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# Master Thesis

# The Concept of Vulnerable Groups under the ECHR

# Pažeidžiamų Grupių Apibrėžimas Pagal EŽTK

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ABSTRACT AND KEY WORDS

The research paper examines the increased application of vulnerability in recent judgments in the European Court of Human Rights. The study critically assesses judges' supposedly pristine competencies to interpret precisely the definition under the European Convention on Human Rights. The further analysis looks for comparisons between previous and more recent case law and the extent of application of the term 'vulnerability' to different groups of people in given circumstances. The positive and negative outcomes of judgments that may set the precedent in the jurisprudence should be examined more broadly. Eventually, the master's thesis provides solutions to prevent similar misconceptions in future case law.

**Keywords:** Vulnerable groups, European Court of Human Rights, Vulnerability, European Convention on Human Rights

LIST OF ABBREVIATIONS

ECtHR – THE EUROPEAN COURT OF HUMAN RIGHTS

ECHR – THE EUROPEAN CONVENTION ON HUMAN RIGHTS

EU – THE EUROPEAN UNION

LGBT– LESBIANS, GAYS, BISEXUALS AND TRANSGENDERS PERSONS

HIV - HUMAN IMMUNODEFICIENCY VIRUS

PTSD – POST TRAUMATIC STRESS DISORDER

AIDS – ACQUIRED IMMUNE DEFICIENCY SYNDROME

ECSR – THE EUROPEAN COMMITTEE ON SOCIAL RIGHTS

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# INTRODUCTION

Debates regarding the universal application of the concept of vulnerability have recently transformed into a widely acknowledged phenomenon in the European Court of Human Rights. The transformation has been occurring from simply being an underlying notion to a more generally recognized concept in a broader manner, possessing an intuitive and wide appeal. Thus, the perception of vulnerability is becoming more embraced, referring to the universal protection of human rights. In recent years, the court has applied these principles related to equality and non-discrimination matters.

Judges have been increasingly aware that their reasoning is based entirely on grounds of discrimination. This has helped to expose lived realities ignored by the public. In other words, there are questions about different interpretations of the term 'vulnerability', which impacts the lives of disadvantaged and marginalized individuals. Meanwhile, a similarly interpreted term might have no effect, even if it should matter otherwise. Theoretically, increased awareness of the plight of disadvantaged and marginalized groups may generate novel ideas for a broader interpretation of vulnerable individual groups. Ultimately, the court must emphasize that discrimination is viewed through vulnerability. However, the term 'vulnerability' remains uncodified in any relevant legal framework, which may affect the conduct of the European Court of Human Rights in assessing vulnerability.

**The object of the research paper** is to define the extent to which the court applies the concept of vulnerability, relying on the provisions found in the European Convention on Human Rights, explaining its rationale behind judgments, and looking for the prospects of broadening the concept of vulnerability in the European Court of Human Rights.

**The topic's relevance** derives from the recently occurring trend of the emphasis on embracing universally accepted human rights provisions emerging onto the mainstream scene. The European Court of Human Rights must constantly examine the rights of disadvantaged and marginalized groups. These judgments leave frequently ambiguous feedback for legal commentators. The master's thesis underlies the scientific novelty of a comprehensive analysis of supposedly precise perception and interpretation of vulnerability. The topic reveals the key challenges existing in present-day jurisprudence in the context of vulnerability, whose announcement should be based on comparative case studies and journal articles by authoritative legal commentators.

**This paper aims to** highlight the court's increased application of the term 'vulnerability' to different groups of persons through a practical and theoretical lens; assess legal commentators' views on recent judgements, expose key challenges, propose recommendations to overcome difficulties in future rulings, and prevent similar criticisms.

To achieve this goal, the following tasks have been identified

- To grasp various nuances of interpretation and application of the term 'vulnerability', relying on articles in the European Convention on Human Rights.

- To compare previous and more recent case law rulings explaining the more certain rationale behind these judgments and how the European Court of Human Rights is willing to set the precedent in upcoming cases.

- To identify reasons for the judges' failure to precisely define and apply the concept of vulnerability in given contexts (e.g., socio-economic).

- To look for preventive measures as the margin of appreciation that consistently contributes to sabotaging the full implementation of the European Convention on Human Rights in party member states.

- To provide solutions to avoid similar misconceptions in future case law based on the legal commentator's highly recommended opinions.

To achieve objectives, the following **research methods** will be used in this paper:

- Linguistic, teleological analysis and synthesis are used to study the European Convention on Human Rights, which leads to crafting the concept of vulnerability in the European Court of Human Rights.

- Comparative and historical methods of previous and more recent judgments allow us to observe and summarize co-existing trends in the jurisprudence related to the status of vulnerable persons and groups.

- Doctrinal research identifies and examines the latest and most significant scholarly writings.

The **primary sources** cited in the research paper include several key books:

- First, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* by Corina Heri enhances our understanding of how the European Court of Human Rights addresses vulnerability through a legal-philosophical perspective, particularly under Article 3 of the ECHR, providing a theoretical framework for inquiry.

- The second notable book is *The Protection of Vulnerable Groups under International Human Rights Law* by Ingrid Nifosi-Sutton. This book evaluates the vulnerability paradigms developed by these entities to broaden protections for vulnerable groups and assists in formulating a legal definition of vulnerable groups.

- The third source utilized in this research is *Improperly Obtained Evidence in Anglo-American and Continental Law* by Dimitrios Giannoulopoulos, offering a thorough exploration of the exclusion of improperly obtained evidence across various legal systems while engaging deeply with jurisdictional boundaries. This book critiques the court's role in forming a rights-based consensus by elucidating how exclusionary rules operate within the jurisdictions discussed.

- Another important work is *Criminal Fair Trial Rights* by Ryan Goss, which critically examines case law through several 'cross-cutting' issues and themes related to many

component rights, including the Court's role in interpreting Article 6 of the ECHR. Goss's case-law-driven analysis reveals that the European Court's jurisprudence on criminal fair trial rights exhibits significant uncertainty, inconsistency, and incoherence, supporting his views on vulnerability assessment.

- The final book discussed is *Values in Climate* ***Policy*** by David Morrow. It assesses potential impacts on future generations by climate policy aimed at dividing between climate ethics and policy assessment by the European Court of Human Rights.

Additionally, the research makes extensive use of journal articles to substantiate the vulnerability concept:

- The first article, 'The Juridification of Vulnerability in the European Legal Culture' by Maria Catanzaritti, conceptualizes vulnerability by examining its interaction with various human rights violations. This article investigates how the ECtHR's case law reflects this emerging, uncodified notion of vulnerability.

- The second article, **'**Vulnerability and its Implications: Some Comments in the Light of the Strasbourg Case Law Concerning Asylum Seekers' by Katarzyna Galka, analyzes the ECtHR's references to asylum seekers' vulnerability, detailing the structure of this argument (its application extent and basis) and focusing on the associated legal consequences considering Strasbourg jurisprudence.

- The third article, **'**Understanding Vulnerability through the Eyes of the European Court of Human Rights' Jurisprudence: Challenges and Responses' by Indira Boutier, highlights the evolution of incorporation of the concept of vulnerability into their decisions, exploring how the Court has developed a more varied and multifaceted approach despite initial caution.

- The fourth article to review is 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' by Corina Heri. This piece connects the discussion of positive climate obligations with climate-related vulnerabilities, which could influence state duties and reduce the procedural and substantive challenges affecting the success of climate cases in the Court.

- The final article to summarize is 'Les vulnérables: evaluating the vulnerability criterion in Article 14 cases by the European Court of Human Rights' by So Yeon Kim. She contends that the vulnerability criterion is intended to address the problems of interpreting Article 14, but ultimately had negative repercussions. The notion of vulnerability has proven ambiguous, inconsistently applied by the Court, and paternalistic. I recommend that the Court emphasize individual autonomy instead of categorizing applicants to enhance its legal interpretation of Article 14.

The master's thesis will incorporate an analysis of case law (notable rulings from the Strasbourg Court), including:

- *Salduz v. Turkey* established the Salduz doctrine concerning the right to a fair trial and access to a defense attorney for persons with physical and psychological impairments. The Grand Chamber identified a violation of Article 6. This approach has been further examined and contested in later cases, such as *Ibrahim v. United Kingdom*, *Beuze v. Belgium,* and *Hasáliková v. Slovakia*

- *M.S.S v. Belgium* explains the applicant's risks of expulsion to Afghanistan without a thorough assessment of his asylum claim and access to an effective remedy. This ruling examines the implications of the judgment on EU Asylum Law, particularly regarding the Dublin II Regulation and the Reception Conditions Directive.

- *Tunikova v. Russia* demonstrates how the Court's jurisprudence on this matter has progressed from primarily relying on Article 8 to frequently invoking Article 3, raising the question of whether domestic abuse (a form of psychological violence) should be explicitly defined as torture.

- The *Fedotova v. Russia* ruling acknowledges the right to legalized same-sex unions under the Convention, significantly influencing LGBTQ rights across Europe. However, this decision raises complex issues regarding the Court's legitimacy and resilience amid ongoing cultural disputes over LGBTQ rights.

- *Verein KlimaSeniorinnen v. Switzerland* addresses Switzerland's failure to comply with the European Convention of Human Rights (the Convention) due to insufficient climate change action. It identified a violation of the right to respect for private and family life as outlined in Article 8, stemming from Switzerland's inability to mitigate climate change's effects on the lives, health, well-being, and quality of life.

- The Constitutional Court of the Republic of Latvia's ruling "On the Compliance of Article 155(1) of the Labour Law with the First Sentence of Article 110 of the Constitution of the Republic of Latvia" significantly affects the Lithuanian Constitutional Court's reasoning regarding the lack of a legal framework for same-sex couples being unconstitutional, as evident in the ruling on "The legal regulation related to the institution of partnership conflicts with the Constitution."

Additionally, this research paper references legislation:

- The Dublin Regulation ensures prompt access to asylum procedures and requires a single, clearly identified EU country to examine an application based on its merits. This Regulation designates the Member State responsible for processing the asylum application.

- The Reception Directive aims to establish uniform standards for reception conditions across the EU. It guarantees applicants access to housing, food, clothing, healthcare,

education for children, and employment opportunities (within a maximum waiting period of nine months).

- The European Convention on Human Rights is a document enshrining fundamental rights including the right to life, the ban on torture, the right to personal freedom and safety, the right to a fair trial, the right to respect for private and family life, freedom of expression, and the prohibition of discrimination.

Eventually, several other sources are referenced in this research paper:

- Simone Cusack's guidelines on *Eliminating Judicial Stereotyping − Equal Access to Justice for Women in Gender-Based Violence Cases* outline the specific barriers women face in their pursuit of justice related to sex and gender. These barriers include male guardianship laws, fear of stigma and retaliation, and cultural beliefs that frame men (rather than women) as rights-holders. Judicial stereotyping is a pervasive and harmful obstacle to justice, particularly impacting women victims and survivors of violence, as it fosters predetermined beliefs within the judicial system rather than focusing on relevant facts and proper investigations.

- The Diagnostic and Statistical Manual of Mental Disorders by the American Psychiatric Association provides a detailed list of mental disorders, including prolonged grief disorder, suicidal behavior, and nonsuicidal self-injury, along with a thorough examination of racism and discrimination's impact on the diagnosis and expression of mental disorders

# CHALLENGES AND METHODS TO DEFINE THE CONCEPT OF VULNERABILITY

## 1.1 Challenges and Proposals to Define Vulnerability in General Terms

It is assumed that the general perception of the person's vulnerability is reminiscent of a highly increased susceptibility to threats and risks of harm, which traces to various sources of human rights violations (Truscan 2013, pp.70). Attention toward the interpretation and application of vulnerability has been increasingly paid at the Strasbourg Court in recent years. The concept of vulnerability has been associated with the sense of inequality and injustice that haunts marginalized and disadvantaged individuals and groups imposed by society. The European Court on Human Rights acts as an institution, driven by the will to confront human rights violations by member states, and is obliged to enhance principles of equality and non-discrimination emphasized in the European Convention on Human Rights. Judges simultaneously attribute human rights violations enshrined in the European Convention on Human Rights. The main task for judges is to assess existing categories of entities deemed to be particularly vulnerable. (Nifosi-Sutton 2017, pp.4).

Primary examples of conditions for group vulnerability can be traced to historical and cultural contexts that result in various forms of social exclusion throughout its jurisprudence. It is assumed that judges can identify existing wounds causing conditions of weakness and resulting in further group marginalization by society that is sufficient to pass the vulnerability test. (Fineman 2014, pp.209). In addition, existing loopholes in the national legal framework also create a stereotypical attitude toward ostracized individuals, preventing individual assessment of needs and capacities. Judges should be increasingly aware of emerging rooms for vulnerability interpretation. This leaves space for a co-existence between individual and group vulnerability assessment (Besson 2014, pp.74 and 79). Despite different shared vulnerability subjects, judges are willing to prioritize vulnerability for individual assessment rather than favoring the collective interest of individuals and groups. Vulnerability is more evident and less ambiguous.

At the same time, this may be challenging for judges when they must determine whether vulnerability tests are based solely on categories of persons, omitting individual circumstances and characteristics (Boutier 2024, pp. 31). The problem emerges due to the absence of a well-defined legal framework for the term in jurisprudence; thus, judges must assess and identify vulnerability separately in each case. Nonetheless, that approach may be backed because of its flexible application demonstrated in individual cases. In other words, the Court possesses the discretion to consider all detailed circumstances and contexts of the case to give adequate reasoning. In addition, this allows the judges to attribute obligations and responsibility to party member states resulting from human rights violations under the European Convention on Human Rights. Factors shaping the core characteristics of vulnerability are not understood as not parallelly existing separately without the Court's assessment of the requirements of so-called 'special consideration' and 'special protection' (Heri 2021, pp.171). Judgments may expand the scope of positive obligations, which entails

the implementation of the European Convention on Human Rights, narrowing the margin of appreciation whilst member states exercise, limiting the enjoyment of fundamental freedoms and human rights. Thus, the foreseeable impact may stipulate the urgent need for the universal incorporation of vulnerability into national legal frameworks, underlying the importance of reconciling fundamental rights with safeguarding individuals across party member states. (Godden-Rasul 2023, pp.7-8)

Judges often view vulnerability as an aggravating factor in violations, particularly when evidence of non-discrimination meets high thresholds that indicate a failure of vulnerability tests for at-risk groups. This perspective can perpetuate stigmatization and escalate discrimination against minorities already categorized as vulnerable (Kim 2021, pp. 622). Furthermore, the shortcomings in vulnerability tests have undermined the effectiveness of legal standards. Therefore, we cannot rely on socially accepted norms to rectify the existing faults within the legal framework, as this approach overlooks potential methods to adhere to human rights protection principles. For instance, courts could proactively adopt measures to confront deeply ingrained social norms rather than being restricted by them (Bossyut 2016, pp.742). However, inconsistent vulnerability assessment in the European Court of Human Rights contributes to varying interpretations, even under similar circumstances. However, there is some mitigation through an emphasis on equality, allowing the court to reevaluate previous unequal situations more effectively. Notably, the possibility for codifying this concept appears greater, expanding the interpretative methods available and enhancing the representation of vulnerability at a broader level.

