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SPECIAL ISSUE ARTICLE

On the Basis of Migratory Vulnerability: Augmenting Article 14 of the European Convention on Human Rights in the Context of Migration

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Abstract

The fact that migration cases seldom raise any questions under Article 14 of the European Convention on Human Rights (ECHR) is neither inevitable nor justified. This article reaffirms the equality provision as a useful and indeed necessary mechanism for the European Court of Human Rights to deal with such applications. More concretely, we build on our previous work, which identified a legal tool suitable for achieving this reorientation in judicial practice: the principle that we call 'migratory vulnerability', once recalibrated away from a group-based approach to a notion of vulnerability as situational and socially induced. In this article, we explain how the principle of migratory vulnerability, even if it does not represent an inherently suspect ground of differentiation, enables us to identify instances of discrimination defined as a measurable disadvantage that is disproportionate or arbitrary and cannot, therefore, be reasonably justified on the basis of the Convention. This presupposes a move away from nationality as a privileged ground in migration-related cases and from the 'comparator' test to determine Article 14 ECHR violations, to also encompass situational experiences. We end with two examples that show that this reconceptualization is both workable in practice and of added value, enabling the Court to find violations that presently go undetected.

Keywords: vulnerability; migration; ECHR; discrimination; equality; undocumented migrants; COVID-19 vaccinations; right to rent

1 Introduction

Can acts of discrimination be generally permissible but for the narrowest of exceptions and unless proven otherwise? This seeming antithesis to human rights law in twenty-first century Europe is mostly an unquestioned reality when it comes to migrants. The sovereign right of states to control their borders is understood to entail a broad discretion to differentiate between persons based on their nationality or residential status. This is true for domestic courts as much as for the European Court of Human Rights (ECtHR or Strasbourg Court). Although Article 14 of the European Convention on Human Rights (ECHR) prohibits discrimination in the enjoyment of the stipulated rights,[1] this guarantee is currently barely relevant to migration cases. Marie-Bénédicte

[1]Article 14 ECHR establishes that the 'enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. It is not a 'freestanding' right, meaning that it must be invoked in combination with another article of the Convention.

Dembour (2012 and 2015) has prominently documented the limited application of the provision following a promising early ruling in *Gaygusuz*, which found a violation of Article 14 ECHR based on the fact that a permanently settled immigrant was denied an advance on his pension despite continuous contributory payments.[2] This, however, was succeeded by case law that is 'quantitatively meagre [and] qualitatively bland' – and was watered down more recently in *Savickis* (Ganty and Kochenov, 2022). In other words, the ECHR protection is diluted and weakened when migrants enter the scene. This mirrors the EU's 'disappearance act', showcasing a tendency of EU law of simply *disappearing* when migrants and their rights are at stake (Kochenov and Ganty, 2022, pp. 10, 28–33).

Building on recent critiques of the Court's general approach to immigration cases (Dembour, 2015; Costello, 2016; Baumgärtel, 2019), this contribution examines specifically the judicial reasoning on the application of Article 14 ECHR and its relation to migration law and vulnerability governance, following the main objective of this Special Issue (Moreno-Lax and Vavoula, in this issue). More concretely, we argue that its current legal practice is based on fundamental oversights regarding the nature of migration control, which is an exercise in differentiation that ought to be addressed via this provision more frequently than is presently the case. The reality of 'civic stratification' along the lines of citizenship and residential status, well-established in social sciences literature (Nash, 2009; de Vries, 2019; Baumgärtel, 2019, sect. 7.1), has been neglected by the Court, which construes it as an exception to human rights protections that is normally unproblematic from a point of view of discrimination. While this fallacy may have been inconsequential at a time when Article 14 ECHR was considered of 'accessory'[3] and relatively undefined in character (Gerards, 2013, p. 100), it became more meaningful once the Court accepted the practical legal purpose of Article 14 ECHR, going beyond its mere 'psychological intention', as defended by some.[4] The ECtHR's recent case law in other domains suggests that the guarantee can be used to tackle instances of indirect discrimination and combat harmful stigmas, stereotypes and prejudices (Fredman, 2016; Peroni and Timmer, 2013). Some even contend that the Court's handling of Article 14 ECHR cases reflects 'a social-contextual approach that targets the discrimination grounds that make a real difference in people's lives and aims for the elimination of structures that perpetuate disadvantage and exclusion' (Arnardóttir, 2014, p. 669).

In migration matters as elsewhere, moving away from an entrenched line of judicial practice is easier proposed than done. This is so even if we set aside, for a moment, any political considerations to focus only on the legal implications of employing Article 14 ECHR in the migration context. This work therefore builds on a previous article where one of us argued that the jurisprudence of the ECtHR already features a principle with the potential to deliver such shifts: the principle of vulnerability (Baumgärtel, 2020, pp. 12–29). We proposed that a theoretically consistent notion of vulnerability cannot be limited to a 'group' characteristic, which excludes immigrants almost by default due to their heterogeneity. Rather, it requires the recognition of exclusionary practices on the social, political, and institutional plane that give rise to distinct and situational disadvantages that we call *migratory vulnerability*. The present article takes this proposition further to claim that if the ECtHR were to recalibrate its approach, migratory vulnerability could – and arguably should – serve as a basis for adjudicating such cases under Article 14 ECHR. While much migration policy would still comply with the provision, this approach would make a meaningful difference by enabling the Court to reprimand invidious, disproportionate and/or arbitrary treatment of migrants which other grounds such as nationality or legal status have failed to address. This would add a much-needed layer of human rights scrutiny in an area rife with state discretion.

[2]*Gaygusuz v. Austria*, Application No 17371/90, ECHR 1996.

[3]Article 14 ECHR needs to be invoked in reference to another right protected by the ECHR.

[4]Meaning that the adjacent substantive provision does not need to be violated. *Belgian Linguistics* (No 2), Application No 1474/62, ECHR, para. 9. The mere psychological role of this provision was defended by the Belgian State, para. 4.

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What follows is an argument divided into four sections. The next part presents Article 14 ECHR in general terms as a powerful legal guarantee that, however, fails to unearth routine discrimination faced by migrants. We thus review the Court's previous case law on the topic and place it in the context of its generally restrained approach to questions of immigration. Section 3 summarizes the concept of 'migratory vulnerability' and explains how judicial practice regarding Article 14 ECHR could be reconceived, using this notion as a protected ground against discrimination. Even if it does not amount to an 'inherently suspect' category, like race or sex, the provision would then become applicable and of relevance where vulnerable migrants confront a measurable disadvantage that is disproportionate or not conducive to the goal of policing migration. The identification of such discrimination requires a move away from the 'comparator' test towards an approach that also encompasses situational experiences. Section 4 discusses two examples to demonstrate that our reconceptualisation is both workable and of added value, enabling the ECtHR to find violations that presently go undetected. The concluding section summarises the findings and ends with a reflection on the desirability and likelihood of the Court adopting this – in our opinion, much improved – principled approach to Article 14 ECHR in the context of migration cases.

2 Article 14 ECHR: A powerful provision of unequal utility

The 'Cinderella' story of Article 14 ECHR has already been told (O'Connell, 2009). Still, this remarkable evolution deserves to be revisited briefly to underscore the provision's malleability and normative import. The first part of this section will address these points, while the second part will discuss the overlooked chapter in this tale: the marginal utility of Article 14 ECHR for persons suffering from migratory vulnerability defined as 'a cluster of objective, socially induced, and temporary characteristics' that results from migration control but that affects vulnerable migrants 'to varying extents and in different forms' (Baumgärtel, 2020, p. 12).[5] This limitation will be dealt with in the second part in discussing relevant rulings that reflect the Court's approach in this area.

