



Organization for Security and Co-operation in Europe
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Notes from the Workshop on Discrimination

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1. Background

The Workshop on Discrimination was organized in co-operation with the [AIRE Centre from London, UK](#), which promotes awareness of European law rights and assists marginalised individuals and those in vulnerable circumstances to assert those rights.

The AIRE Centre argues for the use of strategic cases related to discrimination of Roma in access to birth registration and nationality. It litigates cases before the European Court of Human Rights (ECtHR), provides legal advice on EU migration law and conducts third party interventions and litigation in the UK courts and the EU Court of Justice.

The subject matter of the AIRE Centre's litigation mainly revolves around migration issues: the Dublin Regulation, child abductions, trafficking and other types of expulsions. The [Dublin regulation](#) aims to prevent the movement of asylum seekers from one EU member state to another (or the filing of multiple claims).

The purpose of this workshop was to strengthen the capacities and promote exchange within the Western Balkans Legal Aid Network (WeBLAN) which was created by a group of NGOs ([Praxis](#) from Serbia, [Civil Rights Programme Kosovo*](#), [Association "Vasa prava"](#) from Bosnia and Herzegovina, the [Legal Centre](#) from Montenegro, [Macedonian Young Lawyers Association](#) and the [Information Legal Centre](#) from Croatia).

2. Case studies of strategic litigation

National Insurance Numbers for Roma in Luton

In 2012, Bulgarian and Romanian Roma in Luton were refused National Insurance Numbers. The AIRE Centre provided face-to-face advice and drafted letters to JobCentre Plus. In the end, the AIRE Centre organized a judicial review with legal aid and a solicitor.

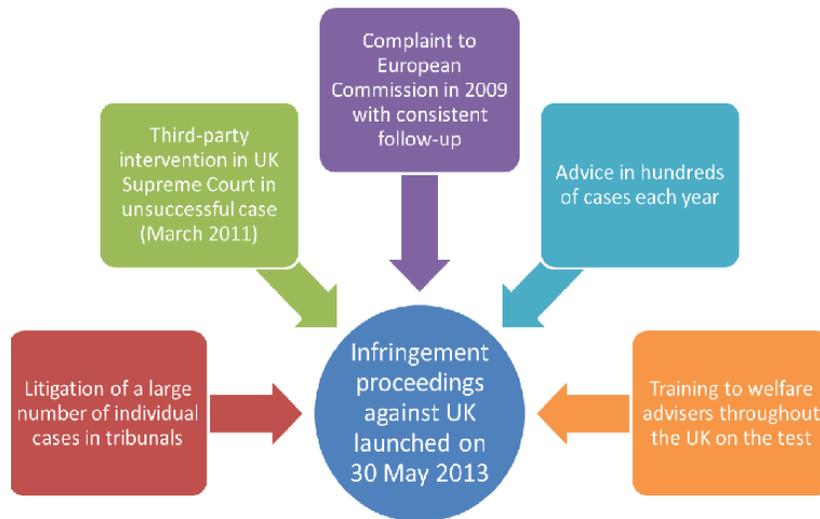
The Right to Reside Test in the UK

In 2007, in response to the accession of new EU Member States from Central and Eastern Europe, the UK introduced a test restricting access to welfare benefits to EU citizens by imposing a 'right to reside' test that British and Irish citizens always pass. The English courts found that the test was generally lawful, but in many cases the courts applied the test incorrectly. As a result, infringement proceedings were launched against the UK on 30 May 2013.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.



Right-to-reside test



3. Examples from the Western Balkans

In Mostar, BiH, “Vasa prava” initiated a case representing a boy with disabilities who could not access the regular education system, in spite of the fact that the 2009 Anti-Discrimination Law and other relevant legislation guaranteed equal access to the education system for all citizens. The court determined that this was indeed a case of discrimination and ordered the State to take necessary measures to allow this student to attend school (i.e. securing an assistant).

In the same city, there are 170 children with disabilities whose parents tried to enrol them in the regular education system. There is a class action filed on this issue (entitled “Two schools under one roof”) – it is currently under appeal at the cantonal court.

In the former Yugoslav Republic of Macedonia, a group of Roma maintenance employees were laid off from one of the malls in Skopje. The Anti-discrimination Commission is aware of the case but there is a lack of enforcement mechanisms and most timeframes for a decision are not respected. In another case, the Anti-discrimination Commission found no discrimination when a school did not react when a parent terrorized and injured a Roma student (even though the child had visible injuries).