Regardless of a non-existent codified legal framework for vulnerability, the court is fully committed to assessing vulnerable persons and developing a universal notion of vulnerability. First, the court views vulnerability as a tool entangled with social changes, laying down the core foundations to combat prejudice, injustice, and oppression against disadvantaged and marginalized persons and groups (Catanzariti 2022, pp.1397). The court may set specific conditions for individuals and groups to pass vulnerability tests, demonstrating a case-based approach. (Catanzariti 2022, pp.1401). The idea of group vulnerability solely relies on stigmatizing factors, depending on different contexts, including unequal medical treatment, disasters caused by environmental catastrophes, migrants, preservation of nomadic livelihoods, the lack of legal recognition for same-sex couples, etc. At the same time, difficulties will arise when these conditions are attributed not only to individuals but to groups of persons as well. This raises only further questions about whether judges can set vulnerability tests distinguishing individuals and persons of groups (Kim 2021, pp.628-629). This attitude may only result in group exclusion, denying the entitlement to exercise human rights provisions under the European Convention on Human Rights.

Logical reasoning is one method to assess vulnerability tests while interpreting the concept. The court recognizes vulnerability as a facilitating aspect of human rights violations; a narrow margin of appreciation will apply. In other words, special protection for vulnerable individuals and groups may be compromised, leading to polarization in judgments based on

logical reasoning. This leaves judges with the dilemma of deciding whether vulnerability is the key factor constituting human rights violations or if these violations stem from the applicants' vulnerable status. (Cole 2016, pp.260) To address this question, judges must first acknowledge that protective measures for vulnerable individuals and groups, which are tied to constantly shifting societal norms, should be considered fundamental to expanding the legal scope of application. Judges should also prepare for a deeper analysis of how checks and balances impact the application of vulnerability tests, which are guided by legal procedures. The perception of vulnerability can be viewed through the ongoing process of individual emancipation, which anticipates the institutional procedures assessing potential human rights violations against vulnerable individuals and groups. To understand how the challenges in interpreting this concept are alleviated, the vulnerability test should be investigated based on a well-structured approach utilized by the European Court of Human Rights (Ferrarse 2016, pp.168). This includes establishing precedents where vulnerability assessments are central to court proceedings, particularly when member states have directly influenced relevant vulnerability factors. Judges can also connect legal reasoning to the interpretation of the notion, with different interpretations based on the unique circumstances and additional facts.

While the court profoundly understands vulnerability, there is consensus that it must continually evolve alongside the legal framework of diverse interpretations. The court employs emic and etic approaches, recognizing perceived vulnerabilities as subjectively experienced within specific psycho-social and cultural contexts. (Dunn, Clare, and Holland 2008, pp. 234–53; 245–46). Cases of ill-treatment and torture serve as prime examples of how these approaches reveal police maltreatment of detained individuals or inadequate conditions for asylum seekers to address risks related to intervention. Essentially, these methodologies enable the court to recognize individual vulnerabilities tied to intersectionality, thus raising the standards for assessing vulnerability. Overlooked social categories, such as race, sex, gender, and disability, illustrate the importance of an intersectional lens shaped by the convergence of social identities. Individual vulnerability becomes heightened when powerlessness and dependency are key factors that increase the likelihood of human rights violations (Peroni and Timmer 2013, pp.1062). Consequently, judges emphasize vulnerability to highlight interdependent human experiences within societal structures, illustrating that susceptibility to harm and adversity is unevenly distributed. An intersectional approach concerning vulnerable individuals can enhance understanding of the complex factors contributing to vulnerability in diverse populations.

### 1.2 Defining Vulnerability Within Article 14 ECHR Context

It is visible in situations where judges must interpret vulnerability precisely to tackle individual and group vulnerability in line with Article 14 of the European Convention on Human Rights. A wide range of circumstances, including existing negative social attitudes, dependency on the state, historical prejudice, and social exclusion, become impactful factors for the judges to determine whether the applicant is entitled to a vulnerable person’s status. Theoretical development of vulnerability helps to increase awareness of the plight of

vulnerable groups in the European Court of Human Rights, where attention is drawn to the increased grounds. It should be noted that judges self-reflect when they must assess how far the differences in status can influence living realities, but other livelihoods do not. (Kim 2021, pp.620). The European Court of Human Rights has shaped the concept of vulnerability through its rulings, leading to a key characterization: vulnerability arises from the interplay between an individual's weakness and the associated risks they face. Thus, applying the concept of vulnerability can highlight the intricate and entrenched instances of discrimination within social contexts. Judges interpret vulnerability through a social lens, indicating an openness to harm, exploitation, or negative consequences. However, the Court views vulnerability as a relative condition, requiring a comparison to another individual deemed less vulnerable. This reflects the Court's confused attitude toward distinguishing vulnerable individuals and vulnerable groups amidst vulnerability assessment. (Gałka 2021, pp.287-288)

The concept of vulnerability was initially addressed in *Chapman v. United Kingdom* (2001) where there was a consensus on the need to protect the minority rights of the Roma people; however, defining a minority was not on the court's agenda (*Chapman v. United Kingdom,* 2001, Para 98). Despite this, the court did not list vulnerability criteria, rendering the Article 14 violation moot. The court's misunderstandings of vulnerability were clarified in *D.H. v. Czech Republic* where the applicants were recognized as vulnerable due to the state's historical biases against the Roma community, which have roots in societal upheaval. Moreover, the margin of appreciation was significantly narrowed, as the imposed restrictions were justified and assessed with proportionality (*D.H. v. Czech Republic,* 2007, Para 182). However, the authorities' biased implementation of the right to education violated Article 14 of the European Convention on Human Rights. Historically, arguments against such issues have subjected groups to legislative stereotypes that hinder local authorities from assessing individual vulnerabilities based on specific needs and capacities. (Timmer 2011, pp. 712). Consequently, the court emphasizes a nuanced understanding of vulnerable groups, aligning this with a suspect grounds approach and a socially contextualized perspective. For example, in *Kiyutin v. Russia,* individuals with compromised health conditions, such as those living with HIV, were scrutinized, with judges determining that discrimination against HIV-positive individuals could not be ruled as the sole basis for discrimination. However, specific characteristics related to discrimination against vulnerable groups were identified, including sex, race or ethnicity, sexual orientation, and disability. This approach to vulnerable groups became increasingly relevant, particularly when judges addressed issues of stigmatization and social exclusion faced by those infected with AIDS/HIV (*Kiyutin v. Russia,* 2011, Para 64).

The aspect of vulnerability is demonstrated as a strong argument for judges in the case of *Opuz* v. *Turkey*, where the vulnerability of impoverished women becomes problematic due to a lack of access to justice, stemming from normalized structural discrimination and the justification of domestic violence against them. Judges must assess the vulnerability test in several ways: First, whether the applicant's socioeconomic situation does not automatically guarantee vulnerability status; second, identifying the issue that the applicant faces in enjoying the same rights as other ordinary citizens; and third, assessing the alleged maltreatment by the

administrative and judicial systems that directly results in the applicant's hardships. Despite the absence of a direct reference to vulnerability, the court still interpreted it as invoking positive obligations to initiate investigations and prosecutions ( Arnardóttir 2017, pp. 152). However, it is challenging for judges to interpret vulnerability when Article 14 does not specifically refer to different concepts regarding the absence of vulnerability references in EU legislation. Additionally, specific disadvantaged and marginalized groups are not explicitly protected separately. Nonetheless, the court lists individuals in judgments based on sex, color, religion, and other factors.

Instead of directly addressing previous cases of intersectional discrimination, the court should refer to these categories to determine human rights violations as valid in judgments, as seen in *B. S. v. Spain* which might reveal the court's categorization of vulnerable individuals based on ethnicity/race and sex (La Barbera and Cruells López 2019, pp. 1179, 1181, and 1185). Regardless of the challenges associated with categorizing vulnerable persons, this allows judges to analyze various aspects of inequality more substantively, helping to address even the most complex situations of marginalized individuals from different angles of vulnerability (*B. S. v. Spain,* 2012, Para 62). This results in a better substantive equality analysis, positioning them as empowered individuals equal to those without vulnerability factors. In addition, judges are not permitted to ignore their past experiences. Ultimately, while vulnerability may seem simplistic without an adequate substitute for the principle of equality, the employed language emphasizes the intersectionality between vulnerability and structural discrimination claims. Judges are granted the discretion to integrate various interpretations of vulnerability through their jurisprudence, even if the European Court of Human Rights does not possess the discretion to extend its competencies beyond the application of Article 14.

Nevertheless, the Court ‘s inclination to ground its reasoning in categories rather than collective groups stems from the idea that individuals, often bonded by ethnic or religious identities, are driven by a shared identity. While the concept of vulnerability has been incorporated into legal interpretation, the Court has not consistently shown how vulnerability influences its decisions. These inconsistencies often arise from political sensitivities or a lack of terminology to clarify vulnerability's role within the European Court of Human Rights (Palanco 2019, pp. 48). For example, while the Court does not see homosexuals as a vulnerable group, it treats them as distinct vulnerable entities. A notable case is *Nepomnyashchiy v. Russia,* where the Court indirectly acknowledged the homosexual minority, suggesting that they should be considered a vulnerable group. This recognition could mitigate legal uncertainty and indicate that these individuals are allegedly legally protected based on sexual orientation (*Nepomnyashchiy v. Russia*, 2023, Para 78). However, the Court still hesitates to designate them as groups, even though this ambiguity is neither new nor unusual in cases involving marginalized communities, which can intensify negative perceptions toward perpetrator groups (Boutier 2024, pp.45). Moreover, there is no clear separation between individual and collective vulnerability, even if the Court acknowledges the Roma as vulnerable due to ethnic discrimination. However, this raises a significant issue:

the lack of clarity from the Strasbourg judges in defining what constitutes a vulnerable individual or group (*Sampanis v. Greece*, 2008, para 70). As a result, comprehending how the Court assesses vulnerability is challenging. The legal rationale applied to one group is not consistently applied to others that might also be deemed vulnerable, leading to ambiguous criteria for identifying vulnerability. A noticeable trend in the jurisprudence indicates that evaluations often commence with an individual's connection to specific groups, such as the Roma.

The problem arose from the Court's inconsistent use of vulnerability criteria, which constrained the margin of appreciation in assessing vulnerability in Party States, even when the applicants' vulnerability was acknowledged. This is particularly relevant for the Roma community. In the Ukrainian case of *Burlya and Others v Ukraine,* the Court notably referred to the applicants as representatives of a vulnerable group, specifically the Roma. This indicates that the Court recognized these individuals as vulnerable and suffering from degrading treatment, despite the respondent state's margin of appreciation not being limited. This was evident even in the case of an ethnically Ukrainian boy, who was intentionally murdered by an alleged man of Romani descent (*Burlya and Others v Ukraine*, 2018, Para. 134). The Court also considered the dignity of the applicants when determining whether they experienced degrading treatment due to their Romani identity. The Court's language regarding vulnerable groups is commendable, as it emphasizes individual experiences rather than viewing individuals solely as part of a group.

Nonetheless, the Court lacks a universal approach to tackle forms of discrimination, undermining substantive equality, including the paternalism issue in case law. This mindset reflects an application based more on stereotypical biases against minorities rather than appropriately applying the vulnerability criterion concerning Article 14 of the ECHR. The Court focused on susceptibility concerning the promotion of sexual orientation instead of emphasizing the applicants' vulnerability, allowing the Russian government to maintain a narrowed margin of appreciation to justify its actions against non-governmental organizations advocating for LGBT rights in *Zhdanov and Others v Russia* (2019, Para. 115). Regrettably, the Court discarded the vulnerability criteria in this instance despite the applicants facing discrimination due to their sexual orientation. Similarly, in *Konstantin Markin v Russia,* judges concentrated solely on negative societal stereotypes, overlooking the vulnerability criterion, even though gender- based violence was condemned *Konstantin Markin v Russia*, 2012, para 83). The vulnerability of women went unaddressed. While historical stereotypes about women's primary role in child-rearing were criticized and deemed insufficient to justify Russia's differential treatment, the focus on both vulnerability and stereotypes is perplexing from a legal scholarly perspective (Arnardóttir 2017, pp. 160). Given the historical discrimination and negative social perceptions, it is odd that the Court opts for varying terminologies in handling similar cases.

Furthermore, universal principles of equality, human rights, and the rule of law could have diverged even if the theoretical application of these ideas appeared sound. As a result,

the Court is reluctant to express even minimal willingness to define 'vulnerability,' as it should encompass a broad range of vulnerability sources under Article 14. The conceptualization of vulnerability became even more intricate during the COVID-19 pandemic when the Court faced pressure to classify those experiencing negative side effects and social exclusion as vulnerable. This could establish a precedent in case law indicating that everyone includes at least one vulnerable member. Similarly, the situation of asylum seekers illustrates the continuous classification of applicants as vulnerable, failing to acknowledge that they suffer from social exclusion and share similar histories and nationalities, often undergoing distinct physical and psychological traumas, as highlighted in *M. S. S v. Belgium* (2011, Para 251). There are encouraging trends recognizing the adverse consequences of the vulnerability criterion. However, this does not imply that judges should have completely abandoned the concept of vulnerability; Contracting Parties should be continuously guided in applying a narrow margin of appreciation to identify individuals as vulnerable.

The European Court of Human Rights does not consistently apply this approach, contributing to ongoing marginalization, reduced trust in equality principles, and a neglect of individual experiences (Kim 2021, pp. 628-629). A key critique is the Court's ambiguous interpretation of the concept of vulnerability. While it agrees with legal scholars on the need for an objective application of this concept to protect against injustice, inequality, and discrimination faced by vulnerable individuals, judges often apply aspects of vulnerability selectively, straying from commonsense reasoning. The Court also struggles to define the required measures for the special protection of those truly in need, which leads to different interpretations of vulnerability in various contexts. Factors like dependence on the state, historical biases, and stigmatization should serve as primary indicators to identify disadvantaged groups as vulnerable; however, there is no clear definition for 'vulnerable groups.' The Court could instead adopt an autonomy approach, moving away from the vulnerability criterion. This would allow for a more precise assessment of the state's broad margin of appreciation in limiting an individual's autonomy. It could be argued that this does not necessitate reliance on group affiliation, which has been the basis for the respondent state's discrimination. Adopting this view could bring the Court closer to substantive equality, enabling applicants who have faced discrimination to be recognized as individuals rather than merely members of vulnerable groups.

### 1.3 Critiquing the Court's Understanding of Vulnerability Regarding the Socio-Economic Rights in Article 3 ECHR

Challenges also arise in cases where indivisible human rights provisions are interlinked with state obligations imposed by the court's mandate to protect civil and political rights. The concept of vulnerability has been applied to extend the scope of positive obligations in the context of socioeconomic spheres under Article 3 ECHR. (Morris 2021, pp.5). To overcome judicial challenges, the court has attempted to make vulnerability compatible with socioeconomic rights. For example, various circumstances, including the rights of asylum seekers, persons with impaired health conditions, and adequate living conditions for detained persons, have been subjected to the positive obligations, which are

determined simultaneously, whether socioeconomic assistance is required deriving from the emphasis on the prohibition of inhuman treatment, to assess vulnerability. (Kagiaros 2019, pp.257). The concept of vulnerability has been widely tested in asylum cases pending a decision on their asylum application and in inhumane conditions. The case is exceptionally applicable for asylum seekers because of detention conditions and alleged marginalization by state institutions, whose claims are often dismissed in judgments due to financial incentives, which are not sufficient to grant vulnerable person status to applicants. To overcome the challenging interpretative methods of vulnerability, one of the solutions could be to evaluate the applicant's experiences of destitution. This might prove the applicant's denial of the enjoyment of human dignity by the authorities. (Heri 2021, pp.225-227).

