

SERBIA

THE CASE OF 'MISSING BABIES' IN SERBIA BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

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Résumé

L'arrêt *Zorica Jovanovic c. Serbie* (CEDH 2013) de la Cour européenne des droits de l'Homme de Strasbourg, dite l'affaire des 'bébés disparus', a conclu à une violation grave du droit au respect de la vie familiale et, par conséquent, du « droit à la parentalité ». Cette décision a été l'une des raisons pour lesquelles le gouvernement a commencé à travailler sur une législation relative au statut des nouveau-nés. Une loi est actuellement en cours d'élaboration et elle a donné lieu à deux propositions. L'une d'entre elles, élaborée par le ministère de la Justice, est relative au statut des nouveau-nés dont on soupçonne la disparition dans une maternité de la République de Serbie. L'autre proposition de loi, rédigée par deux éminents professeurs de droit serbes, est sur la recherche d'un statut pour les nouveau-nés disparus. Ce deuxième projet de loi ayant été rejeté, il ne fera pas l'objet de développements dans la présente analyse. Le présent document analysera le jugement de la CEDH, ainsi que les dispositions de la proposition de loi rédigée par le ministère de la Justice, en mettant l'accent sur la manière dont l'adoption de cette loi contribuera à la résolution de cas identiques ou similaires et à la prévention de futurs cas de disparition de bébés dans les maternités.

1. INTRODUCTION

In the case of *Zorica Jovanovic v. Serbia*,¹ initiated before the European Court of Human Rights (ECtHR) in April 2008, the applicant complained of the continuing failure by the Serbian authorities to provide her with any information about the real fate of her son, who had allegedly died while in the care of a state-run hospital, or indeed with any other redress. Not only did the ECtHR decide that the applicant's right to family life guaranteed by Article 8 of the European Convention was violated, but it also held that the respondent state must, within a year from the date on which the judgment became final, 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.² It is important to emphasise that hers was not a single case. According to some information, there are around 1,500 reported cases of babies missing from maternity wards, although there is no data on the exact number of cases.³ State authorities in Serbia, however, had still done nothing either to investigate and prosecute those cases or to adopt legal mechanisms to resolve them.

2. THE CASE OF ZORICA JOVANOVIC v. SERBIA

To begin with, I will summarise the facts of the only case against Serbia regarding the issue of missing babies. At the end of October 1983, Zorica, the applicant, gave birth to a healthy baby boy in a state-run hospital in Ćuprija, a town in central Serbia. For the next two days, she had contact with her baby on a regular basis, and on the second day doctors informed her that both she and her baby would be discharged the next day since her son had no medical problems.⁴ The following morning the duty doctor told Zorica that her son had died. In a state of shock and disbelief, she quickly went to the room where new-born babies are located, hoping to see her son. However, she was physically restrained by two orderlies and one of the nurses even tried to inject her with a sedative. When she and her family wanted to see and take the body of the baby in order to perform a funeral, the doctors told them that autopsy would be performed in Belgrade so that the body could not be released.⁵ The baby's body was never

¹ ECtHR, *Zorica Jovanovic v. Serbia*, appl. no. 21794/08, Judgment 9 September 2013.

² *Ibid*, at para. 92.

³ <<http://www.balkaninsight.com/en/article/parents-of-missing-babies-disappointed-with-serbian-government-09-23-2017>> (last accessed 20 January 2018).

⁴ *Zorica Jovanovic v. Serbia*, above n. 1, at paras. 8, 9, 10.

⁵ *Ibid*, at para. 11. It is essential to point out that the body of the applicant's son was never released to her or her family and they were never provided with an autopsy report or informed as to when and where he was allegedly buried (para. 22).

released to the family. It was clear that all of this was not a regular practice of the Medical Centre in Čuprija.

The applicant's fight for justice and truth about her son began 19 years later, in October 2002. In 2001, the media began to report about numerous cases similar to this one, so Zorica Jovanović began to reconsider her case over and over again, from the beginning of childbirth until the day she left the maternity ward. There are several facts that raised suspicion as to what really happened to her son. Firstly, at the end of October 2002 the applicant requested from the Medical Centre all relevant files and documents relating to the death of her baby. About two weeks later, Zorica was informed about the exact date and time of her son's death, but from an unknown cause. Secondly, all other possible information about the fate and death of her son were not available due to a flood in the hospital and destruction of all the archived documentation. Thirdly, the applicant sent a request to the Municipality of Čuprija in order to obtain information on the birth and death registration. In the response to the applicant's request, it was very unusual that the birth of her son was registered in the records, but the death was not, leaving no written evidence of it. All information the applicant obtained led her to the conclusion that her son was still alive and therefore must have been abducted.

