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Situating Vulnerability Reasoning in a Broader Context

Chapter Summary

The present chapter provides context for understanding the Court's approach to vulnerability. It does so in three main ways. First, it refers briefly to trends in the work of other human rights bodies, showing that the Court is not alone in deploying this concept. Secondly, it looks at minority protection, showing that vulnerability reasoning evolved in parallel to key moments relating to the protection of minorities, and discusses how a turn to vulnerability fits into the Council of Europe's approach to minority rights. Thirdly, it looks at another key area in which the ECtHR applies vulnerability reasoning, namely its non-discrimination case law under Article 14 ECHR.

Keywords: minority rights; non-discrimination; Article 14 ECHR; comparative perspective; margin of appreciation.

I. Vulnerability and Other Human Rights Bodies

As noted in the introduction to this volume, the Court is not alone in using the concept of vulnerability, or in using it as it does, namely to describe specific situations and groups that require particular attention without providing a clear definition of the concept. A number of human rights bodies have taken the same approach, including the UN Committee on Economic, Social and Cultural Rights (CESCR),¹ the UN Human Rights Committee (HRC), in its documents but not its Views,² the European Committee for the Prevention of Torture and

¹Audrey R Chapman and Benjamin Carbonetti, 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic Social and Cultural Rights' (2011) 33(3) *Human Rights Quarterly* 682–732, 683–85.

²HRC, 'General Comment No 21 on Article 10 (humane treatment of persons deprived of their liberty)', UN Doc HRI/GEN/1/Rev 9 (Vol I), 202–04, adopted on 10 April 1992, para 3.

Inhuman or Degrading Treatment or Punishment (CPT),³ the Committee on the Rights of the Child,⁴ the Committee on the Elimination of Discrimination against Women (CEDAW),⁵ the European Committee of Social Rights,⁶ the Inter-American Court of Human Rights,⁷ and the European Committee against Racism and Intolerance (ECRI),⁸ to name a few. The concept is also an integral part of the EU legal framework applicable to asylum-seekers and refugees.⁹

This is one part of the context of the Court's vulnerability reasoning, although a somewhat remote one in the sense that the Court usually does not refer to these other bodies in finding that someone is vulnerable; its reasoning in this regard is mostly self-contained.¹⁰ In other words, the approaches of these bodies do not provide much insight into the Court's approach beyond indicating that the Court is not alone in using this concept and in using it selectively, ie not in the sense of universal vulnerability. In addition, the fact that so many bodies use this concept may be an indication that regard for vulnerability is considered an intrinsic or underlying element of human rights guarantees.

Next to this source of context, however, there is another one, namely the context of how the concept came to be within the Council of Europe system. The following will explore the evolution of minority protection internationally and within the Council of Europe and suggest that vulnerability came about, at least in part, as a response to the limping along of efforts to provide minority protection.

³ CPT, CPT Standards, CPT/Inf/E (2002) 1, Rev 2015, January 2015, www.cpt.coe.int/en/documents/eng-standards.pdf, 45–46.

⁴ Kirsten Sandberg, 'The Convention on the Rights of the Child and the Vulnerability of Children' (2015) 84(2) *Nordic Journal of International Law* 221–47, 223.

⁵ CEDAW Committee, General Recommendation No 19: Violence against Women, UN Doc A/47/38, 1992, para 15.

⁶ European Committee of Social Rights, Conclusions 2015 (Andorra), Doc 2015/def/AND/17/2/EN, 4 December 2015.

⁷ IACtHR, *Ximenes Lopes v Brazil*, Judgment of 4 July 2006, Series C-149, para 103; IACtHR, *González et al ('Cotton Field') v Mexico*, Judgment of 16 November 2009, Series C-205, paras 282 and 284; Rosmerlin Estupiñán-Silva, 'La vulnerabilidad en la jurisprudencia de la Corte interamericana de derechos humanos: Esbozo de una tipología', *Derechos Humanos y Políticas Públicas: Manual* (Red Derechos Humanos y Educación Superior, 2014), 193–231, 197.

⁸ ECRI, General Policy Recommendation no 3 on Combating Racism and Intolerance against Roma/Gypsies, 6 March 1998, www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N3/Rec03en.pdf, 4.

⁹ See, for example, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [2013] OJ L180/96–116, Art 2k. Overall, see Joanna Pétin, 'Exploring the Role of Vulnerability in Immigration Detention' (2016) 35 *Refugee Survey Quarterly* 91–108, 93, with supporting references.