Judges have taken a similar stance in other cases, reacting to the backlash against reflexively categorizing asylum seekers as 'particularly vulnerable' after the *M. S. S v. Belgium* (2011) (Isa Daniel and Ghrainne 2024, pp.139-143). This tendency risks further marginalizing these groups within an established hierarchical framework. It likely hinders complex reasoning, which is necessary to uphold the principle of equality in human rights law. Judges are urged to adopt a deeper approach to substantive matters, often lacking the legal backing to deliver effective judgments. Moreover, the term 'vulnerability' has ignited debate, as it highlights the ambiguous boundary in international human rights law between civil and political rights, protected by the ECHR, and socio-economic rights, such as the right to social assistance, which fall under other documents like the European Social Charter. Nevertheless, the *M.S.S.* ruling was reaffirmed in subsequent cases, wherein the ECtHR determined that Article 3 ECHR was violated due to the lack of a reception conditions system for asylum seekers, reiterating their status as a 'vulnerable' group (Lebouef 2022, pp.5).

The terminology employed in *M. S. S v. Belgium* underscores the state obligations of member states to maintain conditions that honor human dignity for marginalized and vulnerable groups requiring special protection. This proposal argues for an expanded definition that encompasses a wider array of disadvantaged individuals, giving voice to those particularly impacted by their experiences during detention as asylum seekers. The court recognized that the vulnerability of asylum seekers, rooted in their necessity to flee, is a crucial criterion for their protection. Additionally, this vulnerability is intensified by the actions and inactions of state parties, resulting in violations of Article 3 of the ECHR (Gałka 2021, pp. 289-291). The analysis points out two critical factors that make these individuals particularly vulnerable: This leaves them in a precarious situation after entering the first safe country in a vulnerable state due to the authorities' incompetence. Article 3 should not merely serve as an interpretive guideline compelling member state to provide accommodations and financial assistance to ensure minimum living standards for all. However, the court has mandated that Greek authorities guarantee the applicant's living conditions fulfill basic needs under Article 3. This has led to the acknowledgment of vulnerability as closely tied to various categories of individuals needing special protection, including children, single mothers, and those with mental health challenges. Yet, a significant challenge for claims from disadvantaged and

marginalized individuals lies in whether vulnerability assessment is essential to satisfying the criteria set for contracting member states.

Judges took the approach of *M.S.S v. Belgium,* applying it in *Ananyev v. Russia.* The court had to determine whether the lack of personal space amounted to an Article 3 ECHR violation. Conditions such as whether a detainee has an individual sleeping place in the cell, and the cell surface must be sufficient to allow the detainees to move freely between the furniture items. The absence of this condition may indicate presumptions of degrading treatment in breach of Article 3 (*Ananyev v. Russia*, 2012, Para 148). However, this does not add considerable value to the vulnerability conceptualization because the court considers any individual with similar vulnerable conditions due to a lack of care for detainees' needs. It confirms that vulnerability may not necessarily materialize even if the concept is invoked in cases where references are made to it. It may seem controversial when they do not find a violation of Article 3, even though judges constantly refer to the concept of vulnerability. (Krivenko 2022, pp.204-205). A series of cases were brought against the Maltese authorities due to shortcomings in detention conditions. Regardless of similarly described conditions, all the applicants described, the court found a violation of Article 3 in three cases out of five. The court considered each of the two applicants to be 'particularly vulnerable', exposed to traumatic experiences endured previously. However, features of vulnerability cannot demonstrate a more valuable application if the court views applicants' vulnerable positions because they are adults at the time. The contrast can be made to other applicants' vulnerable position as asylum seekers because they belonged to the group of minors, which put them in an even more vulnerable position than any other adult asylum seeker. Hence, the general application of vulnerability becomes more obscure due to the omission that the judges should redeem. Additional factors for vulnerability tests will become less justified and more obstructive, leaving the clear articulation of vulnerability absent.

The significance of vulnerability is increasingly emphasized in the protection needs of asylum seekers. The Reception Directive (2013, Para 251) serves as a mechanism through which the court establishes special protection as a requirement for asylum seekers. However, the vulnerability of refugees and asylum seekers is not typically regarded as a major factor in judgments that support their claims. In many successful cases, the decisions were based either on additional vulnerability factors or independently of any reference to vulnerability (Krivenko 2022, pp.209). For instance, in the case of *N.H. v. France,* the court found that the applicant's living conditions violated Article 3 of the ECHR due to the state's failure to adhere to national legal obligations, rather than the applicant's vulnerability (*N.H. v. France*, 2020, Paras. 179, 187). Timing was also a distinct factor for the fourth applicant, who experienced unaccommodated living for twice as long as his peers. While the court recognized this condition as substantially adverse, it did not amount to a violation of Article 3 of the ECHR. However, the court failed to clarify why it listed the facts of the case instead of exploring the impact of various factors. This creates uncertainty, particularly when judges selectively consider individuals with similar conditions, leading to biased and seemingly unjust outcomes in subsequent judgements (*N.H. v. France*, 2020, Para 184). A desirable task for judges occurs

when detention conditions of asylum seekers are compared to those of the general population, including sanitary conditions and access to the outdoors.

Furthermore, the analysis is crucial for assessing the severity level with which the court views allegedly vulnerable persons based on group-based characteristics and individual circumstances. Even if applicants have minimal theoretical considerations regarding the court's attitude toward welfare provisions, it may seem absurd to low-income individuals to succeed in these claims. Certainly, the court is not always obligated to ensure even the basic protection under Article 3, even in situations where the mental state of an application becomes critical. It has been assumed that additional conditions of vulnerability may contribute to successful claims in judgments. (Leitjen 2018, pp.270) The court continuously assesses additional elements of vulnerability, including the minor's age and health status. A notable example is *A.S. v. Switzerland*, where the Swiss authorities did not violate Article 3, even though the applicant was severely suffering from PTSD, which required special treatment and emotional support from family members (*A.S. v. Switzerland*, 2015, Paras. 37-38). Nonetheless, the court was reluctant to cite the judgment in *Tarakhel v. Switzerland*, arguing that the applicant's condition was not critical enough to face serious risks of treatment contrary to his provisions on removal to Italy (*Tarakhel v. Switzerland*, 2014, Para 104). One peculiar aspect is that in *Tarakhel,* the court satisfied the applicant's claim solely by relying on the number of children in their age group as an additional vulnerability factor under the Dublin Regulation. The court's ruling reflects that asylum seekers are entitled to vulnerable persons' status, regardless of varying degrees of vulnerability. The court's ambiguous explanation of what degree constitutes "particularly vulnerable" leads to a more careful examination to avoid potential pitfalls in future cases.

This situation illustrates the importance of vulnerability, increasingly recognized in recent case law, possessing heuristic power that could shift judges' perceptions of vulnerability in asylum seekers, where the actual risk of treatment becomes a minimum threshold for passing the vulnerability test under Article 3 (Krivenko 2022, pp.210-212). At the same time, additional conditions for identifying vulnerable persons complicate meeting a minimum threshold of Article 3. Thus, justifications become uncertain and lack clarity, resulting in opacity around vulnerability and an arbitrary position that becomes normalized in case law. (Blöndal and Arnardóttir 2018, pp.169-170). This inconsistency is incompatible with the principles of equality, which the Grand Chamber of the European Court of Human Rights could easily uphold by clarifying the meaning and function of vulnerability. A historic opportunity arose in *V.M. v. Belgium* (2016), where judges criticized the court's stance in a dissenting opinion. The claim communicated regret for the missed potential to define vulnerability and incorporate it into the legal frameworks of the EU legislation. (Dissenting Joint Judgment, 2016, Para 5).

The Court's interpretation of vulnerability significantly depends on the subjective perceptions of decision-makers, each contributing varying degrees of expertise and sensitivity to the challenges applicants face. This ambiguity regarding vulnerability creates uncertainty for applicants, positioning refugees and asylum seekers as mere recipients of charity rather than assertive claimants of their rights. This observation echoes earlier criticisms of simplified interpretations of vulnerability, which do not offer practical legal or policy solutions for ensuring

necessary differential treatment in certain situations. A meaningful understanding of equality, encompassing its multiple dimensions, provides far more effective methods to achieve this objective, ensuring claimants do not become passive recipients of subjective goodwill, as elaborated in the next section. Ultimately, the Court's determination of whether an applicant faces treatment prohibited under Article 3 of the ECHR relies on a thorough assessment of all factors affecting the applicant's resilience, both positive and negative, and their relevance to the actual circumstances in the host country.

In contrast, examining past judgments reveals the complexities of applying vulnerability, which often seems unclear and arbitrary. Unlike the vulnerability analysis previously discussed, which focuses on an individual's status and characteristics relative to others in similar circumstances, a new framework of substantive equality may highlight the adequacy of State actions that bolster the available structures for individuals. This may encompass patterns of victimization or victim-blaming, where claimants become passive beneficiaries, issues notably absent in this context. Consequently, various interpretations of vulnerable individuals will increasingly become optional for the Court; for instance, younger claimants may be acknowledged as additional vulnerable categories, suggesting significant embodiment of resilient social and family networks in assessing potential violations of Article 3. This could lead to arguments against imposing greater constraints on State resources and raise questions about whether the Court might eventually consider more nuanced vulnerability factors for children. Such developments may initiate an exploration of the elements influencing the Court's vulnerability assessments and how applicants might better anticipate these evaluations to strengthen their cases.

## THE ASSESSMENT OF SELECTED VULNERABLE GROUPS IN RECENT ECtHR CASE LAW

### 2.1 Persons with Impaired Health Conditions

#### 2.1.1 High-Risk Vulnerable Persons Amidst the COVID-19 Crisis

It has been five years since the COVID-19 pandemic commenced and spread across the globe, yet the long-term effects (mental and physical) on the general population have still not been thoroughly analyzed. The European Court of Human Rights has increasingly dealt with these claims due to clauses under Article 15 ECHR. In other words, these provisions are not absolute and allow member states to depart from obligations to adhere to the principles of substantive equality in emergencies (Dzehtsiarou, 2020). Nonetheless, the limitations must be proportional and justifiable, even though at the dawn of the pandemic, they were considered to have a limited impact on other Convention Rights. However, national authorities have demonstrated an exercise of unlimited power, transferring it to executives deemed unlawful. This is evident in restrictive measures that became legitimately lawful given their limitations (Lebret 2020, pp.2-3). The current analysis aims to assess the extent to which those severely affected by COVID-19 are placed in the most vulnerable position. Despite the numerous COVID-19 cases examined by the European Court of Human Rights, only a few are related to issues of healthcare or medicines. Assessing vulnerable persons during the COVID-19 crisis has become constrained due to a wide margin of appreciation.

The attitude toward the application of Article 15 has significantly impacted the exercise of Articles 2 and 3 since millions of individuals have died directly from COVID-19 or complications related to the virus. It is important to note that Articles 2 and 3 of the ECHR are non-deferable rights, meaning that party member states cannot deviate from their obligations under Article 2 of the ECHR. This is evident from the guidance provided in the case of *Loupa Sousa Fernandes v. Portugal* (2018, para 114), where a systematically dysfunctional hospital service leads to the deprivation of access to life-saving emergency treatments, constituting a violation of Article 2 of the ECHR. COVID-19 cannot justify the state's departure from positive operational obligations, as other emergencies prompt the ECtHR to enforce rigorous judgments

The first case to discuss is the detainee's vulnerability to COVID-19 infection due to severe kidney conditions in *Fenech v. Malta*. Articles 2 and 3 were invoked and examined by the court, which assessed the significance of the risks to the applicant's life given the high global mortality rate associated with COVID-19 (*Fenech v. Malta*, 2022, Paras. 99 and 125). However, the applicant failed to provide physical evidence to support his claim of being among 'the most vulnerable' and that his life was at risk. Article 2 was not exclusively distinguished regarding its potential applicability to COVID-19 cases. Consequently, the applicant cannot assert that he is a victim of an alleged violation of the right to life. In other words, the examination by a consultant surgeon could hold substantial weight in the ruling, relying on credible studies that support the increased risks posed by COVID-19, which were not substantiated (*Fenech v. Malta*, 2022, Paras. 104-106). The second aspect is whether the detention conditions for all vulnerable individuals obligate the authorities to accommodate them in safer quarters. The court determined that the proportionality test of restricting prison movement to prevent the spread of COVID-19 does not constitute a violation of Article 3 of the ECHR (Heri 2024, pp.10-11). Conversely, the judgment in *Riela v. Italy* highlights the perspective on an elderly prisoner's severe health conditions, which render him vulnerable due to the risk of complications if he contracts COVID-19 (*Riela v. Italy*, 2023, Para 3). Referring directly to vulnerability, the authorities must assess the applicant's likelihood of vulnerability and provide adequate healthcare and infection prevention. Indeed, Article 2 of the ECHR was not implicated because the applicant was housed in a single cell and received a COVID-19 vaccine. It is believed that the applicant did not present sufficient evidence indicating a serious risk to his life (*Riela v. Italy*, 2023, Para 8). However, the authorities failed to uphold Article 3 of the ECHR due to inadequate provisions for ventilating conditions related to his sleep apnea, which necessitated timely and appropriate medical care (e.g., delays in calibrating the CPAP machine) during his detention before the COVID-19 pandemic (*Riela v. Italy*, 2023, Para 36).

It is also essential to note that the concept of vulnerability is analyzed outside the competencies of the Strasbourg Court. This includes the case law of the European Charter of Social Rights. Article 11 of the ECSR indicates the right to health protection during pandemics, by which member states must address discriminatory measures, ensuring equal access to effective and affordable healthcare, including for those at higher risk. The *ECRE v. Greece* case initially explained the issue of insufficient access to the healthcare system amid the COVID-19 crisis. The committee viewed unaccompanied migrant children in Greece as fitting perfectly into the category of higher vulnerability that is likely to be more negatively affected by the pandemic

(*ECRE v. Greece*, 2021, Para 11). Similarly, the Bulgarian case of *OSEPI v. Bulgaria* revealed the government's negligence in recognizing the increased morbidity risk for elderly persons, who tend to experience greater vulnerability. The complaint was based on the alleged discriminatory measures taken in the distribution of COVID-19 vaccines, which necessitated an effective strategy targeting older adults. Credible statistical information that should have been considered in the early days of the COVID-19 vaccination was overlooked, despite the Bulgarian government's attempts to mitigate this issue (*OSEPI v. Bulgaria*, 2022, Paras. 14-19). Conversely, the committee adopted a different approach in *Validity Foundation v. Finland,* arguing that the measures against the COVID-19 virus may not be adequate since all disabled people are vulnerable. One consideration is that categorizing certain groups as vulnerable directly impacts the state's duty to guarantee equitable healthcare access. Nonetheless, the question arises whether the committee's references to vulnerability automatically label all disabled persons as "vulnerable" (*Validity Foundation v. Finland*, 2023, Paras. 32-34). Additionally, whether these measures, resulting from the departure from positive obligations, can be viewed as discriminatory and lack protective tools for vulnerable groups. In this instance, the committee determined that there was no violation due to the margin of appreciation exercised by Finnish authorities imposing restrictions on the general population that were legitimately justified in protecting people's lives and health (Gennet 2024, pp.51)

### 2.1.2 HIV-Positive Persons in the Context of the COVID-19 Pandemic

The most disadvantaged groups were and are arguably persons with HIV/AIDS and other autoimmune diseases. Although the number of HIV infections has been increasingly diminishing globally, adequate access to prevention facilities remains relatively low, indicating an increased risk of contracting HIV. Living with HIV will become a double stigma if they are diagnosed COVID-19-positive. Individuals are dependent on other people's care, and individuals without self-autonomy are the most vulnerable groups in the post-COVID-19 Era. Hence, the court is bombarded with cases primarily concerning the detention conditions for persons. The main concern is the authorities' adequate response to the protection of the health of persons (Brotherton 2024, pp. 2)

