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The notion of "vulnerable groups" in the case law of the European Court of Human Rights

REPORT BY

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The word 'vulnerability' is, as one might imagine, a term that is used with great frequency in the case law of the European Convention on Human Rights (hereinafter ECHR) and this has been the case from the earliest decisions of the Convention institutions. [2] In a human rights treaty dealing on a regular basis with diverse varieties of human suffering this is what one might expect. However, while many applicants can be described as *vulnerable* some are undoubtedly more *vulnerable* than others. It is this latter type of vulnerability that interests us since in certain types of cases the Court has found that the applicant belongs to a special category of vulnerability and has attached legal significance to that fact either by developing the notion of positive obligation under the Convention or by reversing the burden of proof and imposing it on the Government.[3]

Diverse categories of vulnerability – an open-ended approach

It is not accurate to speak of a 'doctrine of vulnerability' in the case law as we would speak, for example, of the doctrine of margin of appreciation which has undergone constant development in the jurisprudence since the earliest judgments of the Court in the 1960's and whose doctrinal basis has been elucidated on a continuing basis throughout the case law. It may even be misleading to speak of an emerging doctrine of vulnerability and even less of a "quiet revolution" as some authors believe. The Court has not developed a coherent set of criteria or indicators that seek to identify which groups qualify as vulnerable. It has rather limited itself to pointers such as the existence of attested historical patterns of stigma or discrimination to guide its path. There is thus no overarching definition that seeks to set out what the inherent elements of a vulnerable group are or in what circumstances such a group exists and what weight or even legal consequences the Court should attach to such a factor of vulnerability. There has rather been a case by case development, over time, in a wide variety of settings – cases concerning the Roma, asylum seekers, HIV victims, detained persons, children, the mentally ill, victims of domestic violence - to give but some examples,

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[2] The relevant judgments of the Court referred to in this paper can be found in Hudoc – www.echr.coe.int

[3] See,generally, Peroni and Timmer, *Vulnerable groups: the promise of an emerging concept in European Human Rights case law*" (2003) Vol 11, Issue 4, Jnl.Int'l of Constitutional Law, pp1056-1085; A. Timmer, *'A Quiet Revolution: Vulnerability in the European Court of Human Rights',* in: M. Fineman & A. Grear (eds.), Vulnerability: Reflections on a New Ethical Foundation for Law and Politics, Farnham: Ashgate, (2013), pp. 147-170. Yussef Tamini, *The protection of vulnerable groups and individuals by the European Court of Human Rights,* University of Amsterdam (Masters Thesis – May 2015), available at http://njb.nl/Uploads/2015/9/Thesis-The-protection-of-vulnerable-groups-and-individuals-by-the-European-Court-of-Human-Rights.pdf

which has crystallised into a particular interpretative approach employed by the Court in such cases in recognition of the factor of vulnerability. In general, it can be said that the Court has avoided the straitjacket of definition preferring to keep its options open for the future. In addition, there are many cases where the Court has rejected the claim that the applicant was to be considered a vulnerable person or belonged to a vulnerable group.[4]

The factor of "vulnerability" - if present - becomes one element amongst many others that is taken into consideration by the Court in its legal assessment. How heavily it weighs in the balance as a factor depends on the facts of the case, the degree and type of vulnerability involved and, where minority groups are concerned, the extent to which it is evidenced by international recognition or historical realities. The advantages to such an approach are that the Court does not bind its hands for the future and remains free to qualify a situation as involving vulnerability if there are good reasons for it. Accordingly, the categories of vulnerability have an open-ended quality to them. Occasionally this gives rise to some difficulty when not all members of the Court are convinced that the applicants belong to a vulnerable category. In the Grand Chamber judgment of *M.S.S v Belgium and Greece* (a case concerning the return of asylum seeker to Greece from Belgium) the Court indicated that it:

« attache(d) considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection (see, *mutatis mutandis*, *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 147, ECHR 2010). The Court noted the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention (relating to the Status of Refugees), the remit and the activities of the UNHCR and the standards set out in the Reception Directive ».[5]

But not all judges agreed with this statement. In a separate opinion in *M.S.S* Judge Sajó expressed the view that asylum seekers did not merit belonging to this category because they did not form part of a group that was historically subjected to prejudice with lasting consequences, resulting in their social exclusion – as in other cases decided by the Court.[6] However, this approach presupposes a certain definition, restricted to minority groups such as the Roma, of what constitutes a vulnerable group. But the Court has not decided in its case law that the notion of social exclusion or historical prejudice are among the

[4] See, for example, the cases mentioned by Yussev Tamini in his thesis (fn 3 above), Section 1.4.3, pp 19-20. The author also provides statistical data concerning cases where the term vulnerability is employed by the Court.
[5] Judgment of 21 January 2011, para 251. See also *Hirsi Jamaa and others v Italy*, judgment of 23 February 2012, para 125 where the Court notes the particular vulnerability of the applicant asylum-seekers if returned to Libya – para 125.
[6] Judgment of 21 January 2011.