2.1 The transformation and rise of Article 14 ECHR

Critical changes in the ECtHR's approach have contributed to the transformation of the non-discrimination clause from an ancillary clause to an autonomous legal basis sustaining ECHR claims. First, the Court liberated the provision from its 'parasitic' existence by clarifying that a violation could occur even if there was no breach of the adjacent substantive provision.[6] The resulting 'ambit' requirement, whose exact scope has been the subject of several studies, can thus be met in cases relating to governmental measures that promote the fulfillment of the Convention rights, even if not required by them (Gerards, 2013, p. 100). The Court also made it clear that the list of grounds enumerated in Article 14 ECHR is not exhaustive, recognising certain discrimination grounds not expressly listed in it.[7] Pushed by a growing number of applications, the Court has increasingly decided cases under this provision.[8]

Second, the Court has occasionally, though not consistently, used a conception of substantive equality in its application of Article 14 ECHR. This approach is all the more important for the protection of vulnerable people (Fraser and Honneth, 2004; Fredman 2007; Atrey, 2018). In contrast to formal equality, which treats likes alike at face value (Fredman, 2011a), considerations

[5]Our conception of vulnerability thus encompasses a diverse set of legal statuses, such as refugees, asylum seekers, persons with an exceptional leave to remain, and undocumented migrants.

[6]We do not mention Protocol 12 ECHR, which concerns a general, stand-alone prohibition of discrimination because the exceedingly low rate of ratifications has limited its effectiveness.

[7]See next section.

[8]A HUDOC search conducted on December 25, 2021 showed that between 1995 and 2000, the Court found a violation of Article 14 ECHR in nine cases, while such a violation was found in fifty-eight cases between 2015 and 2020.

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of substantive equality take into account the context and material conditions in which applicants find themselves (Lavrysen, 2015, p. 33). In this vein, the Court has broadened the scope of Article 14 ECHR to encompass neutral treatment that disproportionately affects one particular group (indirect discrimination),[9] as well as stereotypes and stigma when they serve as the main justification for differentiation.[10] Still, the approach of the Court to the prohibition of discrimination remains somewhat hard to systematize (Gerards, 2013, p. 100; Arnardóttir, 2014). In general, the application of Article 14 ECHR still is not entirely its 'cup of tea' as the Court frequently refuses to discuss such claims, stating instead that there is no need to rule separately on the discrimination angle of a complaint.[11]

Third, the ECtHR has developed a hierarchy of grounds protected under Article 14, deeming some criteria unacceptable as a matter of principle, such as the criterion of race,[12] or, in the absence of 'very weighty' reasons, the criterion of sex.[13] The potential development of this binary standard has been identified as problematic, albeit less rigid than the 'suspect ground' doctrine in the US (Cousins, 2009, pp. 135–136).

A last important aspect related to Article 14 ECHR is that the Court has so far failed to capture instances of *multiple* discrimination. To address all their facets, discriminatory situations must be considered comprehensively, which may include intersecting or additive grounds. Intersectional discrimination specifically arises from 'the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone' (Hannet, 2003, p. 68; Crenshaw, 1989). This differs from additive discrimination where an individual 'belongs to two different groups, both of which are affected by [discriminatory] practices' (Hannet, 2003, p. 68). As we will see, accounting for migratory vulnerability can be crucial in such cases (for a similar perspective, see Moreno-Lax, 2021).

2.2 Article 14 ECHR in the migratory context

Despite its growing relevance and potency, Article 14 ECHR has, at best, played a marginal role in the migratory context, especially in cases concerning third-country nationals in the EU who are treated in a discriminatory manner (for instance, by being refused a residence permit or social benefits) due to their migratory circumstances. This migratory situation is traditionally linked in antidiscrimination law to grounds of nationality, residence status and, more rarely, race and ethnic origin. Only in a few cases have these specific grounds proven helpful in denouncing discrimination against migrants, and only against settled migrants. Among the 'leading' judgments that deploy Article 14 ECHR in a migratory context, the first was arguably the most promising. In *Gaygusuz*, the Court addressed the question of whether there had been discrimination against a settled Turkish migrant who had been denied an advance on his pension, even if he had continuously contributed to unemployment insurance.[14] The applicant claimed a breach of his rights, among others under Article 14 ECHR in combination with Article 1 of Protocol No. 1 ECHR stipulating the right to property. The Court agreed that there was no objective and reasonable justification to exclude the applicant from said benefits.[15] He had been

[9] *D.H. and others v. The Czech Republic*, Application No 57325/00, ECHR, 2007.

[10] *Konstantin Markin v. Russia*, Application No 30078/06, ECHR, 2015.

[11] See, for example, *Lăcătuş v. Switzerland*, Application No 14065/15, ECHR, 2021, para. 123. See also *Wallovà and Walla v. Czech Republic*, Application No 23848/04, ECHR, 2006, para. 88; *Loncke v. Belgium*, Application No 20656/03, ECHR, 2007, para. 59; and more recently, *N. v. Romania*, Application No 38048/18, ECHR, 2021. Some of these rulings have prompted some dissenters to declare a 'denial of justice', as indeed seen in the partly concurring and partly dissenting opinion of Judge Ravarani in *Lăcătuş*, para. 23.

[12] *D.H. and others v. The Czech Republic,* Application No 57325/00, ECHR, 2015, para. 176.

[13] *Konstantin Markin v. Russia*, Application No 30078/06, ECHR, 2015, para. 127.

[14] *Gaygusuz v. Austria*, Application No 17371/90, ECHR, 1996.

[15] *Ibid.*, para. 45, paras 46–47.

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discriminated against based on his nationality, for which the state should have put forward 'very weighty reasons' as justifications.

Dembour's extensive assessment of *Gaygusuz* highlights the limited effect of this ruling (Dembour, 2012) which disappointed expectations of a far-reaching impact for the rights of migrants, not only with regard to their access to welfare systems (Dembour, 2015, pp. 255–256). By not elaborating on why and when discrimination based on nationality was unacceptable under the Convention, the Court left enough interpretive space to 'rein in' such an outcome in subsequent cases (Dembour, 2012, pp. 260–261). In *M.S. v. Germany*, for instance, the Court held that state parties could make a distinction between nationals and non-nationals in the context of pending extraditions.[16] Moving past singular judgments, the Court's approach seems to reflect the belief that a vision of full equality between nationalities and in all instances 'does not at all correspond to our world order' (Dembour, 2015, p. 258). In a few cases that followed, the Court ruled in favor of settled migrants who were refused the benefit of social rights.

In *Koua Poirrez*, the Court found a violation of Article 14 ECHR when a non-citizen, despite being legally resident in France and already receiving minimum welfare benefits, was denied a disability allowance.[17] This outcome has since been emulated in other decisions dealing with benefits for legally settled immigrants.[18] Similarly, in *Ponomaryovi*, two young brothers from Russia who had been living in Bulgaria since the age of six and eight, respectively, were barred from attending the last year of high school due to difficulties related to their nationality and residence status. They were found to have been discriminated against regarding their right to education under Article 2 of Protocol 1 ECHR.[19]

While each of these rulings possesses its own merits and implications, the Court only infrequently recognises nationality discrimination, as evidenced in several other cases (Dembour, 2015, pp. 265–270; de Vries, 2019, pp. 195–198). To give one example, the Court rejected a claim based on Article 14 ECHR in an Austrian case of a Serbian mother whose newborn son was taken away after birth because she was a non-citizen without a legal status.[20] The ruling contrasts sharply with the aforementioned cases where the applicants all held relatively secure legal statuses, effectively making them *less* vulnerable. Tellingly, no ruling based on Article 14 ECHR addresses the existential dilemmas that migrants often confront due to a denial of even basic social services, deprivation of liberty, police violence, torture, inhumane and degrading reception and detention conditions, deportation, *refoulement* and forced labor and slavery.

The prospects of making a successful claim around Article 14 ECHR on grounds of nationality at the Court are paradoxically the highest for permanently settled migrants and the lowest, essentially negligible, for precarious migrants at risk of the gravest violations of their rights (Brouwer and de Vries, 2015, p. 135). Moreover, the state's ability to differentiate 'appears to depend on the nature of the right at stake' (Brouwer and de Vries, 2015, p. 135): the Court usually respects the legislature's policy choices when it comes to social or economic measures (such as the right to education, housing, social assistance) unless they are 'manifestly without reasonable foundation'. This deference stems from the principle that 'national authorities are in principle

[16]*M.S. v. Germany*, Application No 4470/98, ECHR, 2000. See also *Saban Özturk and Others v. Norway*, Application No 32797/96, ECHR, 2000; *Mohammed Aftab and Others v. Norway*, Application No 32365/96, ECHR, 2000. All cases are described more extensively in Dembour, 2015, p. 261.