The case of *S.M. v. Italy* primarily examines the alleged violation of Article 3 ECHR due to the detention of a vulnerable inmate. Since the pandemic posed excessive health risks for prisoners related to cognitive impairments due to the lack of free movement, the court had to assess the incompatibility of detention conditions with the applicant's special needs. The applicant's arguments were based on insufficient implementation of diminishing health risks, such as medical monitoring, social distancing policies, and overcrowding between inmates, largely ignored by the Italian government (*S.M. v. Italy*, 2024, Para 105). Thus, the emphasis was based on alternative measures such as house arrest, which, according to the claimant, diminishes the likelihood of severe complications in the event of COVID-19 Infection. Yet, the Court found that specific medical procedures were already provided, including antiretroviral therapy, and increased monitoring of high-risk, vulnerable prisoners aimed to prevent the claimant from more derogatory health conditions (*S.M. v. Italy*, 2024, Para 108). Even though the court acknowledged that there are feasible factors of heightened risks to prisoners with HIV-

positive in the insular prison environment, no evidence has been found of the suffered health deterioration attributable to prison conditions (*S.M. v. Italy*, 2024, Para 95). Hence, the court concluded that the state authorities didn't need to keep detainees automatically under house arrest even if it results in tangible harm or serious neglect of medical needs (*S.M. v. Italy*, 2024, Para 111). Inhuman or degrading treatment under Article 3 of the ECHR was not found in this case. The margin of appreciation was applied according to diminishing exposure to the coronavirus. The Italian government was not obliged by the Convention rights to put the application in non-custodial premises as specific health needs were already adequate (*S.M. v. Italy*, 2024, Para 115). This judgment fairly balances individual rights and public safety during emergencies where the state practices the margin of appreciation. Nonetheless, the European Court of Human Rights looks after the state's practices against the ECHR standard applicable to persons in vulnerable situations (Ivanenko, 2024)

The following case to look at is *E.F. v. Greece*, in which the alleged medical maltreatment of refugees with HIV-positive, along with inhumane conditions in Greek camps (Polykastro and Moria), resulting in deprivation of access to antiretroviral treatment amidst the COVID-19 crisis, was the major concern. These inhumane conditions (e.g., sleeping in the air, being placed on the overcrowded stage) led to the victim's development of a highly aggressive HIV-related blood cancer, which spread to her cervix. The claimant explicitly blamed the Greeks' actions and omissions, pushing her into a more deteriorated health condition. Particularly, although her transfer to a hospital in Athens was already ordered in March 2020, she was still stranded on the island of Lesvos until she got treatment on 23 June 2020. Unfortunately, this resulted in the claimant's illness progression from HIV to AIDS. The Greek authorities justified delays by attributing COVID-19 preventive measures, even though the transferal had been ordered before the closure of the competent offices (*E.F. v. Greece*, 2023, Paras. 32 and 33). However, the court rejected these justifications, concluding that Moria and Polykastro detention centers did not ensure adequate living conditions for the particularly vulnerable persons, which had to be acted with due diligence. Thus, this resulted in inhuman and degrading treatment against the claimant under Article 3 of the ECHR.

Nonetheless, she did not provide sufficient evidence to back her inhuman and degrading treatment due to the living conditions in camps on several grounds. In addition, a short stay (21 days) does not meet the threshold for the qualification of inhumane and degrading treatment under Article 35 of ECHR (*E.F. v. Greece*, 2023, Para 3 and 4). Nonetheless, the court also held a violation of Article 13 of the ECHR as the Greek government did not provide adequate compensation in similar situations. As previously discussed, this indicates compliance with obligations for party members to respect the Convention's rights regarding adaptation measures for vulnerable persons. A lack of adequate reception conditions will fail if the Contracting Parties do not fulfill obligations under Article 3 of ECHR (*E.F. v. Greece*, 2023, Para 34). Eventually, the access to effective remedies for inherently vulnerable persons defines the *sui generis* principle, enforcing Contracting Parties to provide special needs for vulnerable persons, including medical or psychological assistance to meet the standards under Article 13 of ECHR (*E.F. v. Greece*, 2023, Paras. 18-19).

### 2.1.3 Right to a Healthy Environment

The most recent phenomenon that set the precedent in ECtHR jurisprudence for the following cases is the positive obligations of the government to combat the effects of climate change, such as $CO_2$ Emissions, in given member states. Since climate change becomes less predictable, it is assumed that groups of individuals are likely to be exposed to a higher risk of vulnerability, impacting their health negatively. Various international conventions require states to take measures for a substantial and progressive reduction within the next three decades to prevent a burden on future generations. Hence, judges will examine Articles 2 and 8 of the ECHR derived from the allegedly pursued inadequate climate policies in member states (Heri 2022, pp.928-929). The assessment of climate change outcomes is on the agenda of the ECtHR. The issues of jurisdiction of climate change will bring litigations to the European Court of Human Rights.

Judges apply the admissibility test, setting a high threshold for the victim's vulnerable status. In other words, the applicant or group of applicants must prove the likelihood of high-intensity exposure to the adverse effects of climate change, which are significant to the applicants. In addition, it must be a legitimate aim for individual protection of vulnerability status, owing to the lack of reasonable measures to reduce harm. In essence, the court may not grant victim status to associations if complaints are made on behalf of others, making them inadmissible. The increased emphasis on climate change topics only proves the necessity of promoting intergenerational burden-sharing (Stoyanova 2020, pp.605-606). In climate change case law, the court first concerns itself with evaluating a real and imminent risk to an applicant in the case of a natural disaster. A grave risk of inevitability and irreversibility becomes recognized when adverse effects are visible. Causation becomes an irrelevant factor for assessing state obligations to the adaptation process. In other words, the individual has the right to protection against the state's adverse effects on their lifestyle, well-being, and quality of life caused by climate change, even if the threat is extraneous to the state. This invokes the state's obligation to take protective measures that must be implemented, thus, regulations in practice that will help mitigate the potential outcomes of future climate change (Morrow 2019, pp. 45).

The court guarantees the member states a wide margin of appreciation as they address potential measures they choose to implement to achieve their objectives against climate change. This principle was initially applied in *Urgenta v. Netherlands,* where the duty of the Dutch authorities to prevent GHG emissions into the atmosphere was highlighted. Nonetheless, the Dutch Supreme Court made assumptions that the emissions reductions could not diminish the climate change threat, even if conducted negligently, denying states the obligation to commit (*Urgenta v. Netherlands*, 2019, Para 5.6.4). This ruling has paved the path for groups of individuals of high-risk vulnerability to take climate change litigations to protect human rights. Conclusively, the state is responsible for its contribution, lack of due diligence, and the failure of adaptation measures to protect the rights of vulnerable groups under its jurisdiction. State obligations are committed when the norms of GHG emissions are fulfilled (Stoyanova 2020, pp.648).

Following the *Urgenta* ruling, the case of *VereinKlimaSeniorinnen v. Switzerland* involves the risk faced by an association of elderly individuals, one-third of whom are over 75, concerning climate change-related heat waves. The primary arguments at the federal level focused on the Swiss government's inaction in addressing this climate threat. The Federal Court concluded that the rights to private life and life did not interfere with the applicants' lifestyle choices but advised them to pursue political avenues. Contrarily, the European Court of Human Rights ruled that the conditions for claiming victim status were not satisfied. Although they were part of a group highly vulnerable to climate impacts, they did not adequately demonstrate the necessary intensity and urgency (*VereinKlimaSeniorinnen v. Switzerland*, 2024, Para 519). The court needed to determine whether Switzerland met its state obligation criteria (*VereinKlimaSeniorinnen v. Switzerland*, 2024, Para 657).

As a signatory to the United Nations Framework Convention on Climate Change, Switzerland has been committed to a 20% reduction in CO2 emissions since 1990, yet legislative gaps in climate regulation persist until 2030. Proposed amendments during the June 2021 referendum were rejected, although provisions were revised in 2022, despite unclear measures for the period up to 2050. The Swiss government has yet to implement a national $CO_2$ emissions cap, which concerns NGOs about its effectiveness. While these actions are within the member states' leeway, Switzerland has not upheld its duties under Article 8 of the ECHR (*VereinKlimaSeniorinnen v. Switzerland* 2024, Para 538). This perspective is bolstered by the absence of domestic actions to assess the remaining budget for emissions. Judge Eicke, however, was the sole dissenter in this judgment, critiquing the vague rationale for violating Article 8. He asserted that the stringent threshold for individuals claiming climate change effects should also apply to environmental associations acting in their interest. He posited that associations cannot initiate claims on their behalf, thus making such actions inadmissible (Dissenting Judgment, 2024, Para 16).

This raises questions about whether the court's stringent standards regarding state obligations under Article 8 sufficiently establish a legal basis for addressing climate change in the ECHR. It is evident that the Grand Chamber employs the living instrument doctrine, interpreting Convention obligations in the context of climate change, which allows the court to uphold its legitimacy while navigating the balance between subsidiarity, democratic processes, and its duty to ensure governments fulfill their human rights responsibilities (Seghers 2024). Aware of the criticism it may face, the court's decisions are meticulously argued in legal terms and firmly rooted in credible climate science. It shows a strong commitment to exercising its mandate without overstepping the boundaries set by the separation of powers; climate change requires it to clarify what is necessary to protect Convention rights. For instance, positive state obligations might be evaluated under both Articles 2 and 8 of the ECHR, particularly in cases where applicants cite recent scientific research indicating that national authorities fail to inform locals about potential negative health consequences resulting from emissions linked to oil and gas extraction, which they do not adequately consider when issuing exploration licenses. It is nearly impossible for states and the Court to evade their obligations given the undeniable reality of climate change, which threatens human rights. While checks and balances are crucial, the

reality of climate change leaves little room for doubt, simply highlighting the threat it poses to the enjoyment of Convention rights.

Similarly to *VereinKlimaSeniorinnen v. Switzerland*, *Duarte Agostinho and Others v. Portugal* also centers on outcomes related to climate change. This prompts a discussion about who is entitled to file a claim in court (Heri, 2024) Six applicants, aged 10 to 23, contend that their rights to livelihoods are being overlooked amid the climate crisis, which forces them into high-risk lifestyles, leading to increased heatwaves, wildfires, and smoke from these fires as reflected in current trends. Additionally, Portugal maintains territorial jurisdiction that allows adequate domestic remedies, which removes the state's obligations under Article 35 of the ECHR. In this context, an extraterritorial perspective has emerged as an additional criterion in defining the victim's status regarding climate issues. The court identified four key points regarding the negative impacts of climate change, noting that states are responsible for managing both public and private emissions within their jurisdiction; emissions can negatively affect the rights of people outside the boundaries of contracting states; and cause-and-effect dynamics of climate change are globally recognized as a fundamental threat to humanity (*Duarte Agostinho and Others v. Portugal*, 2024, Para 201). Nonetheless, the Court was hesitant to innovate the extraterritorial approach that the applicants relied upon, based on the view that the European Convention on Human Rights does not directly support environmental rights applicable to territoriality and subsidiarity (*Duarte Agostinho and Others v. Portugal,* 2024, Para 205).

Furthermore, there was insufficient evidence to substantiate claims that climate change abroad could have helped establish jurisdiction. Hence, the court dismissed a new test for jurisdiction based on the control of Convention rights, enjoyment rights, and the source of the harm (*Duarte Agostinho and Others v. Portugal,* 2024, Para 206). This assumption, however, may be debated due to the evolving role of the ECHR as it relates to global climate change treaties. Individuals might have the right to bring litigation to the ECtHR concerning climate change issues, even if they experience outside any contracting state's jurisdiction. As a result, this ruling should not be seen as radical or inevitable, despite its predictability (Rocha 2024). As with *VereinKlimaSeniorinnen v. Switzerland*, the court expressed significant concern about the territorial scope when determining if non-governmental organizations or associations can connect to the jurisdiction where they seek victim status. The "extraterritorial element" is reviewed when emissions are released internationally. This has shaped the collective understanding of binding ECHR obligations, compelling member states to manage and limit GHG emissions to ensure a livable climate for all. Future legal actions might ignite conversations about adding a protocol to the ECHR that acknowledges the right to a healthy environment as a human right (Milanovic 2024, para 208).

## 2.2 THE JUDICIAL ACCESS TO THE GENERAL POPULATION UNDER ARTICLE 6 (DETAINEES)

It is widely recognized that individuals in custody are inherently vulnerable due to their relationship with the State. Suspected individuals, particularly those with mental and psychological disabilities impacting their communicative and cognitive abilities, face significant challenges. This vulnerability complicates their ability to engage in pre-trial procedures,

especially with law enforcement agencies (Henshaw and Thomas 2012). Therefore, it is crucial to examine the European Court of Human Rights' role in adopting a nuanced assessment of vulnerability and the potential positive outcomes of such an approach. Detainees in police custody should have access to all legal services deemed vital for balancing interactions between suspects and the State during detention, as emphasized by international law (Cusack and Dehanghani 2024, pp.3).

Article 6 of the European Convention on Human Rights mandates that States uphold rights-based requirements, focusing on protecting procedural rights, including the right to legal counsel during pre-trial investigations, even if the Court does not find a violation of the applicant's right to a fair trial. Unfortunately, there are concerns over the Strasbourg Court's tolerance of strict pre-trial practices that may not compromise the overall integrity of the criminal justice system. A significant drawback of focusing on vulnerability is that prioritizing vulnerability assessments can be bewildering and procedurally concerning. This represents a shift from practices involving concise interviews, police mandates for regular breaks, and access to telephonic legal counsel, which narrowly define ‘innate vulnerability’ while broadly interpreting the remedial effects of national structural provisions (Goss 2023, pp. 4).

Judges' tendency to adopt this approach in pre-trial jurisprudence highlights a need for a broader, more fundamental understanding of ‘vulnerability’ consistent with Article 6 of the ECHR regarding procedural standards. However, this could lead to negative consequences, resulting in a narrower interpretation of vulnerability for detainees and prisoners, an overstated role for lawyers in advocating for their rights, and a loosely applied pre-trial framework for vulnerable suspects that warrants thorough examination. Therefore, it is acknowledged that accused individuals cannot fully comprehend or engage in the proceedings. Recent evaluations have revealed that true equality in justice is merely an illusion (Vogiatzis 2022, pp.6). Major reductions in legal aid negatively impact the most vulnerable populations, hindering their access to justice. This paper focuses on the relationship between legal assistance/legal aid and the interpretation of vulnerability for detained individuals in custody, as seen in the case law of the Strasbourg Court.

### 2.2.1 The Landmark Judgment of *Salduz v. Turkey*: Overstepped Impact on State Sovereignty

The case of *Salduz v. Turkey* centers on an unprecedented shift from the Court's traditionally protective stance when determining whether the accused, who was a 17—year—old, could have his incriminating statements made to antiterrorism police during interrogation, without legal counsel, admitted as evidence. This judgment emphasizes that access to a lawyer should be guaranteed from the initial interrogation stage, except where compelling circumstances warrant a limitation of this right. Any such restrictions must not unduly harm the accused's rights under Article 6 (*Salduz v. Turkey*, 2009, Para 55).

It can be argued that the Grand Chamber overlooked the lack of legal support provided to the applicant during subsequent proceedings, including his right to call witnesses to address the harm caused by pre-trial statements made without access to legal counsel (Para 58).