indispensable elements of 'vulnerability'- important as they are particularly when dealing with groups. Its approach is considerably more open-ended. Indeed, recent history has proved the majority opinion to be far-sighted on this issue when one considers the recent tragic experiences today in Europe concerning the unstoppable migration flow from Syria and other parts of the middle east. Could it be doubted from what is happening in Europe today in the area of immigration flows that one is in the presence of a special form of vulnerability worthy of consideration by the Court when assessing the obligations of the Contracting Parties? The Court repeated its finding that asylum seekers deserved special protection in *Tarakhel v Switzerland* adding that this requirement is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability even when the children seeking asylum are accompanied by their parents.[7] Thus even within a particular category of vulnerability there may exist a further subset of that category that are deserving of even greater protection.

But what of the case law concerning such groups and what are the factors that the Court has taken into account in its determination of vulnerability?

Recognition of the Roma as a vulnerable group

The notion of a vulnerable group (as distinct from a person in a vulnerable position) developed in the case of *Chapman v UK* in 2001.[8] This case involved a Roma woman who was evicted from her own land because she stationed her caravan there without planning permission. The Court rejected the applicant's alleged violation of the right to respect for her minority lifestyle (Article 8 ECHR) and also dismissed her discrimination complaint (Article 14 ECHR). The applicant's argument was that she was prevented her from pursuing a lifestyle central to her cultural tradition. The Court's Grand Chamber nevertheless observed that "the vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory planning framework and in reaching decisions in particular cases". [9] The door to "special category" status was thus left ajar.

In this early formulation, the vulnerability of Roma seems to arise primarily from the group's minority status and from the lack of consideration of its minority lifestyle in the planning and decision-making processes. Group vulnerability did not, however, play a key role in the Court's proportionality reasoning. In fact, Ms. Chapman lost the case, mostly as a result of the

[7] Judgment (Grand Chamber) of 4 November 2014, para 119.
[8] Judgment of 18 January 2001 (Grand Chamber).
[9] Ibid; para 96.

wide margin of appreciation left to states when it comes to the implementation of environmental regulations. However, in subsequent cases concerning the forcible removal of members of the Roma community from land they had occupied for considerable periods without steps being taken to rehouse them, the Court attached weight to this factor in finding that there had been a violation of the right to respect for private and family life (Article 8 ECHR). In *Yordanova v Bulgaria* the Court held that the authorities had failed to recognise the applicants' situation as an "outcast community and socially disadvantaged group potentially in need of assistance" to be able effectively to enjoy the same rights as the majority population. The underprivileged status of the applicants' group was a weighty factor in considering approaches to dealing with their unlawful settlement and, if their removal was necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter.[10] A similar approach was employed by the Court in *Winterstein v France* where the Court based its finding of a violation of Article 8 also on the failure of the courts to assess the proportionality of the decision to evict the applicants from the land where they had been settled for a long time because it did not comply with the land use plan.[11]

In subsequent cases concerning the right to education of Roma children the Court attached considerable weight to the notion of vulnerability in reaching its conclusion of discriminatory treatment. In *D.H and others v Czech Republic* – the leading case - the issue concerned the allocation of Roma children to special classes which ultimately compromised their educational and personal development. Statistics indicated that more than half of these classes were composed of Roma children. The Court took judicial notice, based on an abundance of international documents, that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority. They thus required special protection. Against this background the Court considered that on the basis of the statistical evidence there existed indirect racial discrimination and placed the burden on the Government to demonstrate, which they were unable to do, that it could be justified under the Convention. It also found that the Government had failed to provide safeguards in its educational system to protect the members of the disadvantaged class from discrimination.[12] A similar finding concerning a lack of appropriate safeguards in the educational system was recorded by the Court in cases that presented comparable issues - *Oršuš and others v Croatia*[13] and *Sampanis v Greece*.[14]

[10] Judgment of 24 April 2012.
[11] Judgment of 17 October 2013, paras 159-167.
[12] Judgment of 13 November 2007, paras 175-210.
[13] Judgment of 16 March 2010 (Grand Chamber).
[14] Judgment of 5 June 2008.

In *V.C v Slovakia* the Court was confronted with a case of forced sterilisation of a Roma woman while in hospital. It recognized that forced sterilization has affected vulnerable individuals of different ethnic origins but considered that the Roma are at particular risk "due, inter alia, to the widespread negative attitudes towards the relatively high birth rate among the Roma compared to other parts of the population, often expressed as worries of an increased proportion of the population living on social benefits."[15] The Court condemned Slovakia for not ensuring the applicant's free and informed consent to sterilization, finding violations of both Article 3 ECHR (degrading treatment) and Article 8 ECHR (respect for private and family life).