[17]*Koua Poirrez v. France*, Application No 40892/98, ECHR, 2003.

[18]Other ECtHR case-law regarding the entitlement to social advantages have been decided on the basis of Article 14 ECHR involving the ground of nationality: see *Niedzwiecki v. Germany*, Application No 58453/00, ECHR, 2005; *Weller v. Hungary*, Application No 44399/05, ECHR, 2009; *Dhabhi v. Italy*, Application No 17120/09 ECHR, 2014; *Fawsie and Saidoun v. Greece*, Application Nos 40083/07 and 40080/07, ECHR, 2010. See also *Luczak v. Poland*, Application No 77782/01, ECHR, 2003; *Andrejeva v. Latvia*, Application No 55707/00, ECHR [GC], 2003, as discussed in Dembour, 2015, pp. 263–264.

[19]*Ponomaryovi v. Bulgaria*, Application No 5335/05, ECHR, 2011.

[20]*Moser v. Austria*, Application No 12643/02, ECHR, 2006.

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better placed than the international judge to appreciate what is in the public interest on social or economic grounds'.[21]

This overall impression does not fundamentally change when looking at other cases, fewer in number, dealing with residence status as a potential ground of discrimination. In *Bah*, the Court did not find a violation of Article 14 ECHR in conjunction with Article 8 ECHR for a person who had unsuccessfully applied for assistance for housing for herself and her son. The reason was that she had not been granted refugee status but merely an indefinite leave to remain.[22] The UK authorities were permitted to differentiate between persons with an unconditional leave to remain and persons with permits conditional on their ability to support themselves.[23] In *Anakomba Yula*, by contrast, a non-national who had not regularised her residency was found to have suffered a violation of Article 14 ECHR linked to Article 6 ECHR, as she had been denied legal assistance to contest the paternity of her child's Belgian father.[24] The jurisprudential value of this case has been questioned, however, given the applicant's status as a 'quasi-regular migrant' seeking assistance in the crucial matter of establishing kinship (Dembour, 2015, p. 272).

Strikingly, the grounds of race and ethnic origin have only played a marginal role in discrimination cases related to a migratory context. The controversial *Biao* case is the most notable one. The Second Section of the Court initially rejected the application of a naturalised Danish citizen of Ghanaian origin. The applicant claimed a violation of Article 14 ECHR due to being denied family reunion with his Ghanaian wife because he had lived in Denmark for only about ten of the required twenty-eight years – a requirement seemingly designed to avoid hindering family reunification for 'native' citizens.[25] The Grand Chamber overruled the decision, siding with the applicant and pointing to the 'disproportionately prejudicial effect on persons who acquired Danish nationality later in life'.[26] It concluded that there was indirect discrimination based on ethnic origin. The fact that the applicant was a naturalised citizen, arguably the 'apex' of integration, might explain the Court's willingness to recognise ethnic discrimination, a recognition that has been extremely rare in migration cases. Curiously, xenophobia and xenophobic motives have, for all intents and purposes, barely ever been addressed in the Court's case law.[27] Moreover, besides *Biao*, the Court has, to our knowledge, never ruled such cases on the grounds of ethnic origin and race.[28] This is certainly a strange signal to be sent by the ECtHR, especially as the literature increasingly acknowledges that international and European migration

[21]*Stec and Others v. United Kingdom*, para. 52; *Carson and others v. United Kingdom*, Application No 42184/05, ECHR [GC], 2010; *Bah v. United Kingdom*, Application No 56328/07, ECHR, 2011, para. 47; *J.D. and A. v. United Kingdom*, Application Nos 32949/17 and 34614/17, ECHR, 2019, paras 77, 89.

[22]*Bah v United Kingdom*, Application No 56328/07, ECHR, 2011.

[23]*Ibid*., paras 47–50.

[24]*Anakomba Yula v. Belgium*, Application No 45413/07, ECHR, 2009. See also *A. and other v. United Kingdom*, Application No 3455/95, ECHR, 2009.

[25]*Biao v. Denmark*, Application No 38590/10, ECHR, 2014.

[26]*Ibid*., para. 138. It should be noted that the Court based its conclusion regarding a violation of Article 14 ECHR mainly on the ground of ethnic origin. Consequently, legislation was deemed discriminatory only for Danish nationals with a non-Danish ethnic origin, while other non-Danish nationals were also concerned by this legislation but *in fine* not by the judgment of the Court.

[27]A HUDOC search conducted on 26 December 2023 reveals that only seven cases find a violation of Article 14 ECHR and even mention the search term xenoph* in the operative part of the judgment (usually under the heading 'The Court's assessment'). Only in two recent cases, *Kreyndlin and others v. Russia*, Application No 33470/18, ECHR, 2023, para. 48, and *Basu v. Germany*, Application No 215/19, ECHR, 2022, paras. 34-35, did the Court explicitly establish a differentiation to be related to xenophobic motives. By comparison, there are forty-nine separate judgments that feature the term racis*. Double hits on a single case were removed from both searches.

[28]This, to be sure, echoes the EU Race Equality Directive, which explicitly excludes from its scope of application the provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States and to any treatment which arises from their legal status. See Article 3(2), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] *OJ L* 180/22.

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laws are racialised (Achiume, 2022; de Vries and Spijkerboer, 2022). In a context where immigration status and nationality often serve as a proxy for race and ethnic origin, European and international courts seem unable, or rather unwilling, to recognise it. Does the Court intend to suggest that in Europe there have been no justiciable instances of discrimination related to xenophobia? Or, worse yet, does it imply that such instances should be considered acceptable as long as they do not undercut specific substantive guarantees? What is sure is that the present approach leaves a gaping hole in the protection system of the Convention, since vulnerable migrants, often among the most racialised, are unable to draw attention to the structural factors underlying their hardship. These factors translate, both directly and indirectly, into considerable disadvantages that are hard to justify.

Finally, it is notable that, except for *Biao*, which was about family reunification for a naturalised citizen, none of the immigration cases decided on the basis of Article 14 ECHR concerned denials of a residence permit. Instead, they confirm that 'the right of an alien to enter or to settle in a particular country is not guaranteed by the Convention'.[29] Neither do states have an obligation under Article 8 ECHR 'to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement'.[30] However, when a state enacts immigration legislation, it must do so in a manner that complies with Article 14 ECHR insofar as grounds *unrelated to migration* are concerned.[31] In rare cases, the Court found a violation of Article 14 ECHR in conjunction with Article 8 ECHR when the granting of a residence permit was at stake, but only when these were concerned with differences of treatment between specific groups of migrants based *on characteristics other* than the ones related to the migratory context, such as family status or health condition. In *Hode and Abdi,* the Court held that the difference of treatment between, on the one hand, refugees who were married prior to fleeing their country, workers, and students and, on the other hand, refugees married *after* fleeing their country, was not objectively and reasonably justified. A refusal to grant a family-based residence permit to a same-sex partner likewise breached the ECHR.[32] In the famous *Abdulaziz, Cabales and Balkandali* case, the Court found sex discrimination against the three applicants – all with indefinite leave to remain in the UK – whose husbands had been refused permission to join them or remain with them in the UK.[33] Finally, deciding to deny a residence permit based on an applicant's health status (for instance, when they are HIV-positive) where they would have received one otherwise is in contravention of these provisions.[34]

To conclude, the Court displays a general reluctance to consider migration cases as instances of discrimination, except in narrowly defined circumstances concerning settled and *less* vulnerable migrants. What is more, we do not know how many applications have never been filed due to a lack of prospects.

