The weight of vulnerability: A comparative analysis of the significance of particular vulnerability attributes under ECtHR jurisprudence in situations of extreme vulnerability concerning migrants

Tomas Morochovic

INTRODUCTION

One of the most famous quotes in George Orwell’s Animal Farm goes as follows: ‘All animals are equal, but some animals are more equal than others’.1 It serves as a lucid reminder of the hypocrisy engrained in quasi-egalitarian political systems, which profess equality yet do not provide equal opportunities to individuals. Sadly, Orwell’s maxim resonates strongly even today, and very few groups feel the brunt of its meaning as strongly as migrants. Being forced to leave their homes for a plethora of reasons, migrants are often exposed to extreme conditions throughout their journeys, suffering from a lack of basic resources, emotional, physical, and mental distress. The situation is rarely better in their destination, and they are often at the margins of society, unable to seek protection of either their home state or the state where they have settled. In short, migrants are particularly susceptible to be in situations of vulnerability.

The vulnerability thesis turns Orwell’s maxim on its head – in the words of a judge from the European Court of Human Rights (“ECtHR”), ‘all applicants are vulnerable, but some are more vulnerable than others’.2 Indeed, the vulnerability thesis has been steadily becoming an established element within the European Convention on Human Rights (“ECHR”)3 system, and within international human rights law more generally. The focus on this article will be on vulnerability

---

1 George Orwell, Animal Farm (Longman 2000), ch X.
as developed by the ECtHR in the context of migration. In particular, this article will examine situations of vulnerability of migrants. The aim of this article is to assess the role of extreme vulnerability in ECtHR jurisprudence concerning migrants and how it can be related to the general vulnerability thesis conceptualised by academics.

This article will proceed in three chapters. The first chapter will provide a theoretical outline of the vulnerability thesis whilst emphasising its conceptual relevance for the protection of human rights, and specifically the protection of human rights of migrants. The second chapter will analyse the jurisprudence of the ECtHR relating to extreme vulnerability of migrants, with a focus on two contexts – situations concerning migrant children and migrants with a fragile state of health. The final chapter will seek to draw conclusions about the relationship between the vulnerability thesis and ECtHR jurisprudence on extreme vulnerability. This article will identify trends in how the vulnerability thesis is being developed in various contexts, addressing the question of whether it is possible to reconcile the particular and universal conception of vulnerability as theorised by academics with the approach of the ECtHR. In particular, the article will argue that some alignment is occurring, but it does not amount to a wholesale adoption of the vulnerability thesis theorised in chapter one.

Before embarking on the substantive part of this article, one necessary note on language. The term “migrants” is used to refer to both regular and irregular migrants, and asylum seekers. The author is aware of the inherent differences between these terms, but the decision to take this approach is reflective of the ECtHR jurisprudence, where cases deal with both irregular migrants and asylum seekers; and there does not seem to be any major differentiation in their treatment by the court when it comes to extreme vulnerability. A generic reference to migrants is thus more convenient.

I. A THEORY OF VULNERABILITY

The doctrine of vulnerability is not a straightforward concept. Although the concept is in common use, its meaning is imprecise and contested and scholars often emphasise its uncertain and conflicting nature. Despite concerns about the complexity of the doctrine, vulnerability has the potential to provide a strong conceptual basis for the protection of human rights generally, as will be argued in this chapter. Furthermore, vulnerability as a concept can be particularly relevant in relation to the protection of human rights of migrants. In order to provide a persuasive account of how vulnerability can be relevant to the human rights discourse relating to migrants, this chapter will, firstly, analyse the vulnerability thesis developed primarily by Martha Fineman, Anna Grear, and Bryan Turner. Secondly, this chapter will endeavour to establish a link between the vulnerability

---

4 Peroni and Timmer (n 2) 1058.
thesis and the existing human rights discourse, emphasising the positive contribution which the use of vulnerability can provide to the protection of human rights. In the second and final section of this chapter, the focus will be both the general importance of vulnerability for human rights on a conceptual and practical level, as well as on the particular relevance of vulnerability for the protection of the human rights of migrants.