Moreover, the Court pointed out the systematic prohibition against custodial access to legal assistance under Turkish law, which failed to account for the applicant's age-related vulnerability. They stressed ensuring access to a lawyer for minors in custody, aligning with international legal standards (*Salduz v. Turkey*, 2009, Para 60). This ruling effectively created a strict, rights-based rule that disallows confessions obtained during custodial interrogation without a lawyer, thus, any incriminating statements made under these conditions may not be utilized for convictions. Consequently, this could lead to irreparable harm to the detainee (Giannoulopoulos 2020, pp.168).

The implications of the *Salduz v. Turkey* ruling can be seen in national courts, as they adjust their pretrial processes to affirm a suspect's immediate right to legal counsel at the time of first interrogation. Before this ruling, the Grand Chamber interpreted Article 6 as requiring Member States to provide legal assistance to accused persons from the outset of police questioning, as ensuring the national procedures to consider a suspect's vulnerability, accepting the claimant's effective participation in criminal proceedings (*Panovits v. Cyprus*, 2008, Para 66). Moreover, the Grand Chamber stressed the positive obligation of state authorities to mitigate feelings of intimidation, ensuring that minors understand the investigation's nature, the stakes involved, the potential penalties, and their right to defense, particularly the right to remain silent (*Panovits v. Cyprus*, 2008, Para 67). Although the Cypriot authorities violated both Articles 6(1) and 6(3) of the ECHR when a 17-year-old confessed to murder without the presence of his parents or legal representation, the significant issues for judges were exacerbated by restrictions limiting the applicant's ability to consult a lawyer or guardian during police questioning. This rendered it unlikely that the applicant could fully grasp the implications of being questioned without legal assistance regarding the murder investigation (*Panovits v. Cyprus*, 2008, Para 71).

Thus, the Court in *Salduz*, building on the *Panovit*s precedent, refined its interpretation of Article 6 ECHR, clarifying that it imposes a duty on states to ensure that vulnerable suspects understand their right to counsel pretrial and possess a comprehensive understanding of the serious nature of the criminal proceedings against them. However, this soon evolved as the ECtHR adapted the *Salduz* framework. For example, the Court interprets Article 6 as requiring suspects to have access to a lawyer upon being taken into custody, rather than solely during questioning (*Dayanan v. Turkey*, 2009, Para 32). Importantly, this ruling widened the interpretation of the protections under Article 6 to include a broad concept of legal support that extends throughout the entire interrogation phase. Given this robust and evolving legal backing from Strasbourg for mandatory pretrial access to legal counsel, it was unexpected that within a mere eight years, a significant shift in attitude would arise within the Grand Chamber, potentially undermining the S*alduz*-driven advancement of suspects' rights in Europe (Giannoulopoulos 2016, pp.106).

As a result, the ECtHR unequivocally established that criminal proceedings in which a conviction is partly based on a self-incriminating statement made during police interrogation without access to a defense attorney are inherently flawed regarding Article 6 standards; thus, evidence obtained in the absence of legal counsel cannot form a valid basis for conviction as a remedy for the identified violation. The Court's implementation of the *Salduz* tests has evolved,

along with how these changes are reflected in the latest case law. The overall analysis of proceedings regarding pre-trial rights under Article 6 is fundamentally shaped by the essential two-stage framework established in *Salduz v. Turkey*, which has been further adapted in *Ibrahim v. United Kingdom* and *Beuze v. Belgium*. This framework has been applied in subsequent case law within specific contexts. Unlike other provisions of the ECHR, Article 6 does not have a qualification clause, leaving a lack of clarity on how and when governments can argue that an apparent infringement of Article 6 is justified. Additionally, the text fails to provide clear guidance for evaluating alleged violations of Article 6. Unfortunately, the right to be characterized as 'unqualified' does not reflect the Court's actual application in decades of Article 6 case law.

### 2.2.2 Vulnerability Assessment in *Post-Salduz* Jurisprudence: Analyzing 'Compelling Reasons' and 'Overall Fairness' Stages

This section outlines two analytical stages for evaluating detainee vulnerability after *Salduz v. Turkey*. The stages encompass the tests for compelling reasons and undue prejudice related to the accused's rights. Judges Serghides and Pinto de Albuquerque, in *Farrugia v. Malta* (2019), noted that the overall fairness of a trial is necessary only if compelling reasons justify limiting the right to legal counsel, as such limitations could jeopardize a fair hearing for the accused (Joint Dissenting Judgments, paras 2-3). Consequently, if compelling reasons do not exist for these restrictions, the two stages are not interlinked. The second approach, mandating the trial fairness to be assessed without regard for compelling reasons, arises from cases like *Ibrahim and Others v. United Kingdom* and *Beuze v. Belgium*. This approach necessitates a mandatory two-stage test in every case. It requires careful analysis due to its perceived regressive nature, raising questions about the linear development post-*Salduz*, especially considering recent case law. The debate on whether to support continuous development or to challenge the existence of conflicting approaches is discussed in Goss (2023, pp.13).

The landmark decision in *Ibrahim v. United Kingdom* serves as the first case for review. Here, the Court contested the application of self-incriminating evidence during Crown Court trials, which had been obtained without legal assistance. The Court underscored the importance of legal representation in alleviating the structural vulnerability of suspects in custody, aligning with the post-*Salduz* jurisprudence. They pointed out that timely access to a lawyer is vital for protecting against coercion and ill-treatment by police, thereby supporting the fairness objectives of Article 6, especially ensuring equality of arms between prosecution and defense (*Ibrahim v. United Kingdom*, 2016, Para 255). Nonetheless, despite recognizing that certain inculpatory statements from the first three applicants' trials were made without legal advice, the Court did not find a violation of Article 6. This ruling represented a significant reinterpretation of the *Salduz v. Turkey* decision, seeming to disregard its original intent (Giannoulopoulos 2020, pp.181). The Court relied solely on the second test to evaluate the prejudice against the defense's rights resulting from the restrictions. Thus, the Court needed to assess the impact of the sanctions on the overall fairness of the proceedings, determining whether the entire process was fair. Therefore, the binary test is designed to either justify or dismiss limitations on the right to legal counsel based on compelling reasons, while also considering whether, after a comprehensive

review, the national proceedings can be viewed as fair overall (Para 257). The Court's conclusion not to hold a violation of Article 6 without compelling reasons points to an unwillingness to acknowledge human rights violations, even when the government fails to provide exceptional circumstances to justify such restrictions (*Mehmet Ali Eser v. Turkey,* 2019, para 50). In this way, the Court concluded that no circumstances justified the restraint while simultaneously determining that the proceedings were so exclusive that any unjustified restriction did not detract from their overall fairness. These conclusions might not inherently contradict each other, but they do not align comfortably.

The Court seems to struggle with fully grasping the compelling nature of the government's justification arguments of disqualified rights when considering valid reasons for imposing restrictions on detainees (suspects) under Article 6 of the ECHR. This discrepancy results in a lack of alignment between the Court's rhetoric and actual practices. The case of *Farrugia v. Malta* exemplifies the requirement for compelling reasons, as it acknowledged the urgent need to prevent serious consequences for the first three applicants, posing significant risks to public life and physical safety. In *Ibrahim v. United Kingdom* (2016, paras. 276-279), the government presented competing arguments against their right to access legal services. However, judges noted that the governments in Party States often fail to provide compelling reasons in their arguments, leading the Court to refrain from considering these reasons. The absence of compelling reasons may convincingly demonstrate why, exceptionally and under specific circumstances, the overall fairness of the trial was not irreparably harmed by restricting access to legal advice (*Ekrem Can v. Turkey*, 2022, paras 61-65).

The government's responsibility proves the overall fairness of the proceedings to be not irreparably prejudiced. As a result, it is concerning why the Court appears to impose a burden on the applicant to demonstrate that he was denied legal advice. Lacking compelling reasons can lead to a general presumption of upholding general law enforcement practices rather than assessing the individual circumstances of the suspect (*Farrugia v. Malta*, 2019, Para 110). Therefore, such statutory restrictions, which do not allow for individualized assessments, fail to meet the procedural requirements tied to the notion of compelling reasons, a concept significantly weakened by post-Ibrahim case law asserting that the absence of compelling reasons will not be conclusive (See Goss 2014, pp.176-201). Ultimately, the government's failure to provide compelling reasons is a critical factor that impacts the overall fairness assessment of the trial and may sway the judgment towards finding a breach of Article 6(1) and Article 6(3).

This rhetorical question likely stems from concerns when a court references the two-stage test, particularly in *Beuze v Belgium*, where no analysis of 'compelling reasons' was provided. Instead, the focus shifted immediately to the stage 2 analysis of the overall fairness of the proceedings. They recognized that the *Ibrahim-Beuze* approach does not apply uniformly, even if it initially appears relevant. Conversely, under the legal framework governing pre-trial proceedings, it is unlikely that the overall proceedings would be deemed unfair, especially when considering the vulnerabilities linked to mental disabilities or minor age. The public interest in investigating and prosecuting specific offenses, alongside features such as unlawfully obtained

evidence that contravenes Article 6 of the ECHR, casts doubt on its reliability or accuracy. The applicant allegedly contested the evidence's authenticity and opposed its usage.

Factors like the nature of the statement and whether it was promptly retracted or modified were also considered (*Ibrahim and Others v. United Kingdom*, 2016, para 274). This approach was similarly adopted in *Doyle v. Ireland*, where criticism arose regarding its binary assessment (See Heffernan 2021). In essence, the ECtHR concluded that no compelling reasons justified the 'general nature' of the restrictions in Ireland, as it lacked an 'individual assessment of the applicant's circumstances.' However, the Strasbourg Court eventually upheld the Irish practice that the overall fairness of the applicant's trial had not been 'irretrievably prejudiced' by this restriction (*Doyle v. Ireland*, 2019, Para 102). The second limb of the binary test considered factors such as the applicant's innate vulnerability, allegations of ill treatment, other inculpatory evidence, the public interest in prosecuting the crime, and procedural safeguards like electronic recording of interviews. These principles of fairness could present significant opportunities for challenges regarding any future admissions made during police interrogations, especially involving vulnerable suspects (Heffernan 2020, pp. 687).

Even after applying a non-exhaustive list approach from Ibrahim, the judges in *Akdag v. Turkey* were reluctant to explore the public interest's role, finding a violation of Article 6 of ECHR (*Akdag v. Turkey*, 2019, Para 65). This finding could potentially balance the public interest in the investigation process against the punishment for those accused of planning a terrorist attack in affiliation with terrorist organizations (*Beuze v. Belgium*, 2018, para 150). However, there is a conspicuous absence of credible analysis on how public interest may adversely affect the investigative process and sentencing for individuals suspected of terrorist affiliations. This lack of analysis contrasts with the overall fairness assessment that held the Party State accountable for violating Article 6 of ECHR (*Mehmet Zeki Celebi v Turkey*, 2020, Paras 57-73). Likewise, the criteria for unfairness are not easily met due to a restrictive classification of 'vulnerability' and a broad interpretation of the remedial effects of legal assistance during detention, as seen in *Hasáliková v Slovakia*. Such a stringent judicial approach raises pressing concerns regarding the ability to meaningfully protect the rights of suspects with intellectual disabilities under Article 6 of the Convention, particularly when compelling public interest seemingly justifies invasive national forensic techniques. These examples highlight the issue of judges in post-*Beuze* cases frequently neglecting public interest in their judgments, leading to uncertainty for governments and applicants in determining which accused individuals are vulnerable during pre-trial investigations (Samartzis 2021, pp. 8-9).

### 2.2.2 *Hasalikova v. Slovakia*: Narrowed Classification of 'Vulnerability' For Suspected Persons

The major problem is whether the court ineffectively supported the vulnerable accused in *Hasalikova v. Slovakia.* Many may find the narrow definition of 'vulnerable accused' in court proceedings unsatisfactory. Furthermore, the claimant argues that reasonable adjustments were not made, questioning whether criminal proceedings provided adequate support for vulnerable individuals without adjustments. Hence, it raises the question of whether the severity of the accused's intellectual or psychological disabilities could lead to wrongful decisions, highlighting

the applicant's vulnerability, which the Court may not prioritize, especially when it worsens the claimant's already vulnerable position.

First, a brief review of the case facts to identify the primary flaws in classifying vulnerability features. Applicants were accused of murder and sentenced to 15 years in prison in Levoča for 'particularly serious' murder. The claimant contested the Slovakian court proceedings, deeming them unfair and violating her rights under Articles 5, 6, and 17 of the ECHR. Notably, during the trial, several factors indicated the applicant's vulnerability, such as her attendance at a 'special school', eligibility for disability benefits, psychiatric treatment, and evident physical and intellectual disabilities. Expert psychiatric and psychological opinions concluded that she had a 'mild' intellectual disability, demonstrated simplistic thinking, and was 'very naïve, emotionally immature, and easily influenced' (*Hasalikova v. Slovakia* 2021, Para 21). However, the claimant criticized the court for failing to consider her vulnerability, which affected her understanding of the legal processes she faced, rather than focusing solely on assessing the victim's deprivation of life.

The European Court of Human Rights adopted a different approach compared to Slovakian courts, emphasizing the vulnerability of the accused and the need for reasonable adjustments to help her comprehend and meaningfully engage in the Slovakian pretrial framework, considering her intellectual disability (*Hasalikova v. Slovakia*, 2021, Para 46). The applicant later argued that various procedural steps during her detention, including the written information provided, were beyond her comprehension, undermining the reliability of the authorities' inculpatory admissions. Moreover, the authorities did not allow her the opportunity to appoint a state-funded lawyer to represent her in court, and she was excluded from interviews with her co-accused and denied the chance to cross-examine (*Hasalikova v. Slovakia*, 2021, Para 70). Nevertheless, the Strasbourg Court, referencing the expert assessment, determined that there was no violation of Article 6 of the ECHR, stating that the notifications concerning her charges were adequately provided upon her arrival at the police station; she received information about her right to legal assistance, her right to remain silent, and the right to select a legal representative within 30 minutes of being informed of the charges (*Hasalikova v. Slovakia*, 2021, Para 65). Moreover, as the applicant had signed a statement confirming her understanding of this information and had a copy of her interview record alongside her court-appointed lawyer, combined with her failure to object to the limitations on her choice of legal counsel, the Court regarded her as a competent, literate adult capable of understanding the charges during her initial questioning by an assisted lawyer. The Court found no evidence of difficulties in understanding or expressing herself, which had been present a year before the trial (*Hasalikova v. Slovakia,* 2021, Para 68).

Ultimately, no evidence of physical or psychological coercion applied to the claimant as a punitive measure can explicitly answer questions. The Court completely neglected to mention the sole other authority in the *Salduz* legal lineage that focused on a seemingly vulnerable suspect in police custody whilst specifying reasons for this omission can only be speculated upon, there are valid grounds to interpret the majority's stance in Hasáliková as part of Strasbourg's ongoing shift away from the stringent standards established in *Salduz v. Turkey.* This shift implies that

violations of the right to legal assistance may no longer be seen as direct infringements on the right to a fair trial (Cusack and Dehaghani 2025, pp. 15). In contrast, the majority favored the less absolute assessment framework set out in *Ibrahim and Others v. UK* (2016), examining the applicant's right to a fair trial solely through the lens of 'the overall fairness of criminal proceedings, ' which established the second part of the test (*Ibrahim and Others v. UK* 2016, Para 274). In a notable joint dissent, Court President Judge Turković and Judge Schembri Orland concluded that violations of Articles 6(1) and (3) had indeed occurred, due to the national authorities' failure to provide appropriate safeguards for Hasáliková's vulnerability during both the police investigation and the trial, particularly through the exclusion of evidence (Joint Dissenting Opinion, 2021, Para 67).