3 Reconceiving the application of Article 14 ECHR in the context of migration

Seeing the shortcomings of the Court's approach, this section proposes a new vision for applying Article 14 ECHR in the context of migration, paying heed to the editors' proposition that law, in its regulation of vulnerability, can make a significant contribution to addressing protection needs (Moreno-Lax and Vavoula, in this issue). To this end, the first part revisits our conception of 'migratory vulnerability', which highlights the socially induced disadvantages incurred by migrants in different contexts. We then show how migratory vulnerability, if proven, effectively

[29]See for instance, *Kiyutin v. Russia*, Application No 2700/10, ECHR, 2011, para. 53.

[30]*Hode and Abdi v. United Kingdom*, Application No 22341/09, ECHR, 2012, para. 43. See also *Kiyutin v. Russia*, Application No 2700/10, ECHR, 2011, para. 53.

[31]*Ibid.*

[32]*Taddeucci and McCall v. Italy*, Application No 51362/09, ECHR, 2012.

[33]*Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application Nos 9214/80, 9473/81, and 9474/81, ECHR, 1985.

[34]*Kiyutin v. Russia*, Application No 2700/10, ECHR, 2011.

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constitutes a ground for discrimination that can and should 'trigger' legal proceedings under Article 14 ECHR. The subsequent section addresses the need to abandon the comparator test – a central element of the Court's current approach to discrimination cases – for it to function where differentiation is based on situational traits. Finally, we address the crucial aspect of justifications, claiming that states can indeed implement measures that pursue the legitimate aim of migration control but in a proportionate and non-arbitrary manner.

3.1 The principle of migratory vulnerability

The principle of vulnerability has been a part of the Court's jurisprudence for some time (Peroni and Timmer, 2013; Heri, 2021), including under Article 14 ECHR (Kim, 2021; Arnardóttir, 2017). Its current usage, however, is largely unsuitable for immigration cases (Baumgärtel, 2020). This section summarises the argument, detailed further in our previous works, that the Court should consider an alternative (and more nuanced) notion of 'migratory vulnerability' to better capture these realities (Baumgärtel, 2019 and 2020). Such a refined conception would enable and indeed require the ECtHR to reassess its approach to Article 14 ECHR in migration cases on a principled and foreseeable basis.

To understand both the inspiration and the need for a legal concept of migratory vulnerability, it is useful to compare the conceptions of vulnerability in scholarship and the practice of the Strasbourg Court. Fineman, in her seminal contribution 'The Vulnerable Subject', introduces vulnerability as a response to the shortcomings of traditional notions of equality, especially *formal* equality, which grounds the reasons for inequality in 'identity categories' that separate and potentially stigmatise people, and obscure the underlying structural conditions, such as disparities in wealth and power (2008). Fineman suggests that vulnerability, as a universal and 'socially embedded' heuristic, may succeed where equality falls short, because it captures the concrete yet differing expressions of inequality in different cases and situations (Fineman, 2017, p. 145).

The approach of the ECtHR, by contrast, has been to incrementally congeal individual experiences into 'categories' of vulnerabilities that are essentially 'group-based' (Baumgärtel, 2020, p. 17). Across different issue areas, the group-based vulnerability notion has proven useful for the Court's work (Peroni and Timmer, 2013; Besson, 2014, pp. 80–81). Originally used in relation to the Roma minority,[35] the concept has gradually expanded to other groups, such as people with intellectual disabilities (Peroni and Timmer, 2013, p. 1057),[36] people living with HIV,[37] and asylum seekers.[38] The Court has even developed a line of case law regarding what it considers 'particularly vulnerable migrants',[39] such as migrant children in detention (Heri, 2021, pp. 94, 98).[40] Yet, this group-based approach is of limited use in the migratory context, which is characterised by a 'multiplication of difference' due to the proliferation of legal statuses carrying various 'packages of rights' (Nash, 2009, p. 1080). Legal statuses are not only numerous but also largely void of innate qualities: persons with the 'same' status may have very different experiences depending on the country, region, or city (see Baumgärtel and Oomen, 2019), as well as the moment in time they find themselves in.[41] Moreover, given the artificial nature of status-based categories like asylum seekers, it is easy to object to the idea that status-holders are experiencing

[35]See, for example, *D.H. and others v. The Czech Republic*, Application No 57325/00, ECHR, 2007; *Oršuš and Others v. Croatia*, Application No 15766/03, ECHR, 2010; *Sampanis and others v. Greece*, Application No 32526/05, ECHR, 2008.

[36]See, for example, *Alajos Kiss v. Hungary*, Application No 38832/06, ECHR, 2010 (*Merits* and *Just Satisfaction*).

[37]*Kiyutin v. Russia*, Application No 2700/10, ECHR, 2011.

[38]*M.S.S. v. Belgium and Greece*, Application No 30696/09, ECHR, 2011.

[39]Partly Concurring and Partly Dissenting Opinion of Judge Sájo in *M.S.S. v. Belgium and Greece*, Application No. 30696/09, ECHR, 2011.

[40]See *Abdullahi Elmi and Aweys Abubakar v. Malta*, Application Nos 25794/13 and 28151/13, ECHR, 2017; as for unaccompanied children, see *Popov v. France*, Application No 39472/07, ECHR, 2012.

[41]On the 'relativity' of vulnerability, see also Brandl and Czech (2017), p. 251.

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vulnerabilities and instead contend that all of these are the acceptable expression of a state's prerogative to control migration (Baumgärtel, 2020, pp. 21–22).

The principle of migratory vulnerability aims to avoid these shortcomings of the group-based approach, while also going beyond an individual understanding of vulnerability,[42] which loses sight of the underlying structural factors (such as xenophobic attitudes, institutional biases, and spatial differentiations). It constitutes, in a way, a middle ground between the two approaches to avoid their respective pitfalls. Following Fineman, migratory vulnerability adds the 'transitory and situational adjective' to describe a characteristic shared by all vulnerable migrants varying extents spatially and temporarily – until they either return or obtain permanent residency (Baumgärtel, 2020, pp. 21–22). Crucially, these characteristics are 'socially induced rather than innate but nonetheless real' (Baumgärtel, 2020, pp. 21–22). Capturing the lived experience of migrants is achieved by replacing set 'identity' categories with a systematic analysis of social processes. Legal status categories, while certainly relevant to the factual context, cannot serve as a crutch to designate vulnerable groups. Rather, the determination of migratory vulnerability would, in each specific case, be based on factual information provided by international organisations, NGOs, scholars, and other reliable sources attesting to the *specific situation* confronting the (allegedly) vulnerable migrant. Unlike a purely individual assessment of vulnerability, this approach still recognises the link to structural causes, notably migration control and the 'route causes' of displacement (Grundler, in this issue), that underlie every situational expression of migratory vulnerability. Conceptually, this emphasis on difference and 'complex experiences' within hierarchical structures is not new but resonates with, for example, anti-essentialist and intersectional approaches to anti-discrimination law (Grillo, 1995, p. 22). In the judicial arena, elements of such a structural yet '*in concreto*' evaluation can already be found in the ECtHR's landmark case of *M.S.S. v. Belgium and Greece* (Baumgärtel, 2020, p. 23) – at least until the total reversal of the principle of 'asylum vulnerability' enunciated therein (Hudson, in this issue).

If incorporated into the Court's legal arsenal, migratory vulnerability could prove to be a highly adaptive tool with a range of legal effects. As a principle characterised by 'flexibility and versatility' (Baumgärtel, 2020, p. 27), its utility would not be limited to the immediate change of Article 14 ECHR praxis proposed here.

3.2 Migratory vulnerability as a ground of discrimination

In this section, we argue that migratory vulnerability, which designates the social processes related to the regulation of migration, ought to be recognised as a prohibited ground under Article 14 ECHR. The fact that migratory vulnerability is not an innate characteristic does not stand in the way of taking this step; the Court has made clear that prohibited grounds need not be inherent or immutable. Moreover, even though in some cases it may be related to a choice to migrate, migratory vulnerability is involuntary – an essential point to consider in the proportionality test (see Grundler, in this issue). Going a step further, we argue that in many instances, this ground could be considered a suspect one, requiring very weighty reasons for its justification. Even when it is not deemed suspect, the scrutiny it would entail is a logical necessity for human rights, given that migratory vulnerability is produced by state measures whose proportionality needs to be assessed specifically from this angle. We conclude this section by briefly addressing the relationship between migratory vulnerability and intersectionality.