Prisoners, disabled persons and HIV status

The Strasbourg case law, however, is not limited to vulnerable minority groups. It also encompasses, in certain circumstances, prisoners or detainees who may be at particular risk, for example, of suicide, or violence from other prisoners. In such cases the Court has emphasised the duty of the state authorities to take all necessary measures of protection once it becomes aware of the risk. Typical of this case law is the evidentiary rule that once a prisoner is in state custody the burden of proof is transferred to the state to explain how any injuries or death occurred. Young persons, disabled persons and the mentally ill are all considered especially vulnerable when detained in prison and the state has a particular duty to ensure that they receive appropriate medical treatment while detained. [16]

A recent judgment of the Grand Chamber (*Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania*) provides a graphic illustration of vulnerability in a hospital setting. The applicant was an orphan and HIV-positive from an early age who had been in hospital care for most of his young life. He was also educationally subnormal. He had been transferred to a hospital unit that was unequipped to provide the type of care that he needed including antiretroviral treatment for his condition. When a local NGO came to hospital to visit him, having been alerted to his condition, they found that he had died.

Since he had no living relatives the first issue for the Court to decide was whether the NGO had standing under Strasbourg rules. Was it open to them to complain to the Court on the applicant's behalf after the applicant had died without ever having consulted him or obtained his agreement to act on his behalf? The Court had previously accepted only close relatives as having standing in such circumstances. It went on to uphold the standing of the NGO and, in doing so, attached considerable weight to the fact that he lacked legal capacity under

[15] Judgment of 8 November 2011.
[16] *Claes v Belgium*, judgment of 10 January 2013 (mental disorder); *Musial v Poland*, judgment of 20 November 2009 (mental disorder); *Bubnov v Russia*, judgment of 5 February 2013 (physical health issues).

Romanian law, that the authorities had not appointed a legal guardian for him when he turned 18 and thus he had been unable to complain to the local courts about his situation. The Court thus took into account the difficulties that disabled persons have in securing access to justice and departed from its traditional admissibility case law on the matter.[17] It also found a violation of the boy's right to life (Article 2 ECHR) on the grounds that he had not received proper care while in hospital and had been transferred to a psychiatric ward that was utterly incapable of attending to his needs. It is worth observing in this context that access to justice for vulnerable and underprivileged groups is considered an essential gateway in the struggle for observance of their fundamental rights. As one commentator has observed:

> "Without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a cycle of impunity, deprivation and exclusion. Moreover, the relationship between poverty and obstructed access to justice is a vicious circle: the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems." [18]

The Court, however, has yet to hold that poverty is, in itself, a factor that places the applicant in need of special protection although, as Françoise Tulkens has pointed out, the Court has taken important strides towards the protection of social rights in its recent case law with both important advances as well as some notable retreats.[19]

HIV status was also at the centre of the dispute in *Kiyutin v Russia*.[20] Under Russian law foreigners married to Russian nationals were only eligible for a temporary residence permit if they produced a medical certificate showing that they were not HIV-positive. The applicant, a Usbek national, was married to Russian woman and had his residence permit refused on the grounds that he had tested HIV-positive. At the heart of the Court's reasoning finding a violation of Article 14 of the Convention was the consideration that people living with HIV had suffered considerable discrimination in the past and that there was no established European consensus

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[17] Judgment of 17 July 2014. The Court noted "While alive, Mr Câmpeanu did not initiate any proceedings before the domestic courts to complain about his medical and legal situation. Although formally he was considered to be a person with full legal capacity, it appears clear that in practice he was treated as a person who did not (--). In any event, in view of his state of extreme vulnerability, the Court considers that he was not capable of initiating any such proceedings by himself, without proper legal support and advice. He was thus in a wholly different and less favourable position than that dealt with by the Court in previous cases. These concerned persons who had legal capacity, or at least were not prevented from bringing proceedings during their lifetime (--), and on whose behalf applications were lodged after their death (para 108).

[18] Cited by Françoise Tulkens, *The contribution of the European Convention on Human Rights to the poverty issue in times of crisis*, Paper delivered in the European Court of Human Rights on 8 July 2015, para 23 and fn 32.

[19] Ibid; *passim.* According to Judge Tulkens "The case-law of the Court is at the same time moving forward and moving backward, an opening and a closing" (at para 8).