II. VULNERABILITY THESIS

The ontological fact underlying the vulnerability thesis is that real human beings are vulnerable due to their embodiment. The idea of vulnerable humanity recognises the obviously corporeal dimension of existence; it describes the condition of sentient, embodied creatures who are open to the dangers of their environment and are conscious of their precarious circumstances. Human embodiment carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events. While we can attempt to lessen the risk or act to mitigate possible manifestations of our vulnerability, the possibility of harm cannot be eliminated. This account of vulnerability emphasises the potential of embodied individuals to experience pain and suffering — however, a more nuanced view is to consider vulnerability not merely in a negative sense, but also as something positive and generative. As Grear points out, Turner renders vulnerability and suffering/pain as virtually synonymous and locates them in a world of conflict and risk. In contrast, both Fineman and Grear recognise the advantages of a positive conception of vulnerability. Fineman’s vulnerability thesis is grounded in considerations of equality. Writing from an American perspective, she argues that the concept of vulnerability can help us better understand how to actually realise our professed commitment to equality of opportunity and access. Grear views vulnerability as a core component of an alternative view of human relations, representing a quintessential embodied openness to each other and to the world. This position highlights a further intrinsic implication of the vulnerability thesis, namely that the

9 Anna Grear, Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity (Palgrave Macmillan 2010), 133.
10 Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 8) 256.
11 Grear, Redirecting Human Rights (n 9) 133.
embodied subject is always and everywhere an inherently inter-relational subject.\textsuperscript{12} As a result, humans are always inherently social.\textsuperscript{13} The social dimension of vulnerability is important, as individuals look to societal institutions for assistance in dealing with vulnerability.\textsuperscript{14} And although society cannot eradicate vulnerability, it can, and does, mediate, compensate and lessen our vulnerability through various means.\textsuperscript{15}

In Fineman’s vulnerability thesis, the underlying notion of embodiment premises that vulnerability is universal, as every embodied human is susceptible to harm, and constant, as the possibility of harm is ever-present.\textsuperscript{16} However, vulnerability is also particular – it is experienced uniquely by each of us, as our vulnerabilities range in magnitude and potential at the individual level.\textsuperscript{17} In recognising that vulnerability is not something that only attaches to specific population groups\textsuperscript{18}, Fineman moves beyond the traditional conception of a group-specific discrimination and vulnerability doctrine. By doing this, she challenges the notion that the paradigmatic modern society provides for real access and opportunity, and that discrimination is the discoverable and correctable exception to an otherwise just and fair system.\textsuperscript{19} This purported paradigmatic situation is problematic, it is argued, because it operates with the model individual who is termed the ‘liberal subject’. The liberal subject represents the ideal of a stable, bounded, self-sovereign individual distinguished by his capacity for autonomy and rationality (“his” because the paradigm of the bounded, sovereign subject is the adult male with full capacity).\textsuperscript{20} Fineman questions the positioning of the liberal subject at the centre of theories about equality, society, politics, and law, as he does not reflect the bodily fragility, material needs, and dependency inherent in vulnerability.\textsuperscript{21} Instead, she argues, the ‘vulnerable subject’ should be placed at the heart of these theories, as it is a more accurate and complete universal figure.\textsuperscript{22}

Fineman’s call for the replacement of the liberal subject by the vulnerable subject has implications for the role of the state under the vulnerability thesis. As she notes, the counterpoint to vulnerability is resilience that comes from having

\textsuperscript{12} Anna Grear, ‘Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject’ in Martha A Fineman and Anna Grear (eds), Vulnerability: Reflections on a New Ethical Foundation for Law and Politics (Routledge 2013), 57.
\textsuperscript{13} ibid.
\textsuperscript{14} Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 7) 10.
\textsuperscript{15} ibid.
\textsuperscript{16} Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 8) 266-267.
\textsuperscript{17} Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 7) 10.
\textsuperscript{18} Timmer (n 5) 148.
\textsuperscript{19} Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 8) 254.
\textsuperscript{21} Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 8) 263.
\textsuperscript{22} Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 7) 11.
some means and resources with which to address and confront misfortune.\textsuperscript{23} Societal institutions are the primary sources of such resilience-building resources, and many of such institutions can only be brought into legal existence through state mechanisms.\textsuperscript{24} Thus, the vision of the state that would emerge from a replacement of the liberal subject by the vulnerable subject is one which is both more responsive and more responsible for the vulnerable subject.\textsuperscript{25} However, it is necessary to be realistic about the capabilities of the state in a globalised context. Although Fineman herself acknowledges the limitations of societal institutions by emphasising their own susceptibility to vulnerability\textsuperscript{26}, her account of the role of the state is, nevertheless, overly idealistic. Grear rightly points towards the threats inherent in globalisation and the ascendance of corporations, and the attendant processes underlying this shift such as the wholesale privatisation, corporatisation, and commodification of municipal law and political culture.\textsuperscript{27} In this globalised landscape, the state is just one of the elements in an extensive system of capitalist interactions and it becomes difficult to make meaning of the theoretical freedom of the state from market and profit controls imagined by Fineman.\textsuperscript{28} Coyle put it succinctly:

Modern governments more than ever find themselves tied to the success of the economy, including its largest corporations. [...] Given the constraints within which governments operate, significant restrictions upon competition must come primarily from the international rather than the domestic level [...] Operating ever more in a globalised context, the assumptions of turbo-capitalism are increasingly incapable of being reversed ‘unilaterally’.\textsuperscript{29}

Therefore, the role of the state within the vulnerability thesis must be carefully assessed and not be overstated. Given the intricacies of a globalised context, the vulnerability thesis must also consider possibilities of building resilience beyond the confines of the state.

\begin{itemize}
\item \textsuperscript{23} Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 8) 269.
\item \textsuperscript{24} ibid [272].
\item \textsuperscript{25} Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (n 7), 2.
\item \textsuperscript{26} Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 8) 273.
\item \textsuperscript{27} Grear Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity (n 9) 184.
\item \textsuperscript{28} Grear ‘Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject’ (n 12) 55.
\item \textsuperscript{29} Sean Coyle, ‘Vulnerability and the Liberal Order’ in Martha A Fineman, Anna Grear (eds), \textit{Vulnerability: Reflections on a New Ethical Foundation for Law and Politics} (Routledge 2013), 72.
\end{itemize}
III. VULNERABILITY AND HUMAN RIGHTS

Having set out the theoretical basis of the vulnerability thesis in the previous section, the article shall now consider how the vulnerability thesis can be used within the human rights discourse. It will be argued that the vulnerability thesis is more than a mere academic concept – it is highly relevant for the human rights discourse and it can positively enhance the protection of human rights on a practical level.

The first way in which vulnerability can be of benefit is by providing a conceptual basis to human rights which protects the most vulnerable. In different ways, both Turner and Grear have conceptualised embodied vulnerability as being foundational to human rights.30 Turner’s study of human rights places the human body at the centre of social and political theory, using our universal vulnerability and the notion of embodiment as a foundation for defending universal human rights.31 This shared vulnerability thus alters the nature of the human rights subject – it establishes the vulnerable subject as the paradigmatic human rights subject.32 While Grear also recognises the conceptual value of vulnerability for human rights, her position is paradoxical. She argues that the Universal Declaration of Human Rights (“UDHR”)33 paradigm contains two contradictory impulses – on one hand, the human rights system is founded around embodied vulnerability; on the other, the liberal subject has been imported into the human rights structure.34 A further difference between Grear and Turner is the scope of rights to which they consider vulnerability as relevant. Turner points out that it can be argued that the vulnerability thesis can be applied in relation to economic and social rights contained in the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)35, but it is not amenable to the civil and political liberties within the UDHR or the International Covenant on Civil and Political Rights (“ICCPR”).36, 37 Although he subsequently questions this argument by emphasising the indirect relationship between vulnerability and civil and political rights through empirical links between enjoyment of social rights and availability of civil and political rights38, Grear’s conceptual assertion that vulnerability can be the basis for all

30 Timmer (n 5) 149.
31 Turner (n 6) 25.
34 Peroni and Timmer (n 2) 1061.
37 Turner (n 6) 36-37.
38 Turner (n 6) 37.
human rights is more persuasive. Despite the partial differences in the approaches of Grear and Turner, it is clear that both seek to underline the value of the vulnerability thesis for the conceptualisation of human rights. By replacing the invulnerable liberal subject with the vulnerable subject, human rights protections can be extended to the most vulnerable.\footnote{Da Lomba (n 32) 351.}

Vulnerability is relevant for the human rights discourse also on a practical level. It can be beneficial, as by utilising the vulnerability thesis in conceptualising human rights, institutions can variously increase the resilience of human rights subjects. And although it cannot be said that vulnerability is firmly established in the existing human rights network, positive developments within leading international human rights institutions indicate a positive trend in the application of a vulnerability approach to human rights. International courts and tribunals are prime examples of this shift towards vulnerability. The analysis of the case law of the ECtHR in the following chapter will provide evidence that the ECtHR has embraced the vulnerability rhetoric in a growing number of significant cases, and particularly in cases concerning migrants. Similarly, the Inter-American Court of Human Rights (“IACtHR”) has resorted to the use of a vulnerability approach in a recent advisory opinion which focused on the rights and protections of migrant children.\footnote{Timmer (n 5) 151.} However, the use of the vulnerability thesis is not restricted to international courts. Care for human vulnerability is part of the culture of human rights both in the Council of Europe and in the United Nations system, as evidenced by the frequent references to vulnerability in the output of these organisations.\footnote{UNGA New York Declaration for Refugees and Migrants (adopted 3 October 2016) UN Doc A/RES/71/1 (New York Declaration).} An example of this is the recently adopted New York Declaration for Refugees and Migrants\footnote{UNHCR, ‘Q&A: The New York Declaration is a ‘once in a lifetime chance’ for refugees’ (UNHCR, 30 September 2016) <http://www.unhcr.org/uk/news/latest/2016/9/57ec3af54/qa-new-york-declaration-once-lifetime-chance-refugees.html> accessed 11 May 2017.}. The document, which makes extensive references to vulnerability reasoning, has been described by the UNHCR’s Assistant High Commissioner for Protection as a ‘once in a lifetime chance for refugees and migrants’.\footnote{Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014).}