Could migratory vulnerability become a ground to make a claim under Article 14 ECHR? The answer, in principle, should be yes, since it is an 'open-ended clause' that allows for criteria other

[42]See for instance the recent case about the criminalisation of beggars in Switzerland *Lağcağtuş v. Switzerland*, Application No 14065/15, ECHR, 2021, where the Court also adopted an individual approach to vulnerability.

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than those specified therein to be invoked (Gerards, 2007).[43] However, for there to be a violation, a difference in treatment must occur based on an 'identifiable' characteristic or 'status'.[44] While the open-ended character of this provision lacks clear and consistent interpretation in its case law (Cousins, 2009; Gerards, 2013; Arnardóttir, 2014), the ECtHR has recognised a large set of grounds, such as the condition of being a prisoner,[45] including the length and kind of a prison sentence,[46] as well as holding fishing rights in different areas, as relevant to the Article 14 ECHR assessment.[47] Migratory vulnerability, as a ground, transcends homogenous groups since it seeks to avoid any determinative affiliations. It thus goes beyond the legal status to encompass different kinds of migratory realities and does not denote a particularly vulnerable sub-group within a larger identity group.[48] Crucially, however, it is not a purely individual characteristic either, but foregrounds the social processes related to the regulation of migration. In short, migratory vulnerability constitutes a constructed but identifiable characteristic that relates to situational vulnerability (Kim, 2021, p. 625) shared by others.[49]

Migratory vulnerability serves as a basis for and is reinforced by social prejudice and stigma (Solanke, 2019, p. 10).[50] These are ingrained in social, political, or institutional practices. Migratory vulnerability captures the lived experience of those possessing this characteristic and replaces a premeditated set of 'identity' factors with an investigation of underlying social processes. In this sense, it should be considered as a viable, if somewhat atypical, ground for examination under Article 14 ECHR.

Judicial practice has long debated whether Article 14 ECHR violations require a 'personal' characteristic 'in the sense of being immutable or innate to the person',[51] or whether the individual is *responsible* for her situation (Fredman, 2011b, pp. 579–580). The ECtHR has by now confirmed that discrimination can occur on the basis of grounds that are *not* inherent or immutable.[52] Still, the question of whether a personal characteristic results from choice is essential to determining whether a ground is suspect and subject to a 'very weighty reasons' test, which implies a very narrow margin of appreciation of the state concerned (Gerards, 2017). This decision significantly impacts the scope and the nature of the ECtHR's control.[53] For instance, as regards immigration status, the ECtHR judged in *Bah* that, '[g]iven the element of choice involved ... while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality'.[54] This reasoning reflects a broader trend to blame migrants for their own conduct in order to forfeit their most basic rights (Carrera, 2020), which reinforces their situational vulnerability.

[43]The ECtHR itself has pointed out that the list set out in this article is illustrative and not exhaustive, for example in *Engel and others v. The Netherlands*, Application Nos 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, ECHR, 1976, para. 72; *Carson and Others v. United Kingdom*, Application Nos 42184/05, ECHR [GC], 2010, para. 70.

[44]*Hode and Abdi v. United Kingdom*, Application No 22341/09, ECHR, 2012, para. 44.

[45]*Stummer v. Austria*, Application No 37452/02, ECHR, 2011.

[46]*Clift v. United Kingdom*, Application No 7205/07, ECHR, 2010.

[47]*Alatulkkila and Others v. Finland*, Application No 33538/96, ECHR, 2005.

[48]In this sense, migratory vulnerability departs from the Court's vulnerability approach under Article 14 ECHR, which is 'distinctly geared towards *groups* that are defined by *common identity markers* and have *historically been subject to prejudice and social disadvantage*, and to have the function of facilitating *stricter review and a more substantive approach* to the case at hand' (Arnardóttir, 2017, p. 169, emphasis added). The fact that migratory vulnerability does not refer to one group is also likely to avoid the pitfall of reinforcing negative stereotypical images of the relevant groups leading to disadvantages and potentially paternalistic attitudes towards a particular class (Arnardóttir, 2017, p. 168; Kim, 2021, pp. 638–629).

[49]As explained, a narrow reference to a group must be avoided, as people are sometimes discriminated against without a particular group being identifiable.

[50]The social prejudice and stigma are the core tenet of the definition of a ground, since they put the emphasis of the disadvantage(s) attached to the characteristic, enabling a social process of disempowerment.

[51]*Bah v. United Kingdom*, Application No 56328/07, ECHR, 2011, para. 45.

[52]*Biao v. Denmark*, Application No 38590/10, ECHR, Grand Chamber, 2016.

[53]Although this impact has risen a great deal of criticism in the literature. See e.g. Peroni and Timmer (2011).

[54]*Bah v. United Kingdom*, Application No. 56328/07, ECHR, 2011, para. 47.

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To reiterate, migratory vulnerability is not an innate characteristic but mutable and likely to evolve over time and in different contexts. However, even if immigration *status* can be described as encompassing a choice dimension (although this, too, can be debated; see van Hear, Bakewell and Long, 2018; Crawley, 2010; Grundler, in this issue), the *vulnerabilities* linked to a migratory background and social processes of exclusion cannot, logically, be described as voluntary. Migrants have no say over the form and extent of migration control, which also varies per state, and would undoubtedly prefer not to be subjected to it. Moreover, it would be illusory to argue that migrants can anticipate all the negative situations that they will encounter. Social stratification perpetuated by migration control entails numerous unintended but harmful consequences (see the notion of 'consequential vulnerabilities' as proposed by Grundler in this issue), such as the entrenchment of racism and xenophobia among significant portions of the population (Baumgärtel, 2020, p. 20).

Should migratory vulnerability then be designated as a suspect ground? The answer to this question is not as straightforward. To recall, grounds found to be suspect in some instances are not *always* regarded as suspect and, as a result, do not always necessitate a 'very weighty reasons' test. Gerards suggests that suspectness 'is a complex notion, which covers a variety of factors and rationales' (Gerards, 2017). If migratory vulnerability is recognised as a prohibited ground, it would not *a priori* require very weighty reasons for justification – at least not on a principled basis, as it does not qualify as an immutable trait like sex or race. However, in a substantive number of cases, it could be argued that stereotyping and stigmatisation based on migratory vulnerability and cases of invidiousness associated with it (such as the examples discussed below) warrant, nonetheless, a 'very weighty reasons' test. More specifically, migratory vulnerability could rise to the level of a suspect ground when specific facts display a differentiation based on 'irrational motives' or where they promote an image of migrants as 'different, second-rate and inferior' (Gerards, 2013, p. 115).[55] Indeed, selection criteria for migrants appear to be neutral and merit-based only at first glance (Farcy, 2020) and often reflect stigma-carrying attributes and negative stereotypes (de Vries, 2019, pp. 206, 209). In a politically polarised context, where misrecognition is a real possibility, the line between 'legitimate' and 'invidious' differentiation is likely to be thin, requiring the Court to scrutinise the direct and indirect effects of a measure more closely. Where policies reflect illegitimate motives, the Court would need to apply a narrower margin of appreciation, just as it would for vulnerabilities other than migratory vulnerability (Peroni and Timmer, 2013, pp. 1080–1081).[56]

Even if not inherently suspect, a difference in treatment based on the ground of migratory vulnerability would still be subject to judicial scrutiny, which is a logical necessity as migratory vulnerability is produced by state measures, especially when it involves a right for which the margin of appreciation is narrower (as seen in *Ponomaryovi*, where the right to education was at stake).[57] Even without a presumption of 'suspectness', the Court may take into account factors 'that are normally relevant to determining the margin of appreciation, such as the European consensus argument or the "better placed" argument, as well the weight of what is at stake for the individual' (Gerards, 2017).[58]

Consideration should also be given to the interplay between migratory vulnerability and the intersectional approach (Crenshaw, 1989; Hannett, 2003; Moreno-Lax, 2021). Distinguishing

[55]For example, certain migrants will be perceived as such due to their particularly 'bad' nationality in terms of its quality. On this point see Kochenov (2019).