Another potential case in the former Yugoslav Republic of Macedonia revolves around the fact that Roma are prevented to leave the country because of the visa facilitation regime but no one is willing to report this officially (and NGOs can appear only as a third party in courts). Nevertheless, MYLA is following up on the case.

4. Development of a litigation case strategy and lessons learned

Elements of the litigation case strategy can include:

- Litigation of low-level cases which turn into big litigation
- Third-party interventions in relevant cases
- Training for yourselves and colleagues
- Reports telling stories in individual cases, including how cases were resolved
- Complaints to national and European bodies to gather support

Remember: in strategic litigation, winning isn't everything (you can lose or settle a case but draw attention to an important issue).

Currently the Roma case load falls into three main groups:

1. Racist attacks
2. Housing and evictions
3. School segregation

Cases can be based on the **European Convention on Human Rights** – Article 8. How can you check if your case is an Article 8 case?

- Is there a protected right at stake? For example, we know now that residence documentation engages private life.
- Is there an interference or a positive obligation? We can rely on the 'particularly vulnerable group' status of Roma to assert positive obligations.
- Is the interference in accordance with the law? You have to be experts on domestic law here. There are two possibilities:
 - Domestic law is not being followed.
 - Domestic law is not sufficiently clear and therefore lacks the 'quality of law' that Article 8 requires.
- Does the interference pursue a legitimate aim? The ECtHR rarely calls this into question, but this provides an opportunity to question what aim is being achieved here.
- Is the interference necessary in a democratic society? The question is whether the refusal is proportionate to the legitimate aim pursued. This again is an opportunity to rely on the 'particularly vulnerable group' status of Roma and to tell individual stories.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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.

However, keep in mind: *Ponomaryov v Bulgaria*¹ (2009) – 'Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit'.

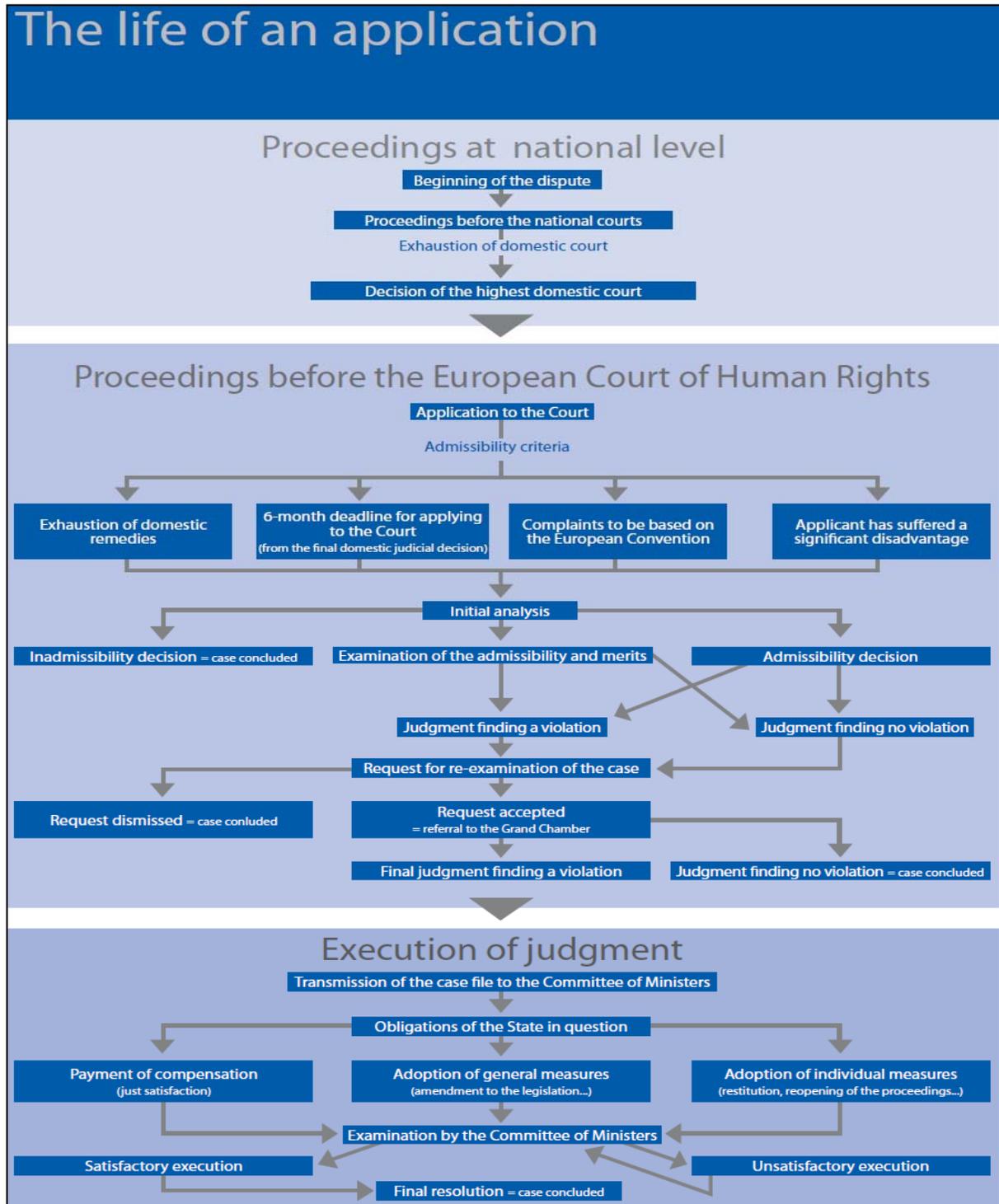
Proposed outline for Submissions to a National Court under Art. 8:

- Set out the text of Article 8.
- Set out the five Article 8 questions and make that the structure of your submission.
- Quote ECHR case law at each stage. Weave in helpful language from other Roma cases.
- Demonstrate failures to follow domestic law and procedure, or the lack of the 'quality' of the law ('not in accordance with the law').
- Assert that there is no legitimate aim and require the Government's lawyers to produce a legitimate aim.
- Dwell on the question of proportionality – tell stories of people's lives.

Thanks to the reference procedure, national courts or tribunals can refer a case to the EU Court of Justice (however, anti-discrimination commissioners and similar bodies are not eligible to do

¹ More information about the case *Ponomaryov v Bulgaria* is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105295#{"itemid":\["001-105295"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105295#{)

the same – see Case C-394/11 *Belov* below). At the same time, national courts tend to avoid determining discrimination.



5. ECtHR case law that can be used to assert the rights of Roma in cases before the national courts and the ECtHR

Racist attacks

*Moldovan and others v Romania*² - The case involves the killing by a mob of three Romani men, the subsequent destruction of 14 Roma houses in the village of Hadareni in Mures County, north-western Romania, as well as the degrading circumstances in which the victims were forced to live in after the event. In 2005, the ECtHR ruled that Romania violated multiple provisions of the European Convention on Human Rights for failing to provide justice in connection with the 1993 pogrom and its aftermath.

*Nachova v Bulgaria*³ - The case concerns the 1996 fatal shooting by military police soldiers of two Roma conscripts. The victims, recently absconded from a military construction crew, were known to be unarmed and not dangerous. The killing, by automatic weapon fire, took place in daylight in a largely Roma neighbourhood, where the grandmother of one of the victims lived. Immediately after the killing, a military police officer allegedly yelled at one of the town residents, "You damn Gypsies!" while pointing a gun at him. The Grand Chamber of the ECtHR affirmed in substantial part its first ever finding of racial discrimination in breach of Article 14 of the Convention. The Court's ruling makes clear that European states have an obligation to investigate possible racist motives behind acts of violence.

Article 14 (prohibition of discrimination): The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

*Sečić v Croatia*⁴ - In 1999, the applicant, a Croatian national of Romani ethnicity, was gathering scrap iron in a neighbourhood of Zagreb when he was violently attacked by a group of individuals. As a result of the beating, he was hospitalised with multiple rib fractures and suffered long term psychological damage. The attackers were known to belong to a skinhead group who would engage over the following years in numerous attacks against Roma. The Court published its judgment in 2007, holding that the Croatian government was responsible for violations of Articles 3 (prohibition of torture) and 14 (prohibition of discrimination) of the Convention.