¹⁰ Although there are exceptions. See *Khlaifia and Others v Italy* App no 16483/12, Judgment (GC) of 15 December 2016, Reports 2016 (extracts), paras 46–47, referring to the International Law Commission (ILC)'s 'Draft articles on the expulsion of aliens', UNGA Res A/RES/69/119 (10 December 2014).

II. Vulnerability and the Context of Minority Rights

A. Attention to Minority Rights in the 1980s and 1990s

The creation of minority-specific international legal protections did not take off until the late 1980s.¹¹ This era saw the conclusion of numerous bilateral treaties concerning minority rights between individual states,¹² which, however, were often characterised by ambiguousness, ‘escape clauses’ and guarantees of territorial integrity.¹³ In Europe, the development of strong minority protections did not really take off until the early 1990s, when the Conference on Security and Co-operation in Europe (CSCE), now the Organization for Security and Co-operation in Europe (OSCE), adopted a series of non-binding minority rights instruments.¹⁴ In 1992, the UN joined in, adopting its Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities¹⁵ One year later, in 1993, it held the Second World Conference on Human Rights in Vienna.¹⁶

To understand who falls under the protection of these instruments, it is helpful to clarify what constitutes a minority group. That definition, like the definition of the concept of vulnerability, has been the source of controversy in the course of drafting the relevant international instruments, reflecting a lack of international consensus.¹⁷ An early definition was provided by UN Special Rapporteur Francesco Capotorti in 1979, who defined a minority as:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹⁸

¹¹ Rainer Hofmann, ‘Minorities, European Protection’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* vol II (OUP, 2012), 240–53, 241, para 2.

¹² For examples, see Arie Bloed and Pieter Van Dijk (eds), *Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe* (Kluwer Law International, 1999). In all, see Hofmann (n 11), 241, para 2.

¹³ Kristin Henrard, ‘Minorities, International Protection’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* vol VII (OUP, 2012) 254–70, 264–65, para 63.

¹⁴ Document of the Second Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, www.osce.org/node/14307; ‘The Challenges of Change’, Document of the Summit of the CSCE, Helsinki, 9–10 July 1992, from 8.

¹⁵ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Doc A/RES/47/135, 18 December 1992.

¹⁶ IACtHR, *Ximenes Lopes v Brazil* (n 7), Separate Opinion of Judge Antônio Augusto Cançado Trindade, para 42, with further references.

¹⁷ Henrard (n 13), 254, para 1.

¹⁸ Francesco Capotorti, ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’ (1979) UN Doc E/CN.4/Sub.2/384/Rev.1, para 568; OHCHR, ‘Minority Rights: International Standards and Guidance for Implementation’ (Geneva 2010) HR/PUB/10/3, www.ohchr.org/Documents/Publications/MinorityRights_en.pdf, 2.

This definition has been criticised because of its requirements of numerical inferiority and of nationality.¹⁹ Commentators have also suggested that the definition should be widened to allow the recognition of groups that did not originally meet its criteria as ‘minorities’, for example persons with disabilities, certain political groupings or LGBTQI people.²⁰ Capotorti’s definition has, however, gained general acceptance regarding the objective elements it contains, namely that a particular trait distinguishes a minority from the majority, that minorities are non-dominant in the general population, and its subjective trait, namely that they share the will to maintain this trait.²¹

How do these developments relate to the Court’s vulnerability jurisprudence? Modern-day attention to the human rights of the vulnerable may be part of the legacy of the 1993 Vienna World Conference, which is at least illustrative of a turn towards vulnerability. The Conference’s agenda concerned ‘all human rights of women and men, including those of persons belonging to vulnerable groups.’²² Its final outcome document called for ‘promotion and protection of the human rights of persons belonging to groups which have been rendered vulnerable’ and for ‘the promotion and protection of the rights of persons in vulnerable sectors of [states’] populations.’²³ While it did not explicitly mention vulnerability, the Vienna Declaration itself contained an appendix on combating xenophobia, racism and discrimination, as well as another on the rights of national minorities.²⁴ This may all have fed into the work of the Council of Europe, where, after 1992, the number of references to vulnerability increased perceptibly in the work of various actors, including the Committee of Ministers and the Secretary-General.²⁵ The Court’s vulnerability jurisprudence, which began to materialise as the World Conference was being prepared,²⁶ also emerged full-force after the Conference’s conclusion.²⁷

Today, as touched upon above, minority protection is based on two pillars: first, the general protection of human rights as they apply to members of minorities

¹⁹ OHCHR (n 18), 2–3.