[56]*Kiyutin v. Russia*, Application no. 2700/10, ECHR, 2011, para. 67; *I.B. v. Greece*, Application No 552/10, ECHR, 2013, para. 81; *Novruk and Others v. Russia*, Application No 31039/11, ECHR, 2016, para. 100.

[57]By contrast, it would be broader when the right of private and family life is invoked, such as in the case *Moser v Austria*, Application No 12643/02, ECHR, 2006.

[58]The better placed argument implies, according to Gerards, that the Court leaves a wide margin of appreciation to the States 'because they are in a better position to assess the necessity, suitability or overall reasonableness of a limitation of fundamental rights'. As for an exhaustive analysis of the 'European consensus' doctrine, see Dzehtsiarou (2015).

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migratory vulnerability from other grounds, even when they intersect, is vital, as none of these 'traditional' grounds fully captures the structural vulnerability that can result from a migratory situation. Migratory vulnerability also does not constitute a case of multiple discrimination in itself, if we consider migration control as a separate and autonomous driver of civic stratification processes. However, in many cases, it can intersect with or add to other grounds, such as gender or race, and can, from this perspective, constitute an element in cases of intersectional or additive discrimination.

3.3 Applying the comparator test to situational traits

One important but also complex aspect in Article 14 ECHR jurisprudence concerns the application of the comparator test, particularly in migration cases (Farcy, 2020). When assessing the basis of nationality, migrants are usually perceived as being in a different situation than citizens (the 'usual' comparator), especially when they are not settled. This renders the proportionality test in antidiscrimination law irrelevant in most cases. Worse yet, when the denial of residence status is at stake, migrants simply have no relevant comparator whatsoever. Resembling the situation of pregnant women, comparisons *within* migrant categories would be inadequate, as they overlook the structural dimensions of migratory vulnerability, just as comparisons within and among women categories overlook the wider context of patriarchy. In essence, any approach premised on migratory vulnerability will face challenges tied to the comparator test. In this section, we argue that the Court should, therefore, abandon the comparator test in the assessment of discrimination on grounds of migratory vulnerability. This follows the suggestions of some authors regarding other grounds. Instead, we propose the Court should adopt the 'disadvantage test' put forward by Janneke Gerards (2013).

In its review of Article 14 ECHR cases, the Court has often applied the comparator test considering that 'only where there is differential treatment … of persons *in analogous or relevantly similar positions*, can there be discrimination' (emphasis added).[59] Some separate opinions have even stated that 'comparability is the logical precondition for engaging in the exercise of examining the justification for a difference in treatment'.[60] According to Judges O'Leary and Koskelo, 'the need to demonstrate analytical rigour when it comes to the question of comparability derives, firstly, from [the Court's] own preference under Article 14 [ECHR] for the Aristotelian principle of treating like with like',[61] which implies that only considerations of formal equality are relevant. However, this comparator approach has not been applied systematically throughout the case law of the Court.[62] In fact, its use has been described as 'underdeveloped and, at times, unclear'.[63]

By contrast, Article 14 ECHR can also imply a substantive equality approach where comparability is not central or even desirable. Timmer observes that it has become 'less important now that the Court adjudicates indirect discrimination cases increasingly often and, anyway, the Court almost never pays explicit attention to the comparability in cases that concern "suspect" classifications' (Timmer, 2011, p. 719). Using a comparability test can be deceptive, especially when a substantive equality approach is needed. As Fredman explains, the comparability approach assumes a 'universal' individual; this comparator is usually male, heterosexual, white,

[59]*Bah v. United Kingdom*, Application No. 56328/07, ECHR, 2011; *Molla Sali v. Greece*, Application No. 20452/14 ECHR [GC], 2011, para. 133; *Popović and others v. Serbia*, Application No. 26944/13, ECHR, 2020, para. 71.

[60]Joint concurring opinion of Judges Ravarani and Schukking in *Popović and others v. Serbia*, Application No. 26944/13, ECHR, 2020, paras 5, 6. See also Joint concurring opinion of Judges O'Leary and Koskelo in *Fábián v. Hungary*, Application No. 78117/13, ECHR [GC], 2017, para. 12.

[61]*Ibid*., para. 10.

[62]See for instance *B.S. v. Spain*, Application No. 47159/08, ECHR, 2012.

[63]Joint concurring opinion of Judges O'Leary and Koskelo in *Fábián v. Hungary*, Application No. 78117/13, ECHR, 2017, para. 2.

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healthy and Christian. This universal individual assumption creates powerful conformist or assimilationist pressures that undermine substantive equality (Fredman, 2011b), as the American feminist experience shows us (Goldberg, 2011). In other words, a comparator approach 'obscures what discrimination law should be about: addressing disadvantage and subordination of certain disfavored groups', by getting stuck in in a sameness/difference ideology (Peroni and Timmer, 2011).[64] The Court itself departed from the comparative approach in several cases involving issues of substantial equalities, especially indirect discrimination, showing that, in some instances, this approach is inappropriate to deal with inequality related cases.[65]

In this context, the comparator test appears particularly unsuitable for dealing with migratory vulnerability, which is grounded in a substantive equality approach. The aim is to identify *specific* exclusionary practices caused by social processes linked to the migratory trajectory and migration control, for which it might be difficult, if not impossible, to find a comparator group – considering that citizens are, by definition, free of any such constraint. Relying on a comparator would obscure the disadvantages that migrants experience due to their specific vulnerabilities that result from the many social processes behind their migratory background, which will be idiosyncratic.[66] Finally, introducing a comparator in such cases would also risk creating groups of 'deserving' and 'undeserving' vulnerable migrants, whereas this ground is fluid and is likely to evolve from one situation to another (Ganty, 2022).

It should be noted that alternative approaches to the comparability tests have been proposed: for instance, the 'disadvantage test' by Gerards (2013) requires applicants to prove that a rule or practice disadvantaged them in comparison to any other person or group of persons without the need to find a 'proper' comparator, understood as a person or group placed in a relevant similar situation. In other words, it is sufficient for the applicant to show that she has suffered a genuine disadvantage or less favourable treatment: 'the only relevant question is if one group or person is allowed to exercise a certain right or receive a certain benefit, whilst this is not permitted for another person or group', regardless of whether it is or is not in a similar situation (Gerards, 2013). The 'disadvantage test' is a good fit for assessing migratory vulnerability ground, as the focus is on the less favorable treatment without regarding for *the other group* placed in a similar situation. For instance, revisiting the previously mentioned *Bah* case, the disadvantage test would involve comparing the applicant – who was not given priority in the allocation of social housing due to her son's immigration status – to any parent who is refused social housing, including British citizens. This contrasts with the narrow comparator that the Court actually applied: a 'person who has indefinite leave to remain in the United Kingdom like the applicant, but whose child is either not subject to immigration control or has an unconditional form of leave'.[67] In this context, the disadvantage test approach is particularly suitable to be applied to the ground of migratory vulnerability, which already encompasses the notion of disadvantage through the vulnerability assessment.

3.4 How to appraise claims including limitations and the proportionality of legitimate measures

As argued in our previous article, the principle of migratory vulnerability can serve different functions within the legal reasoning of the ECtHR; when its effects are diffuse, such as in the

[64]Even when specific and contextual, see Joint concurring opinion of Judges O'Leary and Koskelo in *Fábián v. Hungary*, para. 26. There has been a lot of criticism regarding the comparability approach of the Court in some cases, leading to a 'circular reasoning', especially when it is appreciated on the difference between legal regimes: see dissenting opinion of Judge Björgvinsson in *Burden v. United Kingdom*, Application No. 13378/05, ECHR [GC], 2008, as well as Joint concurring opinion of Judges Ravarani and Schukking in *Popović and others v. Serbia*, Application No. 26944/13, ECHR, 2020, para. 14.