[20] Judgment of 10 March 2011.

for the exclusion of HIV-positive persons from residency. Accordingly, the margin of appreciation was narrower and the state had to demonstrate a particularly compelling justification for the difference in treatment between the applicant and other non-nationals. The Court grounded its finding of discrimination on the facts that (1) Russia imposed no restriction on long or short term visitors who had HIV; (2) thus mere presence in a country was not, in itself, considered to be a danger to public health; (3) such restrictions could actually be harmful to public-health since they drove the problem underground.[21]

Victims of domestic violence

In the landmark Chamber judgment of *Opuz v Turkey* the Court found violations of Articles 2 and 3 because of the failure to protect the applicant's mother from a repeatedly violent husband. It had regard to the general attitude of the police when confronted with allegations of domestic violence as well as a consistent pattern of judicial passivity. It also found that the situation was discriminatory in breach of Article 14 on the grounds that the criminal law system had not provided sufficient protection to the applicant's mother who was, predictably and shockingly, killed by her violent husband. It cited with approval the statement by CEDAW (the UN Committee on the Elimination of Discrimination against Women) that violence against women, including domestic violence, amounts to a form of discrimination against women. In reaching this conclusion the Court emphasised that the applicant fell into the group of "vulnerable individuals" entitled to state protection and took into account not only the repetitive violence suffered by the victim in the past but also the vulnerable situation generally of women in south east Turkey.[22]

Conclusion

So what do we learn from this brief round-up of the most relevant case law concerning the indicators of vulnerability? From the Roma cases we see that the emphasis is placed by the Court on the fact that this group historically has been the subject of prejudice, discrimination and stigmatisation and that this is well attested in a variety of international documents. In other words, there is clear evidence to support the Court's description in *Yordanova* that the Roma as a group are "an outcast community and socially disadvantaged group potentially in need of assistance to be able effectively to enjoy the same rights as the majority population." Stigma and discrimination are also at the root of the cases concerning HIV victims and again there is

[21] Judgment of 10 March 2011, paras 62-74. See also *I.B. v Greece*, judgment of 3 October 2013 where the Court applied a narrow margin of interpretation in a case concerning the dismissal of a HIV positive employee.
[22] Judgment of 9 June 2009, paras 160-176 and 199-202.

ample sociological and historical evidence to support this assertion. From the prisoners' cases we note that the finding of vulnerability is based on the fact that detainees no longer have control over their own destiny being under state authority and control. In the cases concerning young persons, the disabled and the mentally ill this condition of control is supplemented by the quality of helplessness and an inability for the members of this category to fend for themselves. This element of powerlessness is also present in the *M.S.S* and *Tarakhel* cases where the Court was considering the plight of asylum-seekers being sent back to countries where the system for processing and assisting them suffered from systemic deficiencies or had broken down.[23] Lastly the gender based violence cases focus on what one might call an administrative practice of inertia and complicity by the police and judicial authorities faced with the reality of domestic violence. It is the combination of both of these factors that have deprived the victims in such cases of the protection from harm that are essential in a legal system governed by the rule of law thus placing them in a particular category of vulnerability susceptible to spousal violence and even death.

However, several important qualifications are called for. First, the Court is not dispensed from making an individual assessment on the facts in cases brought by members of these groups and deciding that there exist other factors militating against the drawing of legal consequences from their membership of the group. Some are more vulnerable than others even within a well recognised category of vulnerability as we have seen in *Tarakhel v Switzerland*. Not every prisoner will be considered as belonging to a vulnerable group with the legal consequences that this entails and not every asylum-seeker necessarily belongs to the category being described by the Court in *M.S.S.* Second, the mere fact of belonging to a vulnerable group does not necessarily trump other important factors in a case such as the requirements to exhaust remedies or other admissibility rules or the margin of appreciation as we have seen in the *Chapman* judgment. Nor may it be relevant to the particular complaint being made. For example, the vulnerability of members of the Roma community is not likely to have any particular significance when the Court is examining whether the requirements of a fair trial in respect of a criminal charge have been satisfied under Article 6 of the Convention. Vulnerability is but one important factor to be taken into account by the Court when making its overall assessment of whether there has been a violation of the Convention.

We have also seen the interpretative techniques that the Court deploys when it deals with a vulnerable group. It may impact on issues of admissibility such as victim status or the exhaustion rule as in the *Câmpeanu* case. It may direct the Court's enquiry as to the existence

[23] Supra notes 5 and 7.

of adequate legal safeguards to protect the disadvantaged members of the group as in the *D.H. and others* case. It may also lead to a reversal of the burden of proof requiring the authorities to justify practices or differences in treatment sometimes requiring compelling evidence when faced with suspected racial or ethnic discrimination (*D.H.* and *Oršuš and others)* or take into account the generally recognised plight of the group itself in assessing the state's obligations towards one or more of its members (*Opuz).*

In conclusion, the categories of vulnerability in the Strasbourg system are loosely delineated to allow the Court the broadest freedom in future cases to identify other groups and categories that merit special attention. While this may be a point of criticism for some pointing to a certain laxity in the development of the notion, it is, in my view, necessary for an international human rights court faced with the complexities of modern life and the often unforeseeable realities of disadvantage and stigma to leave the categories of vulnerability open.