Report of 14 July 2006 (*Izveštaj o radu anketnog odbora obrazovanog radi utvrđivanja istine o novorođenoj deci nestaloj iz porodilišta u više gradova Srbije*)*

26. In 2005 hundreds of parents in a situation such as the applicant's, i.e. whose newborn babies had "gone missing" following their alleged deaths in

hospital wards, mostly in the 1970s, 1980s and 1990s, applied to the Serbian Parliament seeking redress.

27. On 14 July 2006 the Parliament formally adopted a report prepared by its Investigating Committee. The findings of this report included, *inter alia*, that: (a) there were serious shortcomings in the applicable legislation at the relevant time, as well as in the procedures before various State bodies and health authorities; (b) this situation justified the parents' doubts/concerns as to what had really happened with their children; (c) no criminal redress could now be effective in view of the applicable prescription periods (see paragraph 34 below); and (d) a concerted effort on the part of all Government bodies, as well as changes to the relevant legislation, were thus necessary in order to provide the parents with adequate redress.

### *3. Statements made by the President of the Parliament*

28. On 16 April 2010 local media reported that the President of the Serbian Parliament had stated that a parliamentary working group was about to be formed in order to prepare new legislation aimed at providing redress to the parents of the "missing babies".

### *4. The Ombudsman's Report of 29 July 2010 (Izveštaj zaštitnika građana o slučajevima tzv. "nestalih beba" sa preporukama)*

29. Following an extensive investigation into the issue, the Ombudsman found, *inter alia*, that: (a) at the relevant time, there were no coherent procedures and/or statutory regulations as to what should happen in situations when a newborn child died in hospital; (b) the prevailing medical opinion was that parents should be spared the mental pain of having to bury their newborn babies, which is why it was quite possible that certain couples were deliberately deprived of the opportunity to do so; (c) any autopsy reports were usually incomplete, inconclusive, and of highly dubious veracity; (d) it could not therefore be ruled out that the babies in question were indeed removed from their families unlawfully; (e) turning to more recent times, the Government response between 2006 and 2010 had itself been inadequate; and (f) the parents therefore remain entitled to know the truth as to what was the real fate of their children, which could only be arrived at through the adoption of a *lex specialis*.

5. *The Working Group's report submitted to the Parliament on 28 December 2010 (Izveštaj o radu radne grupe za izradu predloga zakona radi stvaranja formalno-pravnih uslova za postupanje nadležnih organa po prijavama o nestanku novorođene dece iz porodilišta)*

30. In response to the findings and recommendations of the Parliamentary Report of 14 July 2006 (see paragraphs 26 and 27 above), on 5 May 2010 a working group was set up by the Parliament (see paragraph 28 above). Its task was to assess the situation and propose any changes to the legislation.

31. On 28 December 2010 the Working Group submitted its report to the Parliament. Following a detailed analysis of the current, already amended, legislation, it concluded that no changes were necessary except as regards the collection and usage of medical data, but that a new piece of legislation concerning this issue was already being prepared (*nacrt Zakona o evidencijama u oblasti zdravstva*). The Working Group, *inter alia*, specifically noted that Article 34 of the Constitution made it impossible to extend the prescription period for criminal prosecution in respect of crimes committed in the past or, indeed, to introduce new, more serious, criminal offences and/or harsher penalties which would be applicable thereto (see paragraph 32 below). The existing Criminal Code, however, already envisaged several criminal offences of relevance to the issue, and the new Medical Care Act set out a detailed procedure making it impossible for the parents to have their newborn unlawfully removed from hospital wards (see paragraphs 35 and 41 below).

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### **A. The Constitution of the Republic of Serbia (Ustav Republike Srbije; published in the Official Gazette of the Republic of Serbia – OG RS – no. 98/06)**

32. Article 34 of the Constitution reads as follows:

“No person shall be found guilty of any act which did not constitute a criminal offence under law, or any other legislation based on the law, at the time when it was committed, nor shall a penalty which was not prescribed for this act at that time be imposed.

The penalties shall be determined pursuant to the legislation in force at the time when the act was committed, except when subsequent legislation is more favourable for the perpetrator. Criminal offences and penalties shall be laid down by the law.”

**B. The Criminal Code of the Socialist Republic of Serbia 1977 (Krivični zakon Socijalističke Republike Srbije; published in the Official Gazette of the Socialist Republic of Serbia nos. 26/77, 28/77, 43/77 and 20/79)**

33. Article 116 provided, *inter alia*, that whoever had unlawfully kept or removed a minor child from his or her parents would be punished by a prison term of between one and ten years.

**C. The Criminal Code of the Socialist Federal Republic of Yugoslavia 1976 (Krivični zakon Socijalističke Federativne Republike Jugoslavije; published in the Official Gazette of the Socialist Federal Republic of Yugoslavia – OG SFRY – nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90, in the Official Gazette of the Federal Republic of Yugoslavia nos. 35/92, 16/93, 31/93, 37/93, 24/94 and 61/01, and in OG RS no. 39/03)**

34. Articles 95 and 96 stated, *inter alia*, that as regards the crime provided under Article 116 of the Criminal Code of the Socialist Republic of Serbia criminal proceedings could not be issued or, indeed, continued if more than twenty years had elapsed as of the moment of the commission of the crime.

**D. The Criminal Code of the Republic of Serbia 2005 (Krivični zakonik; published in OG RS nos. 85/05, 88/05, 107/05, 72/09 and 111/09)**

35. Articles 191, 192, 388 and 389 define as a crime various forms of child abduction and human trafficking, including for the purposes of adoption.

**E. The Obligations Act (Zakon o obligacionim odnosima; published in OG SFRY nos. 29/78, 39/85, 45/89, 57/89 and 31/93)**

36. Articles 199 and 200 provide, *inter alia*, that anyone who has suffered fear, physical pain or, indeed, mental anguish as a consequence of a breach of his or her “personal rights” (*prava ličnosti*) shall be entitled, depending on their duration and intensity, to sue for financial compensation in the civil courts and, in addition, to request other forms of redress “which might be capable” of affording adequate non-pecuniary satisfaction.

37. Article 376 §§ 1 and 2 provides that a claim based on the above provisions may be brought within three years as of when the injured party learned of the damage in question, as well as the person responsible, but

that, in any event, a claim of this sort can only be filed within a maximum of five years as of the event itself.

38. Article 377 § 1 further provides that if the damage at issue has been caused as a result of the commission of a criminal offence the civil prescription period may be extended so as to correspond to the applicable criminal statute of limitations.

#### **F. Relevant domestic case-law**

39. On 4 June 1998 the Supreme Court (*Rev. 251/98*) held that civil prescription periods concerning various forms of non-pecuniary harm (see paragraphs 36-38 above) shall only start running when the situation complained of has come to an end (*kada su pojedini vidovi neimovinske štete dobili oblik konačnog stanja*).

40. On 21 April 2004 the Supreme Court (*Rev. 229/04*) further held that “personal rights” within the meaning of the Obligations Act include, *inter alia*, the right to respect for one’s family life.

#### **G. The Health Care Act (Zakon o zdravstvenoj zaštiti; published in OG RS nos. 107/05, 72/09, 88/10 and 99/10)**

41. Articles 219-223 provide, *inter alia*, details as regards the determination of the time and cause of death of a newborn child whilst still in hospital. Specifically, the hospital shall inform the family as soon as possible and provide them with access to the body. An autopsy shall be carried out and a biological sample shall be stored for any future purposes. The police shall be informed if no cause of death has been established, whilst the competent municipal authorities shall be informed in any event.

## **THE LAW**

### **I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION**

42. The applicant referred to Articles 4, 5 and 8 of the Convention. In substance, however, she complained about the respondent State’s continuing failure to provide her with any information as to the real fate of her son. The applicant further suspected that he may yet be alive, having unlawfully been given up for adoption.

43. It being the “master of the characterisation” to be given in law to the facts of any case before it (see *Akdeniz v. Turkey*, no. 25165/94, § 88, 31 May 2005), the Court considers that this complaint falls to be examined

under Article 8 of the Convention, which provision, in so far as relevant, reads as follows:

- “1. Everyone has the right to respect for his ... 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.”

## **A. Admissibility**

### *1. Compatibility ratione temporis*

#### **(a) The parties' submissions**

44. The Government maintained that the facts “constitutive of the alleged interference” concerned the time prior to 3 March 2004, that being the date when the Convention had entered into force in respect of Serbia. Specifically, the applicant’s child had allegedly been taken from her on 31 October 1983 and her husband’s criminal complaint had been rejected on 15 October 2003, having only been filed some 10 months previously. The Government, lastly, argued that even the alleged failure of the respondent State to remedy the impugned situation as of 3 March 2004 could not bring the applicant’s complaint within the Court’s competence *ratione temporis*.

45. The applicant submitted that the violation in question was of an ongoing character and that she had, also, complained orally about the issue to various instances over the years.

#### **(b) The Court’s assessment**

46. The Court recalls that its jurisdiction *ratione temporis* covers only the period after the ratification of the Convention or its Protocols by the respondent State. From the ratification date onwards, however, the State’s alleged acts and omissions must conform to the Convention and its Protocols, meaning that all subsequent facts fall within the Court’s jurisdiction even where they are merely extensions of an already existing situation (see, for example, *Yağcı and Sargin v. Turkey*, judgment of 8 June 1995, § 40, Series A no. 319-A; and *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, § 43, ECHR 2000-I).

47. It is further recalled that disappearances are a very specific phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred. This situation is very often drawn out over time, prolonging the torment of the victim’s parents or relatives. It cannot therefore be said that a disappearance is, simply, an “instantaneous” act or event; the additional distinctive element of

subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the positive obligation will, potentially, persist as long as the fate of the person is unaccounted for. This is so, even where death may, eventually, be presumed (see, albeit in the context of Articles 2 and 3, *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 148, ECHR 2009).

48. Turning to the present case, the Court notes that the applicant's son allegedly died/went missing on 31 October 1983, whilst the Convention entered into force in respect of Serbia on 3 March 2004. However, the respondent State's alleged failure to provide the applicant with any definitive and/or credible information as to the fate of her son has continued to date. In such circumstances, the Court considers that the applicant's complaint concerns a continuing situation (see, *mutatis mutandis*, *Varnava and Others v. Turkey* [GC], cited above, §§ 130-150; and, also, in the Article 8 context, *Kurić and Others v. Slovenia* [GC], no. 26828/06, §§ 238 and 240-242, ECHR 2012 (extracts)).

49. Accordingly, the Government's objection as to the lack of jurisdiction *ratione temporis* must be dismissed. The Court is thus competent to examine the applicant's complaint in so far as it relates to the respondent State's alleged failure to fulfil its procedural obligations under the Convention as of 3 March 2004. It may, however, 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 (see, *mutatis mutandis*, *Kurić and Others v. Slovenia* [GC], cited above, § 240).

## 2. The six-month rule

### (a) The parties' submissions

50. The Government contended that the applicant's complaint was brought out of time since she had learned of the outcome of her criminal case more than four years earlier. The applicant should therefore have lodged her application with the Court within a period of six months following the Convention's entry into force in respect of Serbia, i.e. as of 3 March 2004. Whilst it is true that various official reports were produced after this date, the Government submitted that the applicant could not have "reasonably expected" that any of them could have enabled her to initiate proceedings capable of bringing about the "the resolution of her case". No "revival" of the respondent State's obligations under the Convention was therefore possible.

51. The applicant stated that the Parliamentary Report of 14 July 2006, as well as the Ombudsman's report of 29 July 2010, had raised her hopes that redress might, after all, be forthcoming, and that such expectations only

ended on 28 December 2010 when the Working Group presented its own report to the Parliament.

**(b) The Court's assessment**

52. The object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. It marks out the temporal limits of supervision carried out by the Court and signals to both individuals and State authorities the period beyond which such supervision is no longer possible (see, amongst other authorities, *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

53. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant (see *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002).

54. Nonetheless it has been said that the six month time-limit does not apply as such to continuing situations (see, for example, *Agrotexim Hellas S.A. and Others v. Greece*, no. 14807/89, Commission decision of 12 February 1992, DR 71, p. 148, and *Cone v. Romania*, no. 35935/02, § 22, 24 June 2008); this is because, if there is a situation of an ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end.

55. However, not all continuing situations are the same. As regards disappearances, applicants cannot wait indefinitely before introducing their application with the Court. Where there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities, it is more difficult for the relatives of the missing to assess what is happening, or what can be expected to happen. Allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance. Still, applications can be rejected as out of time where there has been excessive or unexplained delay on the part of applicants once they have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and, in any of those eventualities, there is no immediate, realistic prospect of an effective investigation being provided in the future. Where there are initiatives being pursued in regard to a disappearance situation, applicants may reasonably await developments which could resolve crucial factual or legal issues. Indeed, as long as there is some meaningful contact between families and authorities concerning complaints and requests for

information, or some indication, or realistic possibility, of progress in investigative measures, considerations of undue delay will not generally arise. However, where there has been a considerable lapse of time, and there have been significant delays and lulls in investigative activity, there will come a moment when the relatives must realise that no effective investigation has been, or will be provided (see *Varnava and Others v. Turkey* [GC], cited above, §§ 162 and 165).

56. Turning to the present case, the Court notes that on 14 July 2006 the Serbian Parliament formally adopted a report prepared by its Investigating Committee. The report included, *inter alia*, a recommendation to the effect that a concerted effort on the part of all Government bodies, as well as changes to the relevant legislation, were necessary in order to provide the parents with adequate redress (see paragraph 27 under (d) above). On 16 April 2010 local media reported that the President of the Parliament had stated that a parliamentary working group was about to be formed in order to prepare new legislation aimed at affording redress to the parents of the “missing babies” (see paragraph 28 above). Finally, in his report of 29 July 2010 the Serbian Ombudsman opined that the parents remained entitled to know the truth as to what was the real fate of their children, and proposed the adoption of a *lex specialis* in this regard (see paragraph 29, under (f), above).

57. In such, admittedly, very specific circumstances and despite the overall passage of time, it cannot be said that the applicant was 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 on 28 December 2010 when it became obvious that no redress would be forthcoming (see paragraphs 30 and 31 above). Since the application in the present case was lodged on 22 April 2008, the Government’s objection must be rejected.

### *3. Exhaustion of domestic remedies*

#### **(a) The parties’ submissions**

58. The Government averred that the applicant had effectively made no effort to exhaust domestic remedies. In particular, it was her husband who had filed the criminal complaint, and she, personally, had also failed to institute a civil case on the basis of Articles 199 and 200 of the Obligations Act, as applied and interpreted in the Supreme Court’s case-law described at paragraphs 36-40 above. The Government further produced three judgments issued by the Supreme Court where the plaintiffs were granted compensation for the harm suffered as a consequence of medical errors and police misconduct, as well as one ruling repealing a District Court’s decision adopted in the latter context (see Rev. nos. 1118/03, 807/05 and 51/07 of 10 April 2003, 1 December 2005 and 13 March 2007,

respectively). In any event, and as a matter of principle, the Government deemed it unreasonable that a State Party would be required to provide effective redress to applicants in cases where an alleged violation of their rights had taken place prior to the ratification of the Convention.

59. The applicant maintained that the criminal complaint filed by her husband, clearly, included her own complaint to the same effect since the entire matter concerned the disappearance of their child. It is true that the said complaint was filed in 2003, but the applicant could not have previously obtained any relevant evidence or expected any redress. The “missing babies’ issue” was, simply put, a taboo until 2001 when the parents concerned started organising themselves, the media began extensively reporting about it, and even the Parliament discussed the issue at its plenary sessions. It should further be noted that, in the meantime, applicable criminal and civil prescription periods had entered into force.

#### **(b) The Court’s assessment**

60. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Mifsud v. France* (dec.) [GC], no. 57220/00, § 15, ECHR 2002-VIII). The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are effective, sufficient and accessible in respect of his or her Convention grievances. To be effective, a remedy must be capable of remedying directly the impugned state of affairs (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004). The Court has likewise frequently underlined the need to apply the exhaustion rule with some degree of flexibility and without excessive formalism (see *Ringelisen v. Austria*, 16 July 1971, § 89, Series A no. 13).

61. In terms of the burden of proof, it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time (see, *inter alia*, *Vernillo v. France*, judgment of 20 February 1991, § 27, Series A no. 198, and *Dalia v. France*, judgment of 19 February 1998, § 38, Reports 1998-I). Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Dankevich v. Ukraine*, no. 40679/98, § 107, 29 April 2003).

62. As regards the present case, the Court considers that the applicant’s husband effectively filed a criminal complaint on his own behalf and on behalf of the applicant since the incident in question concerned the same

event of equal significance to both. This complaint, however, was rejected by the Public Prosecutor's Office, without indication as to whether any preliminary investigation had been carried out (see paragraph 17 above). Further, any criminal proceedings would indeed have become time-barred by October 2003, at the latest, and would hence have been incapable of providing any redress thereafter (see paragraphs 27, under (c), and 34 above).

63. Concerning the civil claim, the Court considers that this avenue of redress could not have remedied the impugned state of affairs. Specifically, the civil courts could have, at best, recognised the violation of the applicant's "personal rights" and provided compensation for the non-pecuniary damage suffered. They could also have, possibly, ordered other forms of redress "capable" of affording non-pecuniary satisfaction. None of this, however, could effectively have provided redress to the applicant's underlying complaint, i.e. her need for information as to "the real fate of her son". The Government certainly offered no evidence to the contrary. The Court, lastly, notes that neither the Parliament nor the Ombudsman, in their respective reports, considered this issue. Indeed, if anything, by recommending the adoption of a *lex specialis* they appear to have suggested that no existing domestic remedies, including the said civil claim, could have been effective (see paragraphs 27, under (d), 28 and 29, under (f), above).

64. The Government's objection as to the exhaustion of domestic remedies must therefore be rejected.

#### 4. Conclusion

65. The Court notes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is also not inadmissible on any other grounds, and must therefore be declared admissible.

### B. Merits

#### 1. The parties' submissions

66. The applicant reaffirmed her complaint about the respondent State's continuing failure to provide her with information as to the real fate of her son. She added that had her son died as claimed by the ĆMC they should have reported the death to the competent municipal authorities, shown the body to the parents, and produced an autopsy report.

67. The Government submitted that no violation of the applicant's rights could be imputed to the respondent State since the alleged disappearance of her son had occurred in a medical institution, not a State body. There was also no evidence that the applicant's child had indeed been removed from

her unlawfully. Whilst there might have been certain procedural omissions on the part of the ĆMC in 1983, the applicant had not made use of any domestic remedies, despite them being capable of offering redress for any wrongs suffered. The issue has also been considered repeatedly at the domestic level and the relevant legal framework and practices have been amended with a view to offering adequate safeguards. Any changes to the criminal legislation, however, could not, by their very nature, be applied to the applicant's situation which occurred so many years ago (see paragraphs 24, 25 and 31 above).

## 2. *The Courts assessment*

68. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see, among many other authorities, *Monory v. Romania and Hungary*, no. 71099/01, § 70, 5 April 2005).

69. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. There may, however, be additional positive obligations inherent in this provision extending to, *inter alia*, the effectiveness of any investigating procedures relating to one's family life (see, *mutatis mutandis* and in the context of "private life", *M.C. v. Bulgaria*, no. 39272/98, §§ 152 and 153, ECHR 2003-XII).

70. In *Varnava* (cited above) the Grand Chamber, albeit in the context of Article 3, held as follows:

"200. The phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty ... The essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it has been brought to their attention ... Other relevant factors include ... the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person ... 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."

The Court deems these considerations broadly applicable, *mutatis mutandis*, to the very specific context of positive obligations under Article 8 in the present case.

71. With this in mind and turning to the present case, it is noted that the body of the applicant's son was never transferred to the applicant or her family, and that the cause of death was never determined (see paragraphs 22 and 14 above, in that order). The applicant was further 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 (see paragraphs 22 and 15 above, in that order). The criminal complaint filed by the applicant’s husband would also appear to have been rejected without adequate consideration (see paragraph 17 above), 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’s 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, as well as in the procedures before various States bodies and health authorities; (b) there were no coherent statutory regulations as to what should happen in situations when a newborn child dies in hospital; (c) the prevailing medical opinion was that parents should be spared the mental pain of having to bury their newborn, 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/concerns as to what had really happened with 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 what was the real fate of their children (see paragraphs 26-29 above).

73. Finally, 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 usage of medical data. In these circumstances, it is clear that this has only improved the situation *pro futuro*, but has effectively offered nothing to those parents, including the applicant, who endured the impugned ordeal in the past (see paragraphs 30 and 31 above).

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.

## II. ALLEGED VIOLATION OF ARTICLE 13 READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

76. The applicant further complained, under Article 13 of the Convention, about the respondent State’s continuing failure to provide her with any redress for the continuing breach of her “family life”.

77. The Government contested the merits of this complaint (see paragraph 58 above).

78. The Court considers that this complaint falls to be examined under Article 13 taken together with Article 8 of the Convention.

79. The former provision reads as follows:

“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.”

80. Given that the applicant’s Article 13 complaint is effectively the same as her complaint under Article 8, and having regard to its finding in respect of the latter (see, in particular, paragraph 73 above), the Court declares the Article 13 complaint admissible but considers that it need not be examined separately on its merits.

### III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

81. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### **A. Damage**

82. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

83. The Government contested this claim.

84. The Court considers that the applicant has certainly suffered some non-pecuniary damage. Having regard to the character of the violation found in the present case and making its assessment on an equitable basis, the Court therefore awards her EUR 10,000 under this head.

#### **B. Costs and expenses**

85. The applicant also claimed EUR 2,750 for the costs and expenses incurred before the Court.

86. The Government contested this claim.

87. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to their quantum. In the present case, regard being had to the documents in its possession and the above criteria, as well as the fact that the applicant has already been granted EUR 850 under the Council of Europe’s legal aid scheme, the Court considers it reasonable to award her the additional sum of EUR 1,800 for the costs incurred before it.

### C. Default interest

88. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

89. Article 46 of the Convention provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

90. Given these provisions, it follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned any sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress, in so far as possible, the effects thereof (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII).

91. In this connection the applicant requested that the respondent State be ordered to amend its legislation so as to increase the penalties for the relevant criminal offences, extend the applicable prescription period and, subsequently, reopen the criminal proceedings in her case.

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* (see the Ombudsman’s report of 29 July 2010 at paragraph 29 above), 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 (see paragraph 26 above). 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 affording adequate compensation as appropriate.

93. As regards all similar applications already pending before it, the Court decides to adjourn them during the said interval. This decision is without prejudice to the Court’s power at any moment to declare inadmissible any such case or to strike it out of its list in accordance with the Convention.

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there is no need to examine separately the complaint under Article 13;
4. *Holds*
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Serbian Dinars at the rate applicable at the date of settlement:
    - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 1,800 (one thousand and eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction;
6. *Holds* that 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 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 (see paragraph 92 of the judgment);
7. *Decides* to adjourn, for one year from the date on which the present judgment becomes final, all similar applications already pending before the Court, without prejudice to the Court's power at any moment to declare inadmissible any such case or to strike it out of its list of cases in accordance with the Convention.

Done in English, and notified in writing on 26 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos  
Deputy Registrar

Guido Raimondi  
President