[65]See for instance *D.H. and others v. The Czech Republic*, Application No. 57325/00, ECHR, 2015.

[66]The possibility of idiosyncratic disadvantages is well-established: one example are pregnant women and the incomparable situation that they find themselves in in their workplace.

[67]*Bah v. United Kingdom*, Application No. 56328/07, ECHR, 2011, para. 42.

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enlargement of the scope of Article 3 ECHR or the creation of positive obligations (Baumgärtel, 2020), the principle mostly helps to counterbalance vulnerabilities experienced by migrants. By contrast, when it leads to a claim under Article 14 ECHR, it offers an autonomous remedy for migrants to challenge unjustifiable differentiation and exclusion processes.

Key to achieving this objective is the streamlined, three-step process of evaluating whether, in any given case, the applicant(s) suffered a violation of Article 14 ECHR based on their migratory vulnerability (Arnardóttir, 2013). First, it must be assessed whether claims fall *within the ambit* of any substantive ECHR provisions, which is a prerequisite for a successful invocation of Article 14 ECHR. The finding of a substantive violation is hereby *not* required (Arnardóttir, 2013, p. 339). The second step involves identifying the ground of discrimination, namely migratory vulnerability, as outlined above, which implies that a *prima facie* discrimination has occurred (as illustrated in the two examples below). Finally, an assessment of whether there are 'objective and reasonable' justifications for differentiation is needed, which means that states must prove a 'legitimate aim' as well as 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[68] It must be shown to be the least intrusive means in the specific situation of the person concerned. In this context, we expect state parties to easily pass the hurdle of the legitimate aim by referring to immigration control, whose significance is firmly enshrined in the case law of the ECtHR.[69] Providing proof of their proportionality will be more difficult given that many (if not most) government policies in this area are never scrutinised for their *actual* impact, but are largely accepted based on a *presumption* of effectiveness that derives from a problematic paradigm of deterrence (Gammeltoft-Hansen and Tan, 2017; see also Moreno-Lax and Giuffré, 2019). The logical (but seldom discussed) consequence of this state of affairs is that vulnerable migrants are de facto forced to frame their claims as violations of Article 3 ECHR (the prohibition of inhumane and degrading treatment). While the latter does not imply a proportionality assessment, it creates an exceedingly high threshold for them to meet.

The activation of Article 14 ECHR in cases concerning migratory vulnerability would offer the Court an opportunity to reintroduce a sense of real universality, where migrants can at least hope to make a successful claim not only related to Article 3 ECHR but to any provision of the Convention, many of which would be 'unlocked' for the first time in the context of migration. State parties will be asked to justify the limitation of rights in the migration context – as stated, this is presently rarely the case (see also Dembour, 2015). Within the framework of Article 14 ECHR, this requires assessing the proportionality of a measure, which includes its suitability to achieve the intended goal, the possibility of attaining them through alternative, less intrusive measures, and balancing between the disadvantage suffered by the applicant against the (real, not presumed) progress made towards achieving the goal declared. Like the determination of migratory vulnerability, it would have to be determined *in concreto* whether this is the case based on reliable empirical information offered by national and international organisations, NGOs, and scientists (Baumgärtel, 2020). The next section will illustrate how this can be achieved in practice with two examples.

We want to conclude by stressing that the objective assessment of justifications will be central to the evaluation of Article 14 ECHR claims. Indeed, it is 'the natural analytical step by which courts can redeem government actions which … do not pursue or perpetuate invidious bias' (Baker, 2006, p. 722). The option of justifications is the (appropriate) heed that human rights law has to pay to the need for immigration control or, put more abstractly, of inclusion and exclusion into a political order.[70] However, the effect of forcing states to engage in such systematic and

[68] *Thlimmenos v. Greece*, Application No. 34369/97, ECHR, 2000, paras 44–46.

[69] See, most notably *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Application Nos 9214/80, 9473/81 and 9474/81, ECHR, 1985.

[70] For a similar argument, see Schotel (2013). Dembour also endorses this model of state interference in her radical critique of the ECtHR's migration case law, see Dembour (2015), pp. 118–119.

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evidence-based procedures should not be underestimated – again, it introduces human rights scrutiny where there is little to none at present.

4 Applying migratory vulnerability to Article 14 ECHR: Two examples

This section discusses two specific examples of applications of the principle of migratory vulnerability to cases of Article 14 ECHR. While hypothetical, they concern topical issues that showcase the potential immediate benefit of such a changed approach for the protection of human rights across Europe.

4.1 Example 1: COVID-19 vaccinations for vulnerable migrants

The denial of COVID-19 vaccination to groups of migrants provides a paradigmatic example of how migratory vulnerability can be used to expose the discrimination and exclusion of individuals from their most basic need – protecting their health and their lives. In this context, the use of migratory vulnerability in antidiscrimination law appears to be all the more important to protect those migrants who are at the margins of society and excluded from vaccination schemes.

Making a vaccination programme widely available constitutes an international legal obligation for public authorities, as various international and European bodies have confirmed.[71] The ECtHR has recognised that 'vaccination is one of the most successful and cost-effective health interventions'.[72] This echoes the World Health Organization's position that 'vaccines are one of the most effective tools for protecting people against COVID-19' (WHO, 2021). At the same time, it has been well-documented that migrants in Europe, especially undocumented migrants, have been particularly impacted by COVID-19, as they are among the 'at risk' population due to their typically precarious health and living conditions (Bambra *et al.*, 2020, pp. 1–5; Buheji *et al.*, 2020, p. 220). Public authorities' measures during the lockdown disproportionality impacted those living in cramped, unsanitary, and overcrowded accommodation (Beaunoyer *et al.*, 2020, pp. 1–9; Jæger and Blaabæk, 2020, pp. 1–5).[73] Workers in the informal sector, which has a high representation of undocumented migrants, have found themselves without income and lacking social protection. Amid these circumstances, COVID-19 vaccines emerged as a vital and urgent remedy to protect vulnerable migrants, who bore a higher burden of the pandemic compared to the general population.

That said, vulnerable migrants in Europe, especially (but not exclusively) undocumented migrants, have been excluded from the vaccination plans, if not explicitly, then implicitly. Many Western countries initially did not include undocumented migrants in their vaccination plans, thus removing a large number of people who are already in the shadows, de facto out of any health protection schemes (PICUM, 2021; IOM, 2021). As reported by the IOM, based on data collected between January and May 2021 (IOM, 2021), out of twenty-five countries in the European Economic Area (EEA), most regular migrants, asylum seekers and refugees had access to vaccination in practice. However, eight countries excluded undocumented migrants, and five others did not provide clear information about their policies. By March 2022, more than a year

[71]Including under Article 12(2)c) of the International Covenant for Economic, Social and Cultural Rights, which enshrines the right to prevention, treatment and control of disease, including the implementation or enhancement of immunisation programmes and other infectious disease control strategies. See General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, *The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 [2000], para. 16. See also Art. 11(3)(d) European Social Charter and European Committee for Social Rights as well as the European Social Charter and European Committee for Social Rights, Conclusions XV-2, Belgium, Art. 11–3, 31 December 2001.

[72]*Vavricka and Others v. The Czech Republic*, Application No. 47621/13, ECHR, 2021, para. 277.

[73]See also, Special Rapporteur on Extreme Poverty and Human Rights (2020) *Looking Back to Look Ahead: A Rights-based Approach to Social Protection in the Post-COVID-19 Economic Recovery*, Response to HRC Res. 44/13, para. 44.

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after the widespread rollout of vaccines, the situation had somewhat improved, but four EEA countries had still not, in practice, provided vaccinations to undocumented migrants. The status was unclear in another twelve countries (IOM, 2022). Moreover, out of twenty countries spanning Southeastern Europe, Eastern Europe, and Central Asia, six had effectively barred undocumented migrants from receiving vaccinations, with another five not providing clear information (IOM, 2022).