Article 3 (prohibition of torture): No one shall be subjected to torture or to inhuman or degrading treatment or

Education

*Sampanis and others v Greece*⁵ (2009) – includes helpful language about discrimination when the source of the discrimination is in the local community and showing that new violations can take place even during implementation of previous judgements. Specifically, in this case, non-

² More information about the case *Moldovan and others v Romania* is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69670#{"itemid":\["001-69670"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69670#{).

³ More information about the case *Nachova v Bulgaria* is available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1394308-1455831#{"itemid":\["003-1394308-1455831"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1394308-1455831#{).

⁴ More information about the case *Sečić v Croatia* is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80711#{"itemid":\["001-80711"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80711#{)

⁵ More information about the case *Sampanis and others v Greece* is available at [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2378798-2552166#{"itemid":\["003-2378798-2552166"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-2378798-2552166#{)

Cases Relevant to Deprivation of Identity or Residence Documents

i. Expulsion cases

*Nunez v Norway*¹⁰ (2011) - ECtHR ruled that the expulsion of a Ghanaian national from Norway, coupled with a five-year re-entry ban, thus separating him from his wife and daughter would not amount to a violation of Article 8 (respect for private and family life). The principal applicant, Henry ANTWI had previously lived in Germany where he purchased a forged Portuguese passport and a false identity on the black market. He subsequently used this false identity to apply for a work and residence permit in Norway, which was granted to him on 13 April 2000.

A.A. v UK (2011) – shows that special attention should be paid to people who are victims of human trafficking and end up being convicted of a criminal offence during this period, only to be expelled from the country when they serve their sentence. The ECtHR ruled that: ‘while the fact that the applicant was a minor when he committed the offence does not preclude his deportation given the seriousness of the offence in question, the latter consideration must be carefully weighed against the applicant’s exemplary conduct and, as the evidence before the Court demonstrates, commendable efforts to rehabilitate himself and to reintegrate into society over a period of seven years.’

ii. Cases of people denied documents to which they are lawfully entitled: ‘not in accordance with the law’

*Aristimuño Mendizabal v France*¹¹(2005)- The applicant, Maria Isabel Aristimuno Mendizabal, is a Spanish national who was born in 1952 and lives in Tarnos (France). Since 1975 she had been living in France, where she was granted political asylum. The applicant complained that, for 14 years, the French authorities had refused to issue her with a long-term residence permit, to which she was entitled, and that she had had no effective remedy in that connection. The Court found a violation of Article 8 because the refusal to grant her a residence permit was contrary to European Community law.

*Smirnova v Russia*¹² (2003) – ‘The Court finds it established that in their everyday life Russian citizens have to prove their identity unusually often, even when performing such mundane tasks as exchanging currency or buying train tickets. The internal passport is also required for more crucial needs, for example, finding employment or receiving medical care. The deprivation of the passport therefore represented a continuing interference with the applicant's private life.’ Because it was incompatible with Russian law to deprive the applicant of her internal passport, there was a violation of Article 8.

Article 8 cases about people whose situation has changed and could not get their status reinstated

*Kurić v Slovenia*¹³ (Grand Chamber, 2012) - The applicants were left stateless after the dissolution of Yugoslavia and later had their records removed from the civil registry, losing their right to residence. The Court found that the prolonged refusal to resolve the applicants’

¹⁰ More information about the case *Nunez v Norway* is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105415#{"itemid":\["001-105415"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105415#{)