²⁰ Ibid, 3.

²¹ Hofmann (n 11), 241, para 4.

²² World Conference on Human Rights, Provisional Agenda: Note by the Secretary-General, UN Doc A/CONF 157/1, 18 May 1993, para 11.

²³ World Conference on Human Rights, Vienna Declaration and Programme of Action of 25 June 1993, UN Doc A/CONF 157/23, 12 July 1993, para I.24.

²⁴ Council of Europe, Vienna Summit, Final Declaration, 9 October 1993, Appendixes II and III, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680536c83>.

²⁵ See for example the Report to the Committee of Ministers of the European Population Conference held in Geneva on 23–26 March 1993 (CM(93)146, 6 August 1993, 44, 46, 52 and 53).

²⁶ *Tomasi v France* App no 12850/87, Report (Commission) of 11 December 1990, paras 104–05; *Olsson v Sweden (No 2)* App no 13441/87, Judgment (Chamber) of 27 November 1992, Series A250, para 87.

²⁷ *Ribitsch v Austria* App no 18896/91, Report (Commission) of 4 July 1994, para 115; *Aksoy* App no 21987/93, Decision (Commission) of 19 October 1994, 70; *S.P., D.P. and A.T. v United Kingdom* App no 23715/94, Decision (Commission) of 20 May 1996.

as human individuals, and secondly, the more specific provisions of minority protection aimed specifically at protecting these groups.²⁸ To Kristin Henrard, minority rights are ‘actually just one of several sets of category-specific human rights, namely special rights for persons belonging to vulnerable groups.’²⁹ Other examples of these ‘special rights’, she argues, can be found in group-specific human rights instruments such as the CRC.³⁰ The two pillars of general and group-specific human rights protection complement each other, and minority-specific protections supplement lacunae in the protection afforded by more general human rights instruments.³¹

If these two pillars are related, then understanding specific minority rights is essential for understanding the concept of vulnerability as it relates to universal rights. The following will in particular explore the protection of minorities in under the auspices of the Council of Europe. This will transition into an examination of the way in which minority protection-related arguments have flowed into the development of vulnerability reasoning under Article 14 ECHR, which in turn informs the vulnerability heuristic employed under Article 3 ECHR.

B. Minority Protection in the Council of Europe

The two-pillar approach to minority protection can also be observed in the Council of Europe. After the Second World War, the Council of Europe provided some degree of minority protection with Article 14 ECHR’s ‘accessory’ protection of non-discrimination, which was later supplemented by a non-accessory prohibition of discrimination in Protocol No 12 to the Convention.³² Beyond this, the ECHR contains no further specific protection of minority rights, although of course the universal rights in the Convention also apply to members of minorities.³³

In 1992, when the UN and other actors were adopting their own minority protections, the Council of Europe adopted a legally binding instrument by creating the European Charter for Regional or Minority Languages.³⁴ In 1994, these efforts were followed by the adoption of the Framework Convention for the Protection of National Minorities (FCNM).³⁵ The groundwork for this treaty, as well as for the

²⁸ Henrard (n 13), 258, para 28.

²⁹ Ibid, 258, para 27.

³⁰ Ibid.

³¹ Ibid, 259, para 29, and 261, paras 43–44.

³² Hofmann (n 11), 240–41, para 1; Protocol No 12 to the ECHR, ETS 177, Rome, 4 November 2000, in force since 1 March 2005, 20 states parties.

³³ Ibid; Henrard (n 13), 261, para 44.

³⁴ European Charter for Regional or Minority Languages, ETS 148, Strasbourg, 5 November 1992, in force since 1 March 1998, 25 states parties.

³⁵ Framework Convention for the Protection of National Minorities (FCNM), ETS 157, Strasbourg, 1 February 1995, in force since 1 February 1998, 39 states parties, preamble, 10th recital, referring to the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, cited above at n 14.

establishment of the permanent ECtHR and the creation of ECRI, was thus being laid at the same time as the Vienna Declaration was being prepared.