Some countries went even further to exclude regular migrants, refugees and/or asylum seekers from their vaccination plans, either explicitly or in practice. For instance, Hungary's initial vaccination plan did not reference undocumented migrants, or foreigners in general. While vaccination later became possible for foreigners, it required an identification document such as a residence permit for non-national residents, thereby de facto excluding undocumented migrants. In Germany, the Ministry of Health stated that undocumented persons were entitled to vaccinations if they were habitually resident (PICUM, 2021). However, undocumented migrants without health insurance faced a conundrum; to get their vaccination costs covered by public authorities, they had to contact the welfare office, risking exposure to immigration authorities, as all public authorities are obliged to report back to the immigration agency (Haque and Margotinni, 2021; Matlin *et al.*, 2022). As a consequence, beyond the explicit exclusion of certain migrant groups from vaccination plans, the requirement to provide specific documents or the blurred barriers between health and immigration authorities created substantial obstacles for individuals, and hence vulnerabilities arising out of their migratory situation. The IOM has also underlined other challenges faced by undocumented and other migrants, including hurdles in online registration, financial barriers (e.g., fees for the vaccine), informational barriers, vaccine hesitancy, and mistrust in the health system. These issues can be attributed, at least in part, to the persistent experiences of discrimination encountered by migrants (Gamble, 1997, pp. 1773–1778; Razai *et al.*, 2021, pp. 1–2; Bogart *et al.*, 2021, pp. 200–207).

In practice, many migrants have therefore been excluded due to vulnerabilities deriving from the administrative, legal, social, familial, and material context linked to their migratory status. Although such migratory vulnerability is likely most pronounced among those with an undocumented status, it undoubtedly impacts a wider population negatively. In such a context, an antidiscrimination approach (combining Article 14 ECHR in conjunction with Articles 2, 3 and/or 8 ECHR) appears necessary to counteract measures or omissions leading to the exclusion of these individuals. Moreover, as vaccines have become widely available throughout Europe, it is difficult to imagine any justification, including migration control, legitimising disadvantageous treatment. In essence, a ruling related to Article 14 ECHR and linked to migratory vulnerability would likely redress such disadvantages by facilitating easier access to vaccines and mandating the adoption of vaccination policies for migrants. This would include the creation of 'firewalls' (Crépeau and Hastie, 2015) that ensure that undocumented migrants can be vaccinated without their information being forwarded to government agencies.

4.2 Example 2: Discrimination within the 'right to rent' scheme in the United Kingdom

Another example of a useful potential application of the concept of migratory vulnerability can be found in the UK, where the conservative government introduced a 'hostile environment' policy in 2012 (Griffiths and Yeo, 2021). While not unique in Europe, this approach stands out in expressing '[t]he explicit intention … to weaponise total destitution and rightlessness, so as to force migrants without the right to be in the country to deport themselves, at low or no cost to the UK' (Webber, 2019, p. 77). Put differently, the deliberate creation of migratory vulnerabilities – and their entrenchment in law (Moreno-Lax and Vavoula, in this issue) – was openly promoted as a specific policy objective requiring little to no justification in human rights terms. The

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disadvantages have been arbitrary and wide-ranging, affecting social rights, such as the rights to education and health, as well as civil rights, such as the right to liberty and private and family life (Webber, 2019, p. 77).

One aspect that has garnered much public attention and judicial scrutiny is the so-called 'right to rent' scheme, which requires private landlords to check the immigration status of their potential tenants.[74] This policy was legally challenged at the domestic level by the Joint Council for the Welfare of Immigrants, which argued that it constituted a violation of Articles 8 ECHR in conjunction with Article 14 ECHR, as landlords were discriminating against tenants on the basis of nationality, ethnicity and race.[75] The High Court initially sided with the claimants, finding that there was indeed a causal link between the scheme and what it considered proven discriminatory behaviour of landlords.[76] Crucially, the ruling also stated that the government 'failed to justify the Scheme, indeed it has not come close to doing so' and to establish 'a reliable system for evaluating the efficacy of the Scheme'.[77] Yet, the Court of Appeal subsequently set aside the ruling. Applying a different standard to assessing the justification, it held that the measure was not intended to discriminate (migratory vulnerabilities not considered, of course), but that it ended up doing so 'only collaterally', due to the (mis)behaviour of the landlords.[78] The Court also concluded that the scheme's effects were 'difficult to quantify'[79] and that its justification, therefore, derived simply from the 'legitimate objective of the statutory provisions ... to support a coherent immigration system in the public interest'.[80]

With the case still under review with the UK Supreme Court, legal outcomes would change with the application of the principle of migratory vulnerability. Rather than seeing instances of discrimination as 'entirely coincidental',[81] a focus on migratory vulnerability reveals that the effects of the 'right to rent' scheme are not isolated to people without legal residency. Rather, they are situational, dispersed among a wider population of actual and supposed immigrants as well as individuals with a migratory background – even if they are (allegedly) not the target group. The reason for this diffuse effect is that the implementation is 'outsourced' to landlords, private persons who usually lack the required expertise in human rights and migration law (Williams, 2020, p. 239). Without measures to the contrary, possibilities to redress any denial of rights are also limited in practice, as critics have argued from the outset (Williams, 2020). Once empirically identified as creating migratory vulnerabilities for a heterogenous population (Williams, 2020; Grant and Peel, 2015), the discriminatory effects of the measure challenged under Article 14 ECHR appear to fall within the ambit of Articles 8 ECHR and, even more compellingly in our view, Article 3 ECHR: homelessness and the resulting destitution can, under certain circumstances, be considered as 'humiliating treatment showing a lack of respect for ... dignity' on the part of the responsible state.[82] The fact that the UK authorities have neither proven the effectiveness of the scheme for the (legitimate) objective of immigration control nor explored alternative, less intrusive, and less arbitrary measures to achieve the same goal render it disproportionate and ultimately violative of Article 14 of the Convention.

[74]The full assessment of the various effects of this scheme are beyond the scope of this paper. For this, see Williams (2020).

[75]*Joint Council for the Welfare of Immigrants, R (On the Application Of) v Secretary of State for the Home* Department [2019] EWHC 452 (Admin), 2019, paras 93–94.

[76]*Ibid*., para. 105.

[77]*Ibid*., para. 123.

[78]The *Secretary of State for the Home Department v R (on the application of) Joint Council for The Welfare of Immigrants* [2020] EWCA Civ 542, para. 148.

[79]*Ibid*., para. 146.

[80]*Ibid*., para. 113.

[81]*Ibid*., para. 148.

[82]*M.S.S. v. Belgium and Greece*, Application No. 30696/09, ECHR, 2011, para. 263.

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5 Conclusion

This article has challenged the farcical notion that only few instances of discrimination against migrants amount to a violation of Article 14 ECHR. We are not the first to raise this point; as Dembour (2015) has aptly highlighted, 'theoretically, the whole migrant case law could be reconstructed as instances of discrimination' (p. 270). The first part of this article summarised the shortcomings of the existing case law of the ECtHR and the judicial approach that underlies it, while also stressing the potential legal value that can be derived from activating the anti-discrimination clause, as evidenced in other domains. In the second part, we explained how a reconstruction of the Court's approach to migration cases under Article 14 ECHR could be achieved using the principle of migratory vulnerability as its foundation. By enabling the Court to recognise the politically and socially induced disadvantages that confront migrants in different, yet identifiable ways, migratory vulnerability also has the potential to constitute a basis of differential treatment subject to judicial scrutiny. Even if not considered as a suspect ground, a reference to migratory vulnerability would still allow migrant applicants to legally challenge situations of invidious, disproportionate and/or arbitrary treatment. We illustrated this potential for judicial change through two concrete examples, namely the denial of COVID-19 vaccines to migrants and the discriminatory 'right to rent' scheme in the UK that outsources migration control to private persons such as landlords.

We are under no illusions that our argument significantly deviates from the ECtHR's current practice and that we are unlikely to witness any such reform in the near future. However, the history of anti-discrimination law in Europe and elsewhere is full of changes once thought impossible. By showing that it is doctrinally feasible to identify discrimination based on migratory vulnerability under Article 14 ECHR, we hope to have come one step closer to another such moment.

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