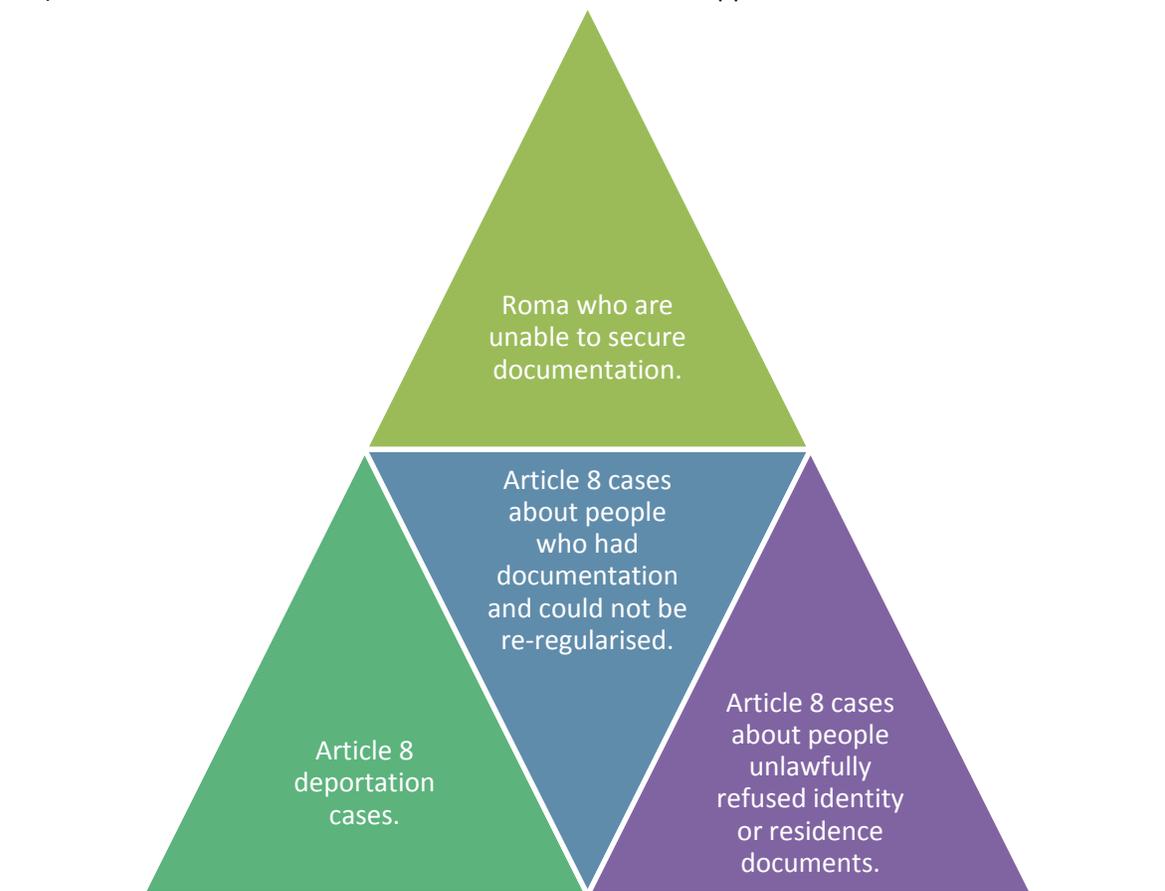
¹¹ More information about the case *Aristimuño Mendizabal v France* is available at <https://wcd.coe.int/ViewDoc.jsp?id=957265&Site=COE>

¹² More information about the case *Smirnova v Russia* is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61262#{"itemid":\["001-61262"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61262#{)

¹³ More information about the case *Kuric v Slovenia* is available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111634#{"itemid":\["001-111634"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111634#{).

residence status constituted an interference with their right to private and/or family life, and that they had been discriminated against because they were in a disadvantaged situation compared to other foreigners in Slovenia. The Grand Chamber of the ECtHR ruled that the Slovenian authorities' treatment of the so-called "erased" people is in violation of Article 8 (right to private and family life) of the European Convention on Human Rights, Article 14 (prohibition of discrimination) and Article 13 (right to an effective remedy).

*Osman v Denmark*¹⁴ (2011) - The case concerned a Somali national who had been living in Denmark from the age of seven and who was expelled from various schools. At the age of 15, she was taken by her father to Kenya for what she (and her mother) thought would be a short stay with her paternal grandmother. Instead, her father left her in the Hagadera refugee camp for over two years, where she provided around-the-clock care to her very ill grandmother. She then left the camp and tried to apply for a new entry visa to return to her mother and siblings in Denmark, but was refused: under Danish law, her residence permit had lapsed, and in the meantime Danish immigration law had changed and she was now too old to be eligible for a new entry visa. The Court found a violation of Article 8 (right to respect for private and family life) due to the Danish authorities' failure to re-instate the applicant's residence status.



¹⁴ More information about the case *Osman v Denmark* is available at <http://www.google.rs/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CC4QFjAB&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fwebsiteservices%2Fcontent%2Fpdf%2F001-105129%3FTID%3Damarrgiroi&ei=AUzEUevyPKqr7AbU94FQ&usg=AFQjCNFA6fMhWx6IYSNw9zBrqBMeUpkTSg>.