Today, the effectiveness of minority rights protection in Europe can be separated into three tiers: (i) the strong, binding judicial system of the ECHR, (ii) the legally non-binding one provided by the OSCE or the Council of Europe's ECRI, and (iii) the intermediate, quasi-judicial system under the FCNM, with its Advisory Committee's non-binding opinions, which form the basis of corresponding binding decisions by the Committee of Ministers.³⁶ Although the ECHR, in structural terms, offers the strongest system of minority rights protection in Europe, its relevance in this area is limited because it lacks minority-specific guarantees and because the Court has, historically, been reticent in addressing such issues.³⁷

The entry into force of Protocol No 12 to the ECHR, which introduces a non-accessory prohibition of discrimination, was seen as a potential step towards strengthening the role of the Court in this area, but the Protocol has only been ratified by 20 states to date and the Court has issued only a handful of relevant judgments.³⁸ An Additional Protocol on the protection of national minorities was suggested in the 1990s, but was not pursued in light of a failure to agree on the content of such an instrument.³⁹ Attempts to draft a new proposal for such an Additional Protocol in 2011 have been accompanied by expressions of regret about the low number of ratifications of Protocol No. 12, the FCNM and the Language Charter, and the 'numerous shortcomings' in their implementation.⁴⁰

Despite – or perhaps because of – these lacunae, the ECtHR has gradually moved from a restrictive, formal take on equality with a focus on the state margin of appreciation to an approach that recognises and incorporates the need to protect minorities, including from indirect discrimination.⁴¹ In 1999, the Court found that a democracy, which it considers to be characterised by 'pluralism, tolerance and broadmindedness', is not simple majority rule: 'a balance must be achieved which ensures the fair and proper treatment of minorities'.⁴² The Court went on to find that measures restricting the rights of a minority must be not merely 'useful' or 'desirable' but 'necessary'.⁴³ This approach was further developed two years later

³⁶ Hofmann (n 11), 245–46, paras 18–20. See also Council of Europe Committee of Ministers, Resolution Res(2002)8 on the Statute of the European Commission against Racism and Intolerance, 13 June 2002.

³⁷ Hofmann (n 11), 245, para. 17. See also, instead of many, the *Belgian Linguistics Case* App nos 1474/62 ..., Judgment of 23 July 1968, Series A6.

³⁸ Hofmann (n 11), 245, para 17, referring to Protocol No 12 to the ECHR (n 32).

³⁹ Henrard (n 13), 263, para 51, and PACE, Committee on Legal Affairs and Human Rights, Report on an Additional Protocol to the European Convention on Human Rights on National Minorities, AS/Jur(2011)46, 8 November 2011, 9–10, paras 30–35.

⁴⁰ PACE (n 39), especially 1, paras 2 and 3.

⁴¹ Henrard (n 13), 266, paras 73–74, 76–77; *Thlimmenos v Greece* App no 34369/97, Judgment (GC) of 6 April 2000, Reports 2000-IV, paras 46–47; *D.H. and Others v Czech Republic* App no 57325/00, Judgment (GC) of 13 November 2007, Reports 2007-IV, from 175, esp para 183.

⁴² *Chassagnou and Others v France* App nos 25088/94 ..., Judgment (GC) of 29 April 1999, Reports 1999-III, para 112.

⁴³ *Ibid.*

in *Chapman v United Kingdom*, where the Court observed an emerging consensus 'recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle'.⁴⁴

This case indicates how lacunae in minority rights protection may have brought about the turn to vulnerability. In *Chapman*, the Court held that, though it was unable to find a consensus on minority protection that was concrete enough to allow it to identify clear standards, and though its own role was a 'strictly supervisory one',⁴⁵ there was a standard by which it could judge the actions of the government: the affected group's vulnerability. In this regard, the Court stated that 'the vulnerable position of Gypsies as a minority' required 'some special consideration' of their needs and their lifestyle regarding the decisions both on a regulatory plane and in adjudicating individual cases.⁴⁶ It accordingly found that the state bore a positive obligation under Article 8 ECHR 'to facilitate the Gypsy way of life'.⁴⁷ This finding by the Court, in one of its most important judgments concerning the vulnerability of Travellers, provides an indication that the concepts of vulnerability and minority protection are, at least originally, closely interlinked.