Judges Turković and Schembri Orland articulated three primary considerations in their dissenting opinion that led them to a shared conclusion. The first was *Hasáliková' s* intellectual disability, which they believed created an inherent vulnerability for the applicant. Notably, their conclusion deviates from the more routine vulnerability analysis seen in the majority's post-*Ibrahim* approach, influenced significantly by established clinical literature. They referenced the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, noting that individuals with mild intellectual disabilities typically need assistance with complex daily tasks and health or legal decisions. Experts described her as having 'infantile features and simplistic thinking, very naïve, emotionally immature and easily influenced' (Joint Dissenting Opinion, para 10). Unlike the majority's ontologically insensitive stance, Judges Turković and Schembri Orland did not dismiss Hasáliková' s mild intellectual disability or the absence of a mental illness or disorder in her case. While mental illness or disorder can co-occur with intellectual disabilities, they remain distinct conditions (Dissenting Joint Opinion, Para 9). Considering the apparent heightened challenges faced by suspects with intellectual disabilities, the judges criticized the national expert for failing to evaluate Hasáliková' *s* vulnerability, fitness for interview or trial, and necessary accommodations. They also faulted the majority for relying on the domestic expert report and neglecting to consider additional evaluations, such as whether Hasáliková could engage with her legal proceedings or required procedural accommodations due to her disability. Given these shortcomings, the dissenting judges concluded that the majority lacked a solid foundation for their judgments regarding her vulnerability (Dissenting Joint Opinion, Para 12). Ultimately, they underscored the necessity for enhanced protections for suspects with intellectual disabilities, including safeguards to facilitate effective participation (like providing an appropriate adult or trained individual), ensure the credibility and voluntariness of confessions (including video recording of interviews), restrict inducements (such as imposing limits on plea bargaining), and mandate corroboration (Dissenting Joint Opinion, 2021, Para 18).

The case analysis should initially examine why the majority at the Strasbourg Court narrowly defined vulnerability, linking it exclusively to conditions of mental illness or disorder. One possible reason is that psychological vulnerabilities may be intensified by various environmental factors inherent in the witness's narrative. It can be argued that witnesses' testimonies are likely biased by the interviewer's status and the formal context in which the exchanges occur (McLeod et al, 2010). This highlights the risk of obtaining false confessions

due to a lack of consideration for the intellectual impairment approach during pre-trial or trial processes (Cusack 2014, pp. 448). Consequently, a detainee may experience significant deficits in memory encoding, storage, and retrieval, hindering their ability to provide accurate eyewitness accounts at trial. Unsurprisingly, they may feel intimidated by authority figures and struggle with communication when interpreting questions and statements. Their regulatory functions, such as attention, inhibition, planning, and problem-solving skills, may also be compromised (Cusack and Dehaghani 2025, pp. 13). It is argued that any failure to adapt forensic procedures at the pre-trial stage to consider the realities of intellectual impairment not only poses a material risk of yielding inaccurate testimony but also presents a more urgent threat of wrongful conviction through the acceptance of false, self-incriminating evidence (Cusack 2022, pp. 424). This indicates a misunderstanding of vulnerability and its manifestations, which were overlooked in the analysis.

The Grand Chamber chose to apply the vulnerability approach narrowly, disregarding the risks for the suspect that could lead to vulnerability, subsequently affecting the reliability of confessions and the fairness of proceedings. Simultaneously, the Grand Chamber interpreted the remedial impact of national structural accommodations whilst raising further concerns. The dissenting judges characterized the applicant as ‘innately vulnerable', pointing out the deficiencies in expert reports and the errors made against Hasáliková, illustrating the majority's failure to engage critically with established literature on psychological vulnerability and its effects on reliability and fairness (See Mergaerts and Dehaghani 2020). However, criticisms regarding the lack of a clear and definitive definition of ‘vulnerability’ persist, even as the dissenting judges at least tried to clarify it. Unfortunately, this judgment did not contribute to the vulnerability concept. Future case law should adopt a more careful and thorough analysis to provide national and European courts with a more comprehensive understanding of a suspect's vulnerability, thereby guiding key decision-makers across Europe.

The second aspect to evaluate is the detainee’s intellectual disability during the interrogation process, which creates a procedural framework hindering the right to a fair trial. This is in line with the judges’ approaches in *Ibrahim*, where authorities maintained a private interrogation process to balance public interest in crime investigation with the need to prevent procedural impropriety (Vaughan and Kilcommins 2008, p.101) A key concern in *Hasálikov*á was the Court’s focus on essentialist ideas regarding the supposed protective effect of access to legal advice (Para 72). Post-*Salduz* jurisprudence assumes that all accused individuals are, to some degree, structurally vulnerable. However, it highlights the risk of overlooking the specific challenges faced by individuals with intellectual disabilities, who may require more than the general support typically provided by a lawyer, following the *Ibrahim* judgment. It can be concluded that there are insufficient grounds to define vulnerability when a lawyer can address structural legal needs. In this context, a lawyer serves as a general safeguard for all accused individuals rather than a specialist resource tailored to the unique requirements of vulnerable individuals (Dehaghani, 2021).

Unlike the dissenting judgment, this could promote broad applicability based on theoretical access to a lawyer, but it masks the inherent and structural vulnerability of the applicant. This

situation raises questions about how far Member States must adapt their criminal procedures to effectively meet the needs of suspects with intellectual disabilities in alignment with the positive demands of Article 6. Essentially, it questions the level of due process protection that can genuinely be provided to such suspects through a 'vulnerability' assessment that is merely one aspect of the overall 'fairness of proceedings'. In simpler terms, despite the enhanced role of the lawyer, it is crucial to recognize that alongside specific safeguards tailored to innate vulnerabilities, well-trained and informed lawyers are vital for upholding the fair trial rights of inherently vulnerable suspects. This approach could significantly address the suspect's inherent vulnerability. Conversely, for proponents of this reasoning, any future expansion by the Court of the understanding of vulnerability within the *Ibrahim* test may not be enough to ensure the fairness of proceedings, especially given the various counterbalancing requirements (particularly the demands of national legal frameworks and public interest considerations) that the Court must also contemplate. The Court might gain a clearer view of the conduct of judicial authorities by exploring how the principle of fairness applies, considering the holistic context of vulnerable suspects throughout the stages of procedural formalities that shape their custodial experiences.

## 2.3 DOMESTIC VIOLENCE VICTIMS

Since the pivotal ruling in *Opuz v. Turkey*, the Court has scrutinized the negligent behavior and failures of domestic law enforcement in handling domestic violence cases. This often leads to a disregard for victims' rights to protection, creating a discriminatory environment that leaves them exposed to harm (Sękowska-Kozłowska 2024, pp.1726) In recent times, the evaluation of risks faced by domestic violence victims has gained traction, recognizing it as an international human rights violation rather than merely a private family concern. The abuse inflicted on victims by aggressors may manifest through coercive actions, including physical, sexual, and psychological abuse, without the victim's consent. The intention behind the perpetrator's acts is to inflict both physical and mental harm, often resulting in victim-blaming towards women.

Certain types of domestic violence, like psychological and economic abuse or controlling behavior, may not produce visible physical injuries. The Court has been instrumental in framing violence against women as an issue of international human rights by interpreting and applying the rights established in the Convention (Grans 2023, pp. 2). For instance, the Strasbourg Court must conduct a more thorough and stringent assessment of the applicability of Article 3 of the ECHR, as it is an unequivocal and non-derogable right. In contrast, Articles 2, 8, and 14 are evaluated less rigorously, yet they can still underline state obligations to prevent, protect against, and address domestic violence. A significant challenge for judges is to identify which facets of domestic violence contribute to victim vulnerability and how much the national courts should consider these aspects in criminal cases before the matter escalates to the European Court of Human Rights (Overmeyer 2021, pp.2).

### 2.3.1 The Ruling in *Kurt v. Austria* – The Failure to Discern Intersectional Discrimination in the Context of Gender-Based Domestic Violence

The Austrian case provides deeper insight into the reasoning of vulnerability. This case involved the murder of an 8-year-old child by the father, who had a history of domestic violence against his wife and two children. The applicant argued that Austrian authorities should have recognized the imminent risk to her children, stemming from their father's actions outside the barring order's restrictions (*Kurt v. Austria*, 2021, Paras. 35-39). She claimed he should have been placed in pre-trial detention. The court chose to follow the approach taken in *Osman v. United Kingdom* (1998, para 116) to widen the admissibility test of various forms of domestic violence. The court consistently underscored that states must evaluate the reality and immediacy of any life-threatening risks in contexts of domestic violence. Such obligations mandate a thorough and proportional assessment of the risk level. This approach has clarified the positive obligations national authorities must fulfill to respond promptly and diligently to domestic violence allegations (*Kurt v. Austria*, 2021, Para 174) Authorities must also assess the lethal risks faced by domestic violence victims with an autonomous and proactive strategy, involving research-based tools and predetermined questions tailored for inquiries (*Kurt v. Austria*, 2021, Paras. 167 and 171).

Nonetheless, the Grand Chamber of the Court upheld the earlier Chamber's assessment, dismissing the applicant's claim of a violation of Article 2 of the ECHR due to the authorities' failure to protect her child from a violent father with a barring order in place since 2010. The judges pointed out that Austrian authorities were aware of the husband's intention to kill the child and had implemented adequate measures to address the risk of renewed violence against the applicant and her children, despite the acknowledged vulnerability of children who are victims of domestic violence, particularly in the context of gender-based violence (*Kurt v. Austria,* 2021, Para 199). Another crucial reason the Grand Chamber found no violation of ECHR rights was the victim's failure to report alleged rape and strangulation by her husband. The Chamber noted her lack of awareness regarding the risks of living in the marital home for three days before she reported to authorities (*Kurt v. Austria*, 2021, para 204).

Meanwhile, dissenting judges did not support this approach, arguing that the children's lives were clearly at risk, which the Court overlooked. The judges felt the assessment of lethal risk was negligent, as the barring order's issuance alone was inadequate. They believed the Court focused solely on the general risk of violence posed by the perpetrator, neglecting the immediate threats to family members. Austrian authorities disregarded factors such as the father's gambling addiction, severe mental health issues (including homicidal thoughts and suicidal ideation), and the applicant's economic dependence as significant risks to the children. Moreover, both the Chamber and the authorities engaged in victim-blaming. Despite the husband's calm and cooperative demeanor, most considered his threats credible enough to warrant pre-trial detention (Joint Dissenting Opinion, 2021, para 7). Ultimately, despite recognizing gender-based violence, the Court was reluctant to address a violation of Article 14 of the ECHR due to the claimant's breach of the six-month limit rule. This represented a missed opportunity for the Court to address domestic violence's underlying issues associated with historically unequal gender roles. The

majority failed to confront gender-based stereotypes and instead reinforced a skewed understanding of domestic violence, missing an opportunity to advocate for more robust preventive measures against perpetrators, rather than merely issuing barring and protection orders (Joint Dissenting Opinion, Para 9). The element of victim-blaming was also ignored, revealing an intersectional discrimination perspective that underscores how misogynistic views permeate the legal framework, complicating the transition from discussion to enforcement. There is a need for standardized risk assessments, mandatory coordination between authorities and schools in domestic violence cases, and sensitivity training for the executive and judiciary to foster significant progress in this area (Joint Dissenting Opinion, para 25).

The primary issue with the Kurt judgment lies in the inadmissibility of Article 14 of the ECHR due to the exceeded six-month limit rule. This case could have been a landmark decision framing domestic violence because of the historically entrenched power imbalance between men and women. Furthermore, the judgment overlooked the opportunity to address issues of gender-based stereotyping and victim-blaming, ideally through the perspective of intersectional discrimination. Societal stereotypes tied to gender roles can have profound implications during legal proceedings, impacting judicial impartiality. For instance, judges might misinterpret the nature of the criminal offense, leading to distorted views on witness credibility, restricted legal capacity, and hindered handling of allegations. As a result, offenders may evade legal accountability, thereby obstructing victims' access to legal rights and protection (Cusack 2014).

Furthermore, reporting domestic violence cases poses significant challenges due to fears of stigma, concerns for children's welfare, and the lingering effects of prior isolation and psychological abuse. This challenge is exacerbated for migrant women who may not be fluent in German and could encounter gendered racism. Moreover, ongoing racism within the legal system and a lack of trust in law enforcement contribute to the under-reporting of domestic violence crimes by women of color and migrant women (Weinberger 2021). If a violation of Article 14 were established, it would have shifted the burden of proof to the government, compelling them to demonstrate that any differential treatment was objective and justified. This shift would have redirected the focus from questioning the applicant's credibility—such as her hesitation to report the rape and strangulation—to the authorities' obligation to defend an approach that disregards the nuances of domestic violence and the specifics of intersectionality. Additionally, dissenting judges unanimously concurred that a violation of Article 2 should have been recognized, as the Austrian authorities ought to have acknowledged the real and immediate risk to the applicant's son's life, implicating Article 14 of the ECHR, intersectional discrimination, and the vulnerabilities of children in domestic violence contexts.

### 2.3.2 Various Interpretations of Psychological Violence in Criminal Law

In contrast to physical violence, the issue of psychological violence case law raises concerns about the legal interest of physiological integrity in various contexts not enshrined in national criminal law acts. Mental suffering or being manipulated factors are more likely to be ignored than physical aspects of violence in court due to the absence of criminal law provisions in this regard (Overmeyer 2021, pp.30-31). However, the ambiguity of persuasiveness and the legitimacy of pronouncements remains concerning because of the broad scope of unreasonable

interpretation. Although the Court has emphasized the special protection to vulnerable persons in this context, the expectations and obligations of Contracting Parties in proceedings cannot be met due to the lack of legitimacy of criminalizing psychological violence not exclusively mentioned in the ECHR (Lavédrine and Gruev-Vintila 2023, pp.8-10).

The Court may assess the alleged violation of Articles 3 and 8 of the ECHR when the national legislation does not explicitly refer to psychological violence and its forms in criminal law provisions. The general perception of domestic violence victims is that they are viewed in the case law as particularly vulnerable individuals (Heri 2021, ch 7). For example, the Court in *Levchuk v. Ukraine* (2020) put the death threats into vulnerable positions due to their economic, emotional, or some dependency, resulting in controlling tactics, including isolating tactics. In this case, the Court addressed broader protection from intimidation, retaliation, and repeat victimization against the victims of domestic violence. Positive obligations also must be compatible with the consideration of the vulnerability of domestic violence victims under Articles 3 and 8 (L*evchuk v. Ukraine*, 2020, paras. 78 and 80). The major issue is how psychological violence is perceived in different jurisdictions. The court proposed stages for criminalization in *Volodina v. Russia*, shaping the precise definition of psychological violence. First, the criminalization process categorizes various forms of abuse into separate offenses. Second, distinct offenses can encompass threats and assault as a whole form of domestic violence (Alke 2023, pp.7-8). Thus, comparisons will reference judgments from Moldova and Lithuania.