Finally, the vulnerability thesis has relevance especially for the human rights protection of migrants. The vulnerability of migrants is generated primarily by the fact that these persons are outside their country of origin, they have lost the protection of that country and are thus in need of surrogate international

\begin{flushright}
\footnotesize
39 Da Lomba (n 32) 351.
40 Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014).
41 Timmer (n 5) 151.
\end{flushright}
protection.\footnote{Ulrike Brandl, Philip Czech, ‘General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?’ in Francesca Ippolito and Sara Iglesias Sánchez (eds), Protecting Vulnerable Groups: The European Human Rights Framework (Hart Publishing 2015), 247.} Thus, they are unable to avail themselves of the resilience-building mechanisms which a state can create. Moreover, the demanding conditions and experiences to which they are exposed during their migration create further sources of vulnerability. Both of these considerations result in the fact that migrants are very likely to be exposed to extensive vulnerability throughout their lives while simultaneously lacking the resources to build the necessary resilience. Using Fineman’s vulnerability thesis in such a context has major benefits. In contrast to a group-based approach to vulnerability, Fineman’s theory emphasises the particular circumstances, vulnerabilities, and needs of individual migrants rather than focusing on their membership of a disadvantaged group. With the affirmation of a vulnerable subject within international human rights, migrants can avoid being continuously posited as ‘liberalism’s others’.\footnote{Da Lomba (n 32) 351.}

IV. ECtHR AND SITUATIONS OF EXTREME VULNERABILITY IN RELATION TO MIGRANTS

Whilst the first chapter of this article provided a theoretical background of the vulnerability thesis, the focus of the second chapter is firmly empirical. The spotlight is on the case law of the ECtHR. The particular focus of this analysis is on situations of extreme vulnerability concerning migrants. In the case law of the ECtHR, the court uses the term ‘extreme vulnerability’ when referring to situations where a number of conditions exist which give rise to various types of vulnerability. There are a number of analogous terms which are used by academics and the ECtHR itself when talking about extreme vulnerability, e.g., ‘compound vulnerability’, ‘double vulnerability’, or ‘great vulnerability’.\footnote{Timmer (n 5) 161.} The author’s decision to address situations of extreme vulnerability is determined by two primary reasons. The first reason is based on humanistic concerns – situations of extreme vulnerability create a serious and increased risk of violations of human rights. Moreover, situations of extreme vulnerability are particularly pertinent to migrants due to their exposure to various sources of vulnerability as a result of their experiences and lack of access to resilience-building institutions, as has been highlighted in the first chapter. It appears that this is also acknowledged by the ECtHR, as it is inclined to attach great importance to the fact that a subject is in a situation of extreme vulnerability.\footnote{ibid.} The second reason relates to the case law of the ECtHR. The ECtHR has been steadily developing an intriguing body of jurisprudence concerning situations of extreme vulnerability which concern migrants in various situations. The existing docket of cases enables this article to

\footnotesize

45 Da Lomba (n 32) 351.
46 Timmer (n 5) 161.
47 ibid.
adopt a comparative approach, assessing whether migrants with different types of additional vulnerabilities are treated differently by the court and whether it is possible to identify any trends and in relation to particular sources of vulnerability. Specifically, this article shall address cases dealing with two sources of vulnerability of migrants – the first pertains to the status as a child, whilst the second concerns vulnerability arising due to a fragile health situation.

Before embarking on the analysis, a brief acknowledgment is necessary. Unfortunately, several cases to be analysed have not been translated into English. Where this is applicable, this article will make references to unofficial translations, as well as the applicable paragraphs of the French-language judgments.

V. GENERAL POINTS ABOUT THE VULNERABILITY THESIS IN THE ECtHR

At the outset of the analysis, it is necessary to point out the nature of the vulnerability thesis which is used by the ECtHR. The ECtHR does not fully endorse Fineman’s universal vulnerability thesis in its case law. Instead, it predominantly applies a more traditional type of group-based vulnerability thesis. A group-based vulnerability thesis means that vulnerability is not derived from an applicant’s personal circumstances, but from his or