The minority in *Chapman* took the vulnerability argument a step further. In their joint dissenting opinion, seven of the judges disagreed with the Court's interpretation of its own role as strictly supervisory. The judges argued against the majority's reluctance to take an activist role given 'the clearly recognized need of Gypsies for protection', arguing that such reluctance perpetuated their 'vulnerability as a minority whose needs and values differ from those of the general community'.⁴⁸ The minority took a more invasive (and, from today's perspective, contemporary) approach by arguing for the application of a 'compelling reasons' test when the lifestyle of the group's members is limited.⁴⁹

In *Chapman* and like cases, the reference to vulnerability eliminated the need to wait for the development of a European consensus on the standards of minority protection. The Court's reference to vulnerability thus allowed it to fill a significant gap in the protection afforded to minorities. The judges, in applying this approach, also circumvented the need to create a definition of minorities and replaced any such categorisation with vulnerability or, in the words of the minority, 'the clearly recognized need of Gypsies for protection'.⁵⁰ Using the vulnerability of minority groups, the Court thus narrowed the state margin of appreciation regarding measures concerning them.

⁴⁴ *Chapman v United Kingdom* App no 27238/95, Judgment (GC) of 18 January 2001, Reports 2001-I, para 93.

⁴⁵ *Ibid.*, para 94.

⁴⁶ *Ibid.*, para 96.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, Joint Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Stráznická, Lorenzen, Fischbach and Casadevall, para 3.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

III. Vulnerability in the Court's Non-Discrimination Jurisprudence

The way in which the Court used vulnerability in *Chapman* has become commonplace in later jurisprudence under Article 14 ECHR, the Convention's accessory prohibition of discrimination. Article 14 protects against differences in treatment that are 'based on an identifiable characteristic, or "status" that cannot be justified reasonably and objectively.'⁵¹ Discrimination can either arise directly, when a person is treated less favourably than another on the basis of a prohibited ground, or indirectly, when seemingly 'neutral' treatment disproportionately impacts the members of a group on the basis of a prohibited ground.⁵²

When a *prima facie* case of discrimination has been established, it may be possible to justify the relevant difference in treatment.⁵³ In this regard, the Member States of the Council of Europe have a certain margin of appreciation in determining what treatment constitutes discrimination, and in balancing the interests at stake.⁵⁴ The Court, in determining the extent of this margin, has regard to whether there is 'common ground' among states. Where there is no such consensus, national authorities have more discretion in determining whether a difference in treatment is justified.⁵⁵ This latter, watered-down version of the justification test is often applied where states have regulated a given matter in different ways or where there are scientifically, legally, morally, or socially complex issues at play.⁵⁶ States also have a wide margin of appreciation regarding general economic or social strategy. Given that the national authorities are better placed to make decisions in this context, the Court will generally respect domestic policy choices unless they are 'manifestly without reasonable foundation'.⁵⁷

The state margin of appreciation has, conversely, also been limited in certain instances. So, when an individual is a member of a certain group, distinctions are subject to a stricter justification test, namely the requirement

⁵¹ *Stummer v Austria* App no 37452/02, Judgment (GC) of 7 July 2011, Reports 2011, para 87; Aalt Willem Heringa and Fried van Hoof, 'Prohibition of Discrimination (Article 14)' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, 4th edn (Intersentia, 2006) 1027–51, 1034–35, citing the judgment of the Court in *Koua Poirrez v France* App no 40892/98, Judgment of 30 September 2003, Reports 2003-X, para 46, and 1043.

⁵² Moeckli Daniel, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, 2nd edn (OUP, 2014) 157–73, 165–66. On direct discrimination, see *Marckx v Belgium* App no 6833/74, Judgment of 13 June 1979, Series A31, paras 38–43. On indirect discrimination, see *D.H. and Others* (n 41), paras 183 and 184; *Di Trizio v Switzerland* App no 7186/09, Judgment of 2 February 2016, paras 80–90.

⁵³ *Di Trizio* (n 52), paras 91–102. For more, see Moeckli (n 52), 167–69.

⁵⁴ Heringa and van Hoof (n 51), 1034–35, citing *Koua Poirrez* (n 51), paras 46 and 1043.

⁵⁵ Heringa and van Hoof (n 51), 1044.

⁵⁶ *Sheffield and Horsham v United Kingdom* App nos 22985/93 and 23390/94, Judgment (GC) of 30 July 1998, Reports 1998-V, paras 60–61, 76–77. In all, see Heringa and van Hoof (n 51), 1044.