*Eremia v. The Republic of Moldova* addresses the terminology of domestic violence under Moldovan criminal law and its impact on jurisprudence in Moldova. The claimants had been victims of verbal abuse by her husband since the late 1990s. Regardless of existing legislation protecting against domestic violence and punishing offenders, social workers failed to follow police orders to prevent the husband from entering the claimant's home without her permission. Subsequently, the Office of the Prosecutor did not indict the husband, despite the plea bargain and sufficient evidence. The reasoning included the husband’s societal status, having three children, and the absence of previous criminal charges, resulting in the perception of a " less serious offense." Consequently, judges examined the alleged violations of Articles 3 and 8 of the ECHR. The first step was considering “family violence” under Article 201 of the Moldovan Criminal Code, interpreted as physical harm leading to “light bodily harm or damage to health, or moral suffering, or pecuniary or non-pecuniary loss" (*Eremia v. The Republic of Moldova* 2013, Paras 29-30). However, the Court found this provision vaguely worded, as they were not convinced by the prosecutor's reasoning that the claimant's husband was not a danger to society. (*Eremia v. The Republic of Moldova,* 2013, Para 57) Issues of interpretation arose when judges had to assess whether moral suffering could be associated with physical suffering. In other words, the potential mental impacts of non-physical verbal abuse were not explicitly emphasized in Moldovan Criminal Law. Nonetheless, the Court concluded that the Moldovan authorities were obligated to address psychological suffering, which should be differentiated from physical suffering (*Eremia v. The Republic of Moldova,* 2013*,* Paras. 74 and 78). Although Moldovan domestic violence laws may benefit those not requiring approval for certain acts with mental impacts, both Articles 3 and 8 were found violated due to the failure to take measures to protect the claimant and her daughters, who witnessed verbal assaults against the applicant. The

experiences causing suffering and anxiety amounted to inhuman treatment at a time when public authorities were obliged to conduct effective investigations (Hedlund 2024, pp.15)

The case to examine is *Valiulienė v. Lithuania*. The claimant experienced ongoing mental and psychological abuse, but the public prosecutor dismissed her claims due to the statute of limitations. The European Court of Human Rights found a breach of Article 3 of the ECHR, which protects individuals from torture and inhuman or degrading treatment. Before the Law on Protection against Domestic Violence, which took effect on 15 December 2011, domestic violence was regarded as a private family issue that victims were expected to address on their own. The perpetrator and the victim were seen as equally responsible for the toxic environment at home (*Valiulienė v. Lithuania*, 2013, Para 65). The Court identified a violation of Article 8 of the ECHR, as the victim endured psychological pain highlighted by the absence of protective measures against attacks on her physical safety. The criminal law mechanisms failed to respect her private life, leaving her vulnerable due to their flaws and eventual time barriers. However, Lithuania's legislature responded by criminalizing domestic violence as an aggravating factor in other crimes. Paragraph 1 of Article 140 of the Lithuanian Penal Code regards minor bodily harm as an offense that can be prosecuted without a complaint. A key issue is determining what constitutes minor bodily harm against a partner or family member as an aggravating circumstance (*Valiulienė v. Lithuania*, 2013, Paras 68-69). In other words, judges must demonstrate to what extent these factors can even be recognized as offenses that otherwise criminalize minor bodily harm. In essence, psychological violence does not necessarily correlate with minor physical injury, which highlights gaps in Lithuanian Criminal Law (See McQuigg 2014, pp. 8-9). In contrast to *Volodina v. Russia*, deficiencies persist in the legal framework addressing domestic abuse, which is only punishable by up to one year in prison. This reflects a lack of seriousness in addressing minor bodily harm, instead labeling them as domestic violence, which should carry harsher penalties (Sękowska-Kozłowska 2024, pp.1727).

### 2.3.3 *Tunikova and Others v. Russia* – The Missed Opportunity to Clarify Forms of Psychological Violence

The lack of sufficient measures to protect domestic violence victims and carry out effective investigations constitutes a significant problem stemming from a discriminatory legal framework. The absence of a clear definition of 'domestic violence' hampers the enforcement of necessary provisions for prosecuting its various manifestations. *Tunikova and Others v. Russia* concerns the precedent set by *Kontrova v. Slovakia* (2007, para 116), which extends jurisprudence regarding psychological abuse. It's essential to note that since 2017, Russia has removed all domestic violence provisions from its penal code and, as of September 2022, has withdrawn from the ECHR and its related obligations. Nevertheless, the Court recognized domestic abuse as a violation of the ECHR. A major difficulty for the Court was defining frameworks that effectively encapsulated psychological abuse, given the varied interpretations in past rulings. A key point of debate was whether psychological violence could be classified as torture under Article 3 of the ECHR (*Tunikova v. Russia,* 2021, Para 69).

Ultimately, it was concluded that the Russian government was reluctant to define a minimum threshold for recognizing psychological violence, which weakens authorities' ability to conduct

thorough investigations or evaluate violence risks. Moreover, the lack of criminal protections against domestic abuse violates Article 14 of the ECHR. Three out of four claimants reported extreme domestic abuse, likening their experiences to torture rather than merely inhumane or degrading treatment, which is typically recognized in severe psychological violence cases (*Tunikova v. Russia,* 2021, Paras. 75-76). Such acknowledgment would empower victims of psychological abuse against their aggressors. However, the Court faced challenges in defining psychological violence and assessing its impact on victims, specifically, fear, psychological distress, and chronic anxiety resulting from noncompliance with abusers' demands (*Tunikova v. Russia,* 2021, Para 119). The Court questioned the importance of fear in evaluating a victim's vulnerability but recognized that this sensitivity poses greater danger given the alleged perpetrator's controlling conduct and subtle threats (*Tunikova v. Russia,* 2021, Para 127-130).

Varying levels of violence complicate the vulnerability assessment. When Member States strictly uphold their obligations to protect under Articles 3 and 8, the Court is confronted with the psychological abuse inflicted by perpetrators. The Court also struggled to agree on whether interference with a victim's autonomy qualifies as domestic violence under Article 8 of the ECHR. This contrasts with *Volodina v. Russia*, emphasizing that the state's duty to criminalize all domestic violence forms, relevant to Article 8 of the ECHR, is not prioritized by the Court. Evaluating the severity of psychological violence suggests a reduced margin of appreciation under Article 3 of the ECHR, creating a high threshold for serious domestic abuse to deserve legal protection. Acknowledging vulnerability is crucial as it aligns with individual autonomy, liberty, and dignity principles, aiding judges in recognizing the systemic nature of domestic abuse when assessing the seriousness of psychological violence and fulfilling positive obligations (Hedlund 2024, pp.7).

The Court's rationale seems inconsistent regarding the need to criminalize all forms of domestic violence, which Russia is required to address despite having repealed relevant provisions since 2017. Conversely, the Court might point to the lack of a specific domestic violence statute given the deficiencies in the Russian criminal law framework, including forms of non-physical abuse. Judges face challenges when determining if there's a violation of ECHR provisions, especially considering the absence of physical harm on a theoretical level. Some types of domestic violence may be too severe to ignore under criminal law and ensure compliance with positive obligations set by Article 3 of the ECHR. However, this does not mean that every case of psychological violence is assured to be protected. Under Article 3, a margin of appreciation seems to apply in regulating less severe acts of domestic psychological violence. Thus, according to this interpretation, criminalization is generally required for acts of psychological violence that meet the threshold set by the Article.

The *Tunikova v. Russia* judgment potentially offers a deeper understanding of psychological violence by distinguishing between isolated minor incidents and those that form a pattern of abuse. The Russian law faces challenges because offenses like stalking fail to adequately account for behaviors that may consist of minor incidents, which together suggest a controlling and coercive pattern. The Court might not view it as necessary for Member States to incorporate these types of psychological violence into their criminal law, leading to situations where certain

behaviors go unrecognized as offenses. While domestic abuse can be unpredictable, exacerbating the vulnerability of victims, it poses a complex challenge for legal experts to identify which forms of psychological harm constitute violence without clearer directives from the Court. Conversely, this ruling could encourage judges in future cases to seek options that ensure authorities have suitable and proportional responses aligned with the assessed risk level in each situation. The ECtHR might emphasize the proactive responsibility of states in developing and implementing legal frameworks to meet their positive obligations under Article 3, especially in contexts where vulnerable individuals face increased risks.

## 2.4 THE RIGHT TO LEGAL RECOGNITION OF SAME-SEX COUPLES (ARTICLE 8 IN CONJUNCTION WITH ARTICLES 12 AND 14 ECHR)

While same-sex marriage and gender-neutral civil partnerships are widely accepted in Western Europe, the situation remains different in former communist countries. Here, organizations promoting "traditional families" and the Church strongly oppose same-sex marriage, significantly influencing public opinion and political stances. In these nations, marriage is strictly viewed as a union between a man and a woman, which is reflected in the constitutions of 15 out of 51 countries, effectively prohibiting same-sex unions both in practice and theory. Currently, Estonia and Slovenia are the only countries allowing same-sex marriage; other forms of legal acknowledgment for same-sex couples, such as cohabitation agreements or registered partnerships, exist but vary across the region. In several Eastern European countries, same-sex couples receive no formal recognition at all. Consequently, courts have been examining alleged discrimination under the Convention rights due to the lack of a legal framework for same-sex couples. It remains to be seen if the court's decisions will shape the legal framework for same-sex couples at the national level.

### 2.4.1 Landmark Ruling of *Fedotova v. Russia*

The *Fedotova v. Russia* case marks a pivotal moment in Eastern European jurisprudence, establishing a precedent that Contracting States must provide legal recognition within their domestic laws (Poppelwell-Scevak 2023). The applicants claimed violations of Articles 8 and 14 of the ECHR due to the refusal to issue marriage licenses for same-sex couples. They argued that the refusal stemmed from deep-seated prejudices against homosexuals that prevent same-sex relationships from being recognized in marriage, as per the Russian Family Code's definition of marriage. The assessment under Article 8 referenced the *Oliari v. Italy* case, emphasizing the state's obligation to ensure legal recognition for same-sex couples (*Oliari v. Italy*, Para 166). The Court recognized that Russia's Family Code, which permits only opposite-sex marriages, imposes significant obstacles on same-sex couples, hindering their access to housing, financial support, hospital visitation, legal rights against witness testimonies, and inheritance. The Russian government justified its blanket ban on same-sex marriage as essential for maintaining traditional marriage and family structures. (*Fedotova v. Russia*, 2023, Para 117). However, the Grand Chamber disagreed, asserting that permitting same-sex couples to marry does not undermine traditional family values. The challenge was for the government to balance societal prejudices against the rights of homosexual couples while considering the interests of applicants and the broader LGBT+ community in Russia. Under Article 8, ECHR guarantees that same-sex

relationships deserve legal recognition and protection equivalent to that of opposite-sex couples in stable, committed partnerships, characterized by mutual support and emotional connection. The margin of appreciation grants the discretion of the member states, which narrows to the Party States guaranteeing the right to adequate recognition and protection of relationships (Para 162).

Additionally, the Grand Chamber did not view the predominantly negative attitudes in Russian society towards homosexuality as a decisive justification against same-sex marriage, in line with the reasoning from *Oliari v. Italy*, which labeled such prejudices as discriminatory against a minority group (*Oliari v. Italy*, 2015, Para 163). The justification also involved protecting minors from exposure to same-sex relationships, referencing the *Bayev v. Russia* case, where the application of a so-called gay propaganda law was deemed egregiously homophobic and overly restrictive of LGBT+ individuals' freedom of expression (*Bayev v. Russia*, 2017, Para 83). The Court consistently prioritizes Convention protections over majority opinions. In this case, the Grand Chamber determined that Article 8 had been violated, dismissing Articles 12 and 14 from further consideration (*Fedotova v. Russia*, 2023, Para 194).

Nevertheless, the exclusion of Article 14 led to dissenting opinions from Judges Pavli and Motoc, who felt the judges missed a chance to invoke a consensus among Contracting Parties to recognize same-sex couples. This could have clarified what rights Contracting Parties must grant to same-sex couples, even amid sensitive moral and ethical debates. This situation creates a significant margin of appreciation regarding whether rights should be conferred upon same-sex couples and what constitutes a 'family' (Dissenting Opinion, Para 4). Referring to the *Villanatos v. Greece* ruling, the Court was compelled to allow same-sex couples to enter civil partnerships that may have intrinsic value. Such recognition forms part of developing their personal and social identity as guaranteed by Article 8 of the Convention (*Villanatos v. Greece*, 2013, para. 83). They argued that the legal challenges surrounding key rights for same-sex couples are influenced by this margin of appreciation, resulting in inconsistencies Therefore, Article 8, whether alone or in conjunction with Article 14, should not be considered an alternative to achieving marriage equality under Article 12, particularly since any recognition of marital or non-marital status cannot occur without consensus if it excludes same-sex couples from marriage rights (Para 7). On the other hand, there is no indication that the consensus doctrine will be able to decisively narrow the margin of appreciation concerning either obliging Member States to allow for same-sex marriage through this broad legal framework of recognition and protection under Article 8 or through a more progressive and liberal interpretation of Article 12 (Biskup 2024, pp.3)

The *Fedotova v. Russia* ruling significantly influences subsequent judgments of LGBT+ status within national legal frameworks. This judgment exerts external pressure on the Contracting States to revise the legal environment surrounding the politically sensitive issue of LGBT+ rights (Santaló Goris 2024). The cases like *Buhuneascu and Others v. Romania* (2023) illustrate how judges have heavily referenced the precedent in *Fedotova v. Russia*. The Court acknowledged that same-sex couples seeking recognition may call for equal rights, validation, and inclusion. Both homosexual and heterosexual couples can register their partnership through

the same legal framework. This recognition carries symbolic significance that should not be underestimated or ignored by the Court (Fedele 2023). However, a crucial question emerges: does the differential treatment of same-sex couples by national institutions validate actions that the Court might deem discriminatory? Thus, a broader examination of discriminatory practices is necessary, rather than restricting it to a single Article 8 evaluation (Fedele 2023).

### 2.4.2 Absence of Enforcement Measures of Positive Obligations in Party Member States

While the *Fedotova v. Russia* ruling marked a significant advancement, it also exposed weaknesses in enforcing positive obligations within Party Member States to guarantee a minimal legal framework for recognizing same-sex couples (Vikarská 2023). This is despite Article 46(1) of the ECHR urging Party States to adhere to the Strasbourg Court's final judgment, which necessitates adaptive non-discrimination measures favoring the legal acknowledgment of same-sex couples. For instance, in 2015, the Greek government enacted the Cohabitation Agreement Act, which laid the groundwork for the Marriage Equality Act passed in February 2024, drawing on the reasoning established in *Villanatos v. Greece* (2013, para 81). Similarly, the *Oliari v. Italy* (2015) decision spurred the Italian government to introduce civil partnerships in May 2016. However, the implications of *Fedotova v. Russia* are unlikely to sway Russian authorities toward establishing a legal framework for recognizing same-sex couples for several reasons. Firstly, a referendum held in June 2020 introduced amendments to the Russian Constitution, categorically defining marriage as a union between a man and a woman, effectively prohibiting same-sex marriage. Secondly, Russia's withdrawal from the European Convention on Human Rights in September 2022 exempted its authorities from positive obligations to ensure at least minimal legal recognition for same-sex couples. Consequently, the European Court on Human Rights halted the review of subsequent applications against Russia. Thirdly, as of 2023, the public display of same-sex relationships in Russia has been increasingly restricted, affecting not just minors but adults as well.

This situation reflects a broader stagnation in advancing LGBT+ rights, largely driven by governmental reluctance to embrace change. A pertinent example is the *Maymulakhin and Markin v. Ukraine* case, which has greatly influenced the Strasbourg Court's evolving jurisprudence on this topic (Hayward 2023). Since the full-scale Russian invasion of Ukraine, societal attitudes have shifted away from the homophobic narratives prevalent in Russian media, with polls indicating a decrease in negative sentiment toward same-sex relationships. The presence of numerous LGBT+ soldiers fighting for Ukraine has highlighted the need for legal recognition of their rights under the Convention, including benefits such as joint matrimonial property, inheritance, and hospital visitation rights (Toren 2024). In this case, the claimants contended that they were denied the right to marriage or, at the very least, the protections of a de facto partnership, which they argued was discriminatory based on sexual orientation, particularly in a situation where Melakhim was not informed about his mother's death (*Maymulakhin and Markin v. Ukraine,* 2023, Para 62). The proposed bill remains stuck in committee, despite government assurances of gender-neutral same-sex partnerships being legislated. It lacked the political backing necessary for progression in Parliament for nearly three years. Meanwhile, Ukrainian LGBT+ soldiers are still unable to be notified of a partner's death, visit them in

hospitals, or inherit joint property due to the absence of legal recognition for same-sex couples in Ukraine. As a result, Ukrainian authorities continue to neglect the positive obligations outlined in *Fedotova v. Russia* (2023) regarding compliance with basic recognized rights and partnerships (*Maymulakhin and Markin v. Ukraine,* 2023, Para 64).