Thereafter, in 2003, the applicant's husband, and the father of the baby, tried to seek justice before the court and lodged a criminal complaint with the municipal public prosecutor's office against the medical staff of the Medical Centre. The complaint was, however, rejected as unsubstantiated on the grounds that there was evidence proving the exact date of the death of the applicant's son with no further reasoning. Since competent authorities had not conducted a more detailed investigation, it was evident that the public prosecutor did not want this issue to be resolved. In April 2008, the applicant filed an application to the ECtHR.

There are several domestic laws dealing with criminal law matters that are relevant to this case. Two criminal codes that were valid at the time the applicant gave birth contained provisions regarding the criminal offence of unlawful detention or abduction of a minor child from his or her parents, and a time-bar for filing. The Criminal Code of the Socialist Republic of Serbia 1977⁶ provided that anyone who had unlawfully detained or abducted a minor child from his or her parents was liable to a prison sentence of between one and ten years. The Criminal Code of the Socialist Federal Republic of Yugoslavia 1976⁷ provided

⁶ Criminal Code of the Socialist Republic of Serbia (Krivični zakon Socijalističke Republike Srbije, Official Gazette of the Socialist Republic of Serbia nos. 26/77, 28/77, 43/77 and 20/79), Art. 116.

⁷ Criminal Code of the Socialist Federal Republic of Yugoslavia (Krivični zakon Socijalističke Federativne Republike Jugoslavije, 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

that prosecution of the above-mentioned crime became time-barred where more than 20 years had elapsed since the commission of the crime. The Criminal Code of the Republic of Serbia adopted in 2005 and last amended in 2016 and still in force,⁸ provides several relevant criminal offences, such as abduction of a minor,⁹ change of family status,¹⁰ human trafficking and trafficking in children for adoption.

As far as the European Convention on Human Rights is concerned, the applicant referred to Articles 4,¹¹ and 8, but the ECtHR considered that this case should be examined under Article 8 of the Convention. Article 8 guarantees the right to respect for private and family life. In addition to the Convention rule that everyone has the right to respect for his or her private and family life, home and correspondence, Article 8 specifically provides that 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.

Having this provision of the Convention in mind as well as its previous case law, the ECtHR took a strong view in favour of a stand that 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.¹² The concept of family is always interpreted completely autonomously by the Court, not taking into account formulations and definitions used and provided for by national legislation, meaning that the Court will evaluate the de facto situation in every individual case.¹³ It is difficult to spell out precisely the meaning of 'family life', because family and family life are based on sophisticated combinations of emotions, on the one hand, and personal and social duties and obligations, on the other hand, so the ECtHR has through its jurisprudence determined the degree of kinship between individuals within family and the existence of real

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), Art. 95, 96.

⁸ Criminal Code of the Republic of Serbia (Krivični zakonik Republike Srbije, Official Gazette of the Republic of Serbia nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016).

⁹ Art. 191 of the Criminal Code 2005.

¹⁰ Art. 192 of the Criminal Code 2005. Whoever by replacement or from negligence changes the family status of a child, shall be punished with imprisonment up to 1 year (para. 4).

¹¹ Art. 4 of the European Convention regulates prohibition of slavery and forced labour and Art. 5 regulates the right to liberty and security.

¹² *Zorica Jovanovic v. Serbia*, above n. 1, at para. 68.

¹³ V. BEŠIREVIĆ, S. CARIĆ, M. DRAŠKIĆ ET. AL., *Komentar Konvencije za zaštitu ljudskih prava i osnovnih sloboda (The Commentary of the Convention for the Protection of Human Rights and Fundamental Freedoms)*, Službeni glasnik, Belgrade, 2017, p. 170.

family life between them as the criteria for defining 'family life'.¹⁴ Although the ECtHR has a quite flexible approach to the interpretation of family life owing to the diversity of modern family arrangements, it still decides on the existence of family life on the facts of each case, applying the general principle of existence of close personal ties between the parties.¹⁵ In this case, the Court was led by the reasoning and rationale in the case of *Varnava and others v. Turkey*, noting:

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.¹⁶

Therefore, in Zorica's case the ECtHR unanimously decided that the applicant had 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 and that there had accordingly been a violation of Article 8 of the Convention.¹⁷ However, the ECtHR also considered that she had certainly suffered some non-pecuniary damage and, having regard to the nature of the violation, held that the respondent state must pay the applicant €10,000 converted into Serbian dinars.¹⁸ Not only did the ECtHR find the violation of Zorica's right to family life guaranteed by the Article 8 of the

¹⁴ V. DIMITRIJEVIĆ and M. PAUNOVIĆ, *Ljudska prava – udžbenik (Human Rights – textbook)*, Beogradski centar za ljudska prava i Dosije (Belgrade Center for Human Rights and Dosije), Belgrade, 1997, p. 287.

¹⁵ U. KILKELLY, *The Right to Respect for Private and Family Life – A Guide to the Implementation of Article 8 of the European Convention on Human Rights*, *Human Rights Handbooks No. 1*, Council of Europe, Strasbourg, 2003, p. 16. See also I. ROAGNA, *Protecting the Right to Respect for Private and Family Life Under the European Convention on Human Rights*, Council of Europe, Strasbourg, 2012, p. 27.

¹⁶ ECtHR, *Varnava and others v. Turkey*, appl. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment 18 September 2009, at para. 200.

¹⁷ *Ibid*, at paras. 74, 75.

¹⁸ *Ibid*, at para. 84.

European Convention, but it also held that the respondent state must, within a year from the date on which the judgment became final (which was 9 September 2014), 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, hers.¹⁹ This part of the judgment is very important, since it is not very usual for ECtHR to make decisions that have expanded effect and refer to all possible future cases by directly imposing an obligation for the state to adopt or harmonise its legislation. This is also the first judgment in which the ECtHR applied the procedural aspect²⁰ of the obligations of the member states of the European Convention in the context of the right to respect for family life.²¹

3. THE IMPORTANCE AND THE IMPACT OF THE JUDGMENT IN THE CASE OF *ZORICA JOVANOVIĆ v. SERBIA*

As a result of the ECtHR landmark ruling in the case of *Zorica Jovanovic v. Serbia*, there are a few major facts that show its impact on national legislation.

Before the last amendments of the Criminal Code 2005, Article 191, regarding abduction of a minor, provided several ways of committing this criminal offence and, depending on it, the criminal sanction varied from a fine to imprisonment up to five years. Article 191 provided that:

1. Whoever unlawfully detains or abducts a minor from a parent, adoptive parent, guardian or other person or institution entrusted with care of the minor or whoever prevents enforcement of decision granting custody of a minor to a particular person, shall be punished with a fine or imprisonment up to two years;
2. Whoever prevents enforcement of the decision of a competent authority setting out the manner of maintaining of personal relationships of a minor with parent or other relative, shall be punished with a fine or imprisonment up to one year;

¹⁹ *Zorica Jovanovic v. Serbia*, above n. 1, at para. 92. This is also essential because in the parliamentary report of 14 July 2006 it was stated that in 2005 hundreds of parents in the same situation as that of the applicant, whose new-born babies had 'gone missing' following their alleged deaths in hospital wards, especially in the 1970s, 1980s and 1990s, applied to the Serbian Parliament seeking redress (para. 26).

²⁰ For more about procedural obligations, see K. KAMBER, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law*, Brill, Leiden, 2017, pp. 29–92.

²¹ M. DRAŠKIĆ, *Presuda Evropskog suda za ljudska prava Zorica Jovanović v. Serbia: kakve obaveze slede? (Judgment of the European Court of Human Rights Zorica Jovanovic v. Serbia: What Legal Obligations Follow?)*, Zbornik radova sa petog međunarodnog naučnog skupa Dani porodičnog prava (Collection of Papers from the Fifth International Scientific Conference Days of Family Law), Year V, No. 5, Mostar, 2017, p. 37.

3. If the offence specified in paragraph 1 of this Article is committed for gain or other base motives or the offence results in serious impairment of the health, care or education of the minor, the offender shall be punished with imprisonment from three months to five years.

With the amendments of the Criminal Code in 2016, criminal sanctions have been tightened for criminal offences regarding this issue, so that the penalty for the offence provided for in Article 191 paragraph 1 is a fine or imprisonment of up to three years. There is also one new paragraph added to this Article that deals directly with new-born babies, so if the criminal offence specified in paragraph 1 is committed towards a new-born baby, then the penalty ranges from imprisonment of six months to five years (paragraph 2). Although in the first paragraph the criminal offence refers to a minor and by interpretation refers also to a new-born baby, this new paragraph is added for reasons of greater legal certainty and to narrow possible interpretations of paragraph 1. The text of the third paragraph of Article 191 is the same as the text of paragraph 2 before the Code was amended, except that the prescribed penalty was increased to a fine or imprisonment of up to two years. However, the revision added language specifying that if the criminal offence is committed by an organised criminal group, the offender shall be punished with imprisonment from one to ten years (paragraph 4).

Article 192 of the Criminal Code 2005, regarding the change of family status, provided that:

1. Whoever by substitution, replacement or otherwise changes the family status of a child, shall be punished with imprisonment from three months to three years;
2. Whoever by replacement or from negligence changes the family status of a child, shall be punished with imprisonment up to one year;
3. The attempt of the offence specified in paragraph 1 of this Article shall be punished.

After the amendments in 2009, the penalty for the offence specified in the first paragraph is an increase in the term of imprisonment from six months to five years. With the amendments in 2016, two new paragraphs were added. One deals with the offence in paragraph 1, so the same penalty prescribed for this offence shall be applied if committed by a physician of a medical institution who declares a live new-born baby dead in order to change a family status. The second new paragraph deals with the offences in both paragraphs 1 and 2 and provides that whoever commits those offences for gain, abuses a position of power or commits the offences by an organised criminal group, is liable to a term of imprisonment of between one to ten years. Former paragraph 3 is now paragraph 4, and with the amendments in 2009 the penalty was decreased to imprisonment up to three months.

Not only did the legislature increase the penalties by these amendments of the Criminal Code, but it also established the criminal responsibility for a

physician or an organised criminal group who might commit these criminal offences. I would agree with the argument that none of the amendments of the Criminal Code could solve the cases that happened in the past, either owing to obsolescence²² or to the constitutional provision on the prohibition of the retroactive effect of the law,²³ but at least the amended provisions could contribute to prevention or prosecution of potential future cases.

Article 388 of the Criminal Code 2005 regarding the criminal offence of human trafficking contained six paragraphs. After various amendments, there are four new paragraphs, and another six are formulated either the same way or slightly expanded, except that penalties have been tightened since the amendments from 2009 came into force. Article 389 prescribes the criminal offence of trafficking in minors for adoption in three paragraphs.

All the facts in the case of *Zorica Jovanović v. Serbia* and other similar cases indicate that the issue of missing babies born in maternity wards actually involves committing the criminal offence of trafficking in minors for the purpose of adoption.²⁴ Bearing in mind the many potential cases involving missing babies born in Serbian maternity wards, it is absolutely essential to have such criminal offences prescribed by the Criminal Code. It, however, remains unclear why the legislator limited committing of the criminal offences of trafficking in minors for adoption only against minors who have not reached 16 years of age and not to all minors until they reach the age of majority, which is 18 years.

All issues dealing with adoption²⁵ are regulated by the Serbian Family Act 2005. Therefore, only a minor can be suitable for adoption, but a child less than three months old or a minor who has acquired full legal capacity cannot be adopted.²⁶ If missing babies were stolen from Serbian maternity wards in order to be sold and therefore adopted, it is questionable how those babies could be legally adopted before they reached three months and if someone takes care of them until they reach proper age to be suitable for legal adoption then

²² The reason for enacting the Draft Law is the fact that all possible criminal offences are time-barred, so that the only remedy left is the factual determination.

²³ Art. 197 of the Constitution of the Republic of Serbia (Ustav Republike Srbije, Official Gazette, no. 98/2006). This article stipulates that laws and other general acts could not have retroactive effect, but exceptionally only certain provisions of the law could have such effect if it is required by public interest. However, a provision of the Criminal Code may have retroactive effect only if it is more lenient to the perpetrator of the criminal offence.

²⁴ Art. 389 deals with trafficking a person under 16 for adoption, with a punishment of imprisonment from one to five years.

²⁵ For more on adoption in Serbia, its conditions, effects and termination see O. CVEJIĆ JANČIĆ, *Porodično pravo – prvo izdanje (Family Law)*, 1st ed. Pravni fakultet Univerziteta u Novom Sadu (The Faculty of Law, University of Novi Sad), Novi Sad, 2009, pp. 339–359. For more on international adoption and Serbia, see N. VUČKOVIĆ ŠAHOVIĆ, *Međunarodno usvojenje i Srbija (International Adoption and Serbia)*, Pravni zapisi (Legal Records), No. 1, 2001, pp. 135–149.

²⁶ Family Act of Serbia (Porodični zakon Srbije), *Official Gazette of the Republic of Serbia* nos. 18/2005, 72/2011 and 6/2015), Art. 90.

one wonders where those babies are kept, in a hospital or with future adoptive parents. Still, any such adoption would not meet all legal requirements, because the Family Act contains a provision according to which it is possible to adopt a child whose parents are not alive, a child whose parents are unknown or whose residence is unknown, a child whose parents are fully deprived of parental rights or fully deprived of legal capacity and a child whose parents gave their consent to adoption.²⁷ In these cases of missing babies, parents are alive and known, and of course did not give their consent to adoption, so it would imply forging and counterfeiting of complete documentation and raises question about the validity of any adoption.²⁸ There are, however, authors who claim that no one knew or had any reason to suspect that it involved crimes of kidnapping or the change of family status.²⁹

Moreover, the main and very significant effect of the ECtHR case involving missing babies in Serbia is the Draft Law on the Establishment of Facts on the Status of Newborn Children Suspected of Missing from Maternity Ward in the Republic of Serbia,³⁰ drafted by the Ministry of Justice. This Draft Law establishes a proceeding in which facts about the status of new-born children suspected of missing from maternity wards in Serbia are determined and a proceeding in which a fair financial compensation of non-pecuniary damage is awarded.³¹ Additionally, the aim of this law is to meet the obligations of the Republic of Serbia imposed by the ECtHR in the case of *Zorica Jovanović v. Serbia*.³² Since the proceeding is non-contentious, an applicant begins by submitting a proposal for determination of the facts surrounding the status of a new-born child suspected to have disappeared from a maternity ward in Serbia within six months from entry into force of this law.³³ The applicant must be a parent of a new-born child

²⁷ Family Act of Serbia, Art. 91. A parent may not give a consent to adoption before the child reaches 2 months, but a parent may withdraw his/her consent to adoption within 30 days from the day the consent was given (Art. 95 paras. 3 and 4). However, there are a few situations when the parent's consent would not be necessary. That would be the case if a parent is fully deprived of parental rights or fully deprived of legal capacity or if a parent is deprived of a right to decide on issues that significantly affect a child's life (Art. 96).

²⁸ Adoption may be terminated only by annulment, if it is null or voidable, but it cannot be rescinded (Art. 106 of the Family Act of Serbia). If, at the moment of its establishment, the conditions for its validity prescribed by the Family Act have not been met adoption is null and if the consent to adoption is given under coercion or in misrepresentation, then adoption is voidable (Art. 107 and 108).

²⁹ M. DRAŠKIĆ SLUČAJEVI, "nestalih beba": Ustavni sud vs. Evropski sud za ljudska prava? ("The "Missing Babies" Cases: Constitutional Court v. European Court of Human Rights?") (2017) 1 *Anali Pravnog fakulteta u Beogradu (Annals of the Faculty of Law in Belgrade)* 230.

³⁰ This Draft Law is available in Serbian at <<https://www.paragraf.rs/dnevne-vesti/220318/220318-vest15.html>> (last accessed 10 February 2018).

³¹ Art. 1 of the Draft Law. A fair financial compensation may not exceed more than €10,000 in RSD equivalent (Art. 23. para. 2).

³² Art. 2 para. 2 of the Draft Law.

³³ Art. 14 para. 1 and Art. 16 of the Draft Law.

if by 9 September 2013 he/she had addressed himself/herself to state authorities or maternity wards in regard with the status of a new-born child.³⁴ If no parent was alive or has no legal capacity, the proceeding might be initiated by a brother, sister, grandfather or grandmother of a missing new-born child regardless of whether they had addressed themselves to state authorities or maternity wards regarding the status of a new-born child.³⁵ These provisions on the circle of applicants who may pursue a case is quite narrow since only living parents who previously addressed themselves to state authorities and maternity wards by 9 September 2013 may initiate the court proceeding. I argue that filing should also be allowed by those parents who have not previously addressed themselves to state authorities or maternity wards to initiate a court proceeding, if they suspect the real fate of their allegedly missing baby, even though they originally had confidence in the statements received from the hospital or maternity ward about the death of their child.

When the court makes a decision on adoption of an application, it determines the status of a missing new-born child by making sure that the child really died, and if the surrounding facts may not be determined, then whether the facts could explain what happened to a missing new-born child. If these facts cannot be ascertained, then the court concludes that the status of a missing new-born child cannot be determined.³⁶ This provision is quite problematic and could lead to a conclusion that such law is pointless and that the objective of law could not be achieved, because it could easily happen that the court could not show what actually happened to their missing new-born child. There is no investigation and no liability, but only financial compensation, which is not the primary goal of parents, who wish to know what happened to their children or to locate them. In March 2018 the Draft Law is proposed by the Serbian Government and entered the parliamentary procedure, but we are about to see if and when this Draft Law will pass in Parliament. Although it contains some inadequate provisions, it is still the only solution within the current legislative framework.

4. THE CASE OF 'MISSING BABIES' BEFORE THE CONSTITUTIONAL COURT OF SERBIA

Immediately after the ECtHR judgment in the case of *Zorica Jovanović v. Serbia* became final, another couple, called G.R., filed a complaint³⁷ for alleged violation

³⁴ Art. 14 para. 2.

³⁵ Art. 14 para. 3 of the Draft Law.

³⁶ Art. 21 paras. 2 and 3 of the Draft Law.

³⁷ According to Art. 170 of the Constitution of Serbia, a constitutional complaint may be lodged against individual general acts or actions performed by state authorities or organisations

of their constitutional rights to legal remedy and the rights of the child (Article 36 paragraph 2 and Article 64 paragraph 2 of the Constitution of Serbia) and conventional rights to respect for family life and to an effective remedy (Articles 8 and 13 of the European Convention), indicating that state authorities had not taken all appropriate measures within their jurisdiction in order to determine the death or fate of their twins.³⁸ The Constitutional Court rejected the constitutional complaint as unfounded. Taking into account the ECtHR decision and facts in the case of *Zorica Jovanović v. Serbia*, the Constitutional Court distinguished the two cases, although the allegations and claims were quite similar. In this case, unlike the ECtHR case, the Constitutional Court determined there was evidence and medical documentation of the birth, death and cremation of the babies. As far as the alleged violation of the right of a child to find out its origin, the constitutional protection is guaranteed to a child but may be claimed by a legal representative if a minor. Since the parents filed a complaint on their own behalf, there were no procedural conditions to decide on the violation of this right. Regarding the allegations on the violations of the right to respect for family life, the Court decided these allegations were unfounded, indicating that the inspection requested by the parents and supervised by competent authorities determined that all relevant data on delivery, illness history, clinical diagnosis, release list, transfer and reception of babies and corpses were recorded in the registries, with no irregularities. The applicant, however, claimed that the state failed to fulfil its positive obligation to carry out the effective investigation since the bodies of the babies had never been given to the family, the cause of death had not been determined, autopsy records had neither been delivered to the family nor were they informed about when and where the babies were allegedly buried. They claimed the criminal charges were dropped without adequate investigation and that they had never received any information about the fate of the babies. The Court opined that the ECtHR decision in the case of *Zorica Jovanović* too broadly extended the right to respect for family life. Finally, regarding the alleged violation of the right to effective legal remedy, the Court decided that imposing measures and establishing a mechanism that would open up obsolete criminal cases was not in accordance with the constitutional principle of legal certainty in criminal law.

exercising delegated public powers that violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified.

³⁸ The judgment of the Constitutional Court in Serbia, the Case of *G.R.*, no. UŽ-7936/2013. The case involved prematurely born twins who died shortly after their birth due to serious disorders of the basic life functions that had been diagnosed. To receive adequate specialised medical care, they were sent to an institution specialising in infants and neonatal care in cases where there are health risks that are life-threatening. There were still disputes about the information the parents received, and about whether all documents were authentic.

5. CONCLUSION

The ECtHR judgement in the case of *Zorica Jovanović v. Serbia* was encouraging to many parents who started to question the real fate of their babies who died in maternity wards. Therefore, some of them will want to initiate a proceeding before the Constitutional Court of Serbia. Until now, there has only been the one case before the ECtHR and Serbian Constitutional Court dealing with the issue of 'missing babies'. The violations of the right to effective legal remedy, the right to respect for family life and the right of a child to find out its origin were not determined in *G.R.*, with the Court explaining that not all cases of 'missing babies' are the same. The amendments to the Criminal Code of Serbia give hope that the theft of babies in Serbian maternity wards will be prevented or at least be more difficult to perform in the future. According to the ECtHR decision, Serbia was obliged to take all appropriate measures, preferably by enacting a special law, that could give some answers to the fate of 'missing babies' within a year from the date on which the judgment becomes final (which was 9 September 2014). Since the state authorities have failed to comply with the ECtHR judgement by not enacting a *lex specialis*, there may be more cases before the ECtHR against Serbia with regard to this highly sensitive legal matter.