⁵⁷ *Stummer* (n 51), para 89.

of 'very weighty reasons'.⁵⁸ A distinction has even been found to be a priori unjustifiable when it is based on race and, in the past, on religion.⁵⁹ The 'very weighty reasons' test is applied, inter alia, to distinctions on the basis of sexual orientation and gender,⁶⁰ nationality,⁶¹ birth in or out of wedlock,⁶² and ethnicity.⁶³

In addition, and to tie the above into the subject of the present volume, the weighty or serious reasons test has been implemented in the context of cases concerning groups that the Court has labelled as vulnerable. The state only has a limited margin of appreciation regarding alleged discrimination against members of such groups.⁶⁴ The Court has justified this by referring to the social exclusion that results from lasting historical prejudice, which may entail legislative stereotyping and thereby preclude an individualised evaluation of a person's capacities and needs.⁶⁵

The relevant case law identifies a number of groups that are vulnerable on the basis of gender, sexual orientation, race or ethnicity, intellectual disability, or HIV/AIDS infection.⁶⁶ Though the determination of the groups that can be considered 'most vulnerable' in this context may not be complete, the case law on Article 14 clearly delineates the content of that concept, and its effect: the margin of appreciation afforded to the national authorities under Article 14 is limited if an individual belongs to a group that has historically suffered 'prejudice with lasting consequences' that led to its 'social exclusion'.⁶⁷

While this jurisprudence, which has been discussed elsewhere and taken up by the Court in later judgments, concerns Article 14 ECHR, it provides some insight into how the Court came by the still-undefined concept of vulnerability under Article 3.⁶⁸ The relevance of non-discrimination rules for the present analysis lies not only in the fact that the humiliation that can constitute degrading treatment

⁵⁸ *Konstantin Markin v. Russia* App no 30078/06, Judgment (GC) of 22 March 2012, Reports 2012 (extracts), para 127. In all, see Heringa and van Hoof (n 51), 1046.

⁵⁹ Contrasting *Hoffmann v Austria* App no 12875/87, Judgment of 23 June 1993, Series A255-C, para 36) with *Eweida and Others v United Kingdom* App nos 48420/10 ..., Judgment of 15 January 2013, Reports 2013 (extracts)) shows that the Court has backed down from this position. On race, see *D.H. and Others* (n 41), para 196.

⁶⁰ *Konstantin Markin* (n 58) para 127; *X. and Others v Austria* App no 19010/07, Judgment (GC) of 19 February 2013, Reports 2013, para 99; and *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09, Judgment (GC) of 7 November 2013, Reports 2013 (extracts), para 77.

⁶¹ *Gaygusuz v. Austria* App no 17371/90, Judgment of 16 September 1996, Reports 1996-IV, para 42; *Koua Poirrez* (n 51), para 46; *Ponomaryovi v Bulgaria* App no 5335/05, Judgment of 21 June 2011, Reports 2011, para 52.

⁶² *Mazurek v France* App no 34406/97, Judgment of 1 February 2000, Reports 2000-II, para 49; *Sahin v Germany* App no 30943/96, Judgment (GC) of 8 July 2003, Reports 2003-VIII, para 94.

⁶³ *Oršuš and Others v Croatia* App no 15766/03, Judgment (GC) of 16 March 2010, Reports 2010, para 149.

⁶⁴ *Alajos Kiss v Hungary* App no 38832/06, Judgment of 20 May 2010, para 42, with references.

⁶⁵ *Ibid.*, para 42, with references.

⁶⁶ *Kiyutin v Russia* App no 2700/10, Judgment of 10 March 2011, Reports 2011, para 63, referring to *Alajos Kiss* (n 64), para 42.

⁶⁷ *Alajos Kiss* (n 64), para 42, with references.

⁶⁸ *I.B. v Greece* App no 552/10, Judgment of 3 October 2013, Reports 2013, para 79. For more, see Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in

may result from ‘discrimination on various grounds, such as ethnic, national, or social origin, color, gender, religion, sexual orientation, disability, or age’.⁶⁹ The Court’s non-discrimination case law is also relevant because it can be considered the origin, or at least part of the origin, of its understanding of vulnerability. The two continue to overlap in some regard, as well, for – as the remainder of this volume will show – a vulnerability-based approach to Article 3 can help to ensure substantive equality between applicants.

Martha Albertson Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013) 147–70.

⁶⁹ Manfred Nowak, ‘What Practices Constitute Torture?: US and UN Standards’ (2006) 28(4) *Human Rights Quarterly* 809–41, 840.