Additionally, the judgment *in Koilova and Babulkova v. Bulgaria* addresses the risks faced by a same-sex couple legally married in the United Kingdom, who cannot register their union in Bulgaria, resulting in legal uncertainty and forcing them to navigate a legal vacuum within Bulgarian territory. This situation poses risks to the couple due to the absence of regulations recognizing same-sex families. The lack of legal recognition for LGBT+ families impacts all facets of family law that apply to these individuals, including inheritance, taxation, kinship, and the rights of their future children, which are typically safeguarded for heterosexual families (Nugraha 2023). The Court decided that, without official recognition, same-sex couples in Bulgaria are merely viewed as de facto unions, leaving partners unable to govern essential areas of their relationship, such as property management, alimony, domestic violence protection, and inheritance, akin to officially recognized families. They are also barred from presenting their relationship to judicial or administrative authorities. The applicants are particularly invested in registering their union to ensure legal recognition and protection of their relationship, free from unnecessary hurdles, and to secure fundamental rights equivalent to those available to any stable couple (*Koilova and Babulkova v. Bulgaria*, 2023, Para 29).

Meanwhile, the Bulgarian government failed to provide a clear justification for its refusal to acknowledge same-sex marriages performed abroad, leaning on traditional values and prevailing public sentiments against such unions (*Koilova and Babulkova v. Bulgaria*, 2023, Paras 55-57). Nonetheless, the Court determined that Bulgaria exceeded its latitude in failing to fulfill positive obligations stipulated in *Fedotova v. Russia*, which required respect for the applicants' private and family life (*Koilova and Babulkova v. Bulgaria,* 2023, Para 61). Since this ruling, the Bulgarian government has not introduced any legislative measures aimed at establishing civil unions, likely due to significant opposition from the majority party, which reflects societal negativity toward LGBT+ rights. Additionally, the Bulgarian parliament passed an amendment in August 2024 that prohibits the promotion of "non-traditional" sexual orientation in educational settings ranging from preschool to secondary school (Todorov 2024).

Litigation regarding the lack of varied legal recognition for same-sex couples suggests a systemic issue in certain Contracting States, wherein an effective mechanism to compel states to implement judicial decisions is lacking. The recent declaration from the Romanian Prime Minister indicates that legally recognizing same-sex couples is not a priority for the government, reflecting societal opposition to LGBT+ rights, consistent with a ruling from the European Court of Human Rights. In contrast, the European Court of Justice enforces substantial penalties on member states that resist enacting EU laws relating to the status of same-sex couples. The judgment in *Coman and Others v. Romania* provides a notable example of financial fines imposed on member states, compelling national governments to grant residency rights to non-EU citizens based on same-sex marriage recognized in other EU jurisdictions (Beury 2018). Proposals for such recognition emerged five years post-judgment, likely driven by apprehension

of significant fines from the Commission. Nevertheless, same-sex couples maintain a strong determination to seek justice at the Strasbourg Court, despite the absence of mechanisms to ensure compliance with rulings.

Lithuania also faces potential condemnation from the Strasbourg Court. Although the parliament has passed two readings favoring the legalization of civil unions solely for same-sex couples, the final vote is still pending. Alternatively, expectations from the Lithuanian Constitutional Court may establish a partnership institution, granting legal recognition for same-sex couples under the Lithuanian Family Code, influenced by Article 8 of the ECHR and the decision in *Vallianatos v. Greece.* The Lithuanian Constitutional Court has determined that the lack of legal regulations for partnership institutions, particularly those for same sex couples, violates the Constitution. The Court stated that the state must provide legal protections for relationships outside of marriage, rooted in the principles of human dignity and the right to private and family life (Article 41). This means that same-sex couples can file petitions to the courts to register their partnerships unless the government establishes a partnership framework for both opposite-sex and same-sex couples. They argued that the absence of legal acknowledgment for same-sex couples violates the principles of human dignity and private and family life, asserting that societal stereotypes cannot justify the denial or restriction of fundamental rights and freedoms (Article 12.3.3). This Aligns with the Latvian Constitutional Court's previous ruling (Article 110), which required the political establishment to recognize same-sex relationships by June 1, 2022. However, it is noted that due to the government's failure to meet this deadline, only the courts can safeguard their rights to private and family respect. It appears there is no consensus within the ruling coalition and opposition regarding the introduction of gender-neutral same-sex partnerships during this Seimas term, suggesting a likely absence of political will to adhere to this ruling. It is interesting to think about whether the Strasbourg Court will recognize that the government's failure to allow same-sex couples to legally register their partnerships through notary services or civil registrations, rather than via the complicated court petition process, constitutes a violation of Articles 8 and 14 of the ECHR.

## CONCLUSIONS

This research paper largely confirms the observations of legal scholars and commentators over the past two decades regarding the Court's evolving view of vulnerable groups. Initially limited to Roma minorities, the discussions in legal academia have broadened to define which groups or individuals qualify for vulnerability assessment, and which need to define 'vulnerability.' This concept has now become a significant cornerstone in jurisprudence, addressing various issues faced by disadvantaged and marginalized individuals, such as the lack of legal protections for same-sex couples, victims of domestic violence, high-risk vulnerable persons (e.g., those affected by the COVID-19 crisis or environmental disasters caused by climate change), detainees' rights during the pre-trial phase, and socio-economic rights, particularly for asylum seekers and those facing derogatory conditions in prison.

The Strasbourg Court's understanding of vulnerability is influenced by the existing prejudices, stigma, and discrimination against minorities in Contracting States, rooted in historical and cultural contexts. Vulnerability is thus closely linked to the heightened risk of

harm to disadvantaged and marginalized individuals. The Court's efforts to interpret various aspects of vulnerability following Convention rights are a positive advancement toward better safeguarding universal principles of equality, justice, and non-discrimination, even without a formal definition of vulnerability. This approach underscores the European Court of Human Rights' fundamental role. When vulnerability is applied in case law, it is anticipated to invoke positive state obligations, leading to the implementation of the European Convention on Human Rights; this may narrow the margin of appreciation that member states have when limiting fundamental freedoms and human rights.

This research paper supports universally defining vulnerability within the legal system, emphasizing the need to align fundamental rights with individual protection across member states. It acknowledges the challenges that foster conditions of weakness, which further marginalize certain groups, thus fulfilling the vulnerability assessment criteria regardless of the relevant ECHR articles or situations involved in the judgments. The master thesis underscores the significance of formalizing this idea, allowing judges to examine different aspects of inequality more effectively, thereby addressing complex issues faced by marginalized individuals from multiple angles of vulnerability, potentially placing these individuals on equal footing with those who lack vulnerability factors. Consequently, judges will possess greater capacity to integrate diverse interpretations of vulnerability through their decisions. Moreover, while vulnerability may appear overly simplistic without a suitable alternative to the equality principle, the court's language focuses on the intersectionality between vulnerability and claims of structural discrimination.

However, a significant portion of the research paper addresses the main flaws surrounding the Court's evaluation and interpretation of vulnerability, which tends to be selectively applied to marginalized and disadvantaged groups. The Court's negative stance poses risks in cases where alleged violations specifically refer to vulnerability as an aggravating factor, as the high threshold set for evidence of non-discrimination can lead to failures in vulnerability assessments for at-risk groups, manifesting in varied forms of social exclusion. This perspective is critiqued for perpetuating stigma and intensifying discrimination against minorities already labeled as vulnerable, ultimately resulting in group exclusion and denying these individuals their human rights enshrined in the European Convention on Human Rights.

The initial issue highlighted in the research paper is the ambiguous definition of 'vulnerability'. Critics argue that the concept of vulnerability does not consistently influence future case law, despite the presence of codified interpretative procedural rules. These inconsistencies frequently stem from political sensitivities or a lack of precise terminology clarifying the role of vulnerability within the European Court of Human Rights. The research paper notes that the Court's interpretation of vulnerability significantly depends on the subjective perspectives of decision-makers, depending on varying levels of expertise and sensitivity to the challenges faced by applicants. This ambiguity leads to uncertainty for applicants, causing them to feel like passive recipients of charity rather than active claimants of rights. This issue resonates with earlier critiques of overly simplified notions of vulnerability that do not provide effective legal mechanisms for necessary differential treatment, which could potentially infringe upon

Article 14 of the ECHR. Consequently, the research paper concludes that the Court's hesitance to recognize even minimal definitions of 'vulnerability' is problematic, as it should encompass a wide range of vulnerability sources under Article 14. This conceptual ambiguity underlies the challenges in applying the term to cases arising from the COVID-19 pandemic when the Court faced pressure to identify individuals experiencing adverse effects and social exclusion as vulnerable. The master's thesis expressed disappointment that this opportunity to set a legal precedent was overlooked, as it could have indicated that everyone includes at least one vulnerable member, thereby allowing for continued classification of applicants as vulnerable and avoiding the pitfalls of recognizing those suffering from social exclusion while sharing similar histories and nationalities, often enduring distinct physical and psychological traumas, such as asylum seekers.

The second issue highlighted is the Court's inconsistent application of vulnerability characteristics. Such inconsistencies often arise from political sensitivities or a lack of appropriate vocabulary to clarify the role of vulnerability within the European Court of Human Rights. For instance, while homosexual individuals may not be recognized as a vulnerable group, the Roma minority is treated as such. This inconsistency undermines the principles of equality, and the Grand Chamber could address this by clarifying the meaning and application of vulnerability. The Court's reluctance to acknowledge these groups persists, despite the ambiguity being neither new nor unusual in cases involving marginalized communities, thereby intensifying negative perceptions of the perpetrator groups. In addition, there is a lack of clear differentiation between individual and collective vulnerability, leading to varying legal reasoning that is not uniformly applied across different groups that may be considered vulnerable. A notable trend indicates that assessments often start with an individual's affiliation with specific groups, such as detainees, where a different two-stage approach derived from *Salduz* in subsequent judgments results in a deviation from previously established precedents, complicating the determination of violations under Article 6 of the ECHR. The Court's decision not to recognize a breach of Article 6 without compelling reasons suggests a reluctance to accept human rights violations, even when the government does not present extraordinary circumstances to justify such limitations.

Another significant issue outlined in the master's thesis is the lack of enforcement measures to uphold positive state obligations in the Contracting Parties. Essentially, this problem underlies the ongoing challenges regarding the margin of appreciation, which Member States apply to justify their restrictive measures against alleged vulnerable individuals. The most prominent examples involve politically and socially sensitive issues such as same-sex legal regulations and domestic violence. For instance, the impact of the *Fedotova v. Russia* judgment has unveiled national weaknesses in enforcing positive obligations within member states to provide a minimum legal framework recognizing same-sex couples. Litigations concerning the inadequate legal recognition for same-sex couples highlight a systemic issue in some Contracting States, where there is an absence of effective mechanisms to compel compliance with judicial decisions. This lack of enforcement suggests that legal recognition for same-sex couples is not a priority for national governments in Eastern Europe, often ignoring the Court's observations. Furthermore, the litigation surrounding domestic violence victims in Russia reveals a similar

lack of effective mechanisms to ensure compliance with judicial decisions, even though rulings such as those in *Volodina* and *Tunikova* found violations of the right to life. However, these decisions do not drive the Russian authorities to reinstate domestic violence as a criminal offense, largely due to the extensive margin of appreciation and Russia's withdrawal from the European Convention on Human Rights in September 2022.

The research paper also proposes solutions to prevent similar misinterpretations in future judgments. Firstly, it is essential to consider the comprehensive protective measures for vulnerable individuals and groups as fundamental to expanding the legal scope of application. A thorough analysis is necessary to assess the checks and balances affecting the application of vulnerability tests. It would assist judges in forming new procedural rules that could set precedents for future case law. It should be viewed as part of an ongoing process of individual emancipation, anticipating institutional procedures that evaluate potential human rights violations against vulnerable individuals and groups. To address the challenges in defining this concept, vulnerability tests should be scrutinized through a structured approach employed by the European Court of Human Rights. This includes establishing precedents where vulnerability assessments are pivotal in court proceedings, especially when member states influence relevant vulnerability factors. Additionally, judges can link legal reasoning to this notion, interpreting it differently based on the unique circumstances and additional facts.

While the master's thesis aims to illuminate the issues in interpreting and applying the concept of vulnerability in Strasbourg judgments and proposes solutions to address these misinterpretations in future case law, this research paper does not encourage other legal commentators and scholars to reference it as a key foundational source when evaluating the fallacies of vulnerability application in upcoming rulings. Instead, this paper might be useful for those looking to compare ongoing judgments with the analyzed case law, particularly the five-year case law study presented herein. It is anticipated that future legal articles will delve deeper into the application issues concerning the concept of vulnerability and novel solutions to resolve the confused interpretations found in judgments.

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SUMMARY

**The Concept of Vulnerable Groups under the ECHR**

**Dominykas Bernotas**

The author of the master's thesis examines various interpretations of the term ‘vulnerability’ at the Strasbourg Court, specifically regarding the rights of disadvantaged and marginalized applicants as vulnerable individuals and groups. The analysis employs comparative measures to review significant cases, whether they are over a decade old or more recent judgments, evaluating how these decisions interact and influence one another within contexts like socio- economic rights, issues of domestic violence, legal recognition for same- sex couples, and the plight of high- risk vulnerable individuals and groups during the COVID- 19 crisis (e. g., adverse effects from climate change and impacts on individuals with HIV), as well as detainees in pre-trial proceedings by ECHR rights. Additionally, legal scholars and online journal articles serve as primary authorities to support the author's arguments by detailing the cases, highlighting criticisms, or commending their approaches, potentially offering solutions to prevent future misinterpretations.

Additionally, the research highlights the importance and difficulties of accurately applying and interpreting vulnerability, including effective methods for determining when to invoke positive state obligations and criteria for assessing vulnerability. This process categorizes disadvantaged and marginalized individuals and groups as vulnerable. As a result, the analysis deepens our understanding of the intricate challenges that judges at the Strasbourg Court encounter when conceptualizing vulnerability, including the principles of equality, non-discrimination, and the rule of law rights outlined in the Convention. However, it also tackles the complexities of interpreting the term ‘vulnerability’ within case law. The focus is on how selective applications and interpretations of vulnerable groups can perpetuate discrimination and stigma against marginalized individuals and groups, rather than genuinely safeguarding their equality with the wider population. The author also underscores the margin of appreciation within the ECHR, pointing out that Contracting Parties have some (though limited) latitude to justify human rights violations, even when described as fulfilling positive state obligations. This aspect of the master's thesis exposes weaknesses in ECtHR jurisprudence that are frequently overlooked by Contracting Parties, which lack enforcement mechanisms, subsequently leaving vulnerable individuals without support. This situation arises from a compromise among contracting states, as the ECHR endeavors to harmonize the laws and practices of diverse states, creating a certain legal average. While some states will need considerable effort to achieve it, others may see it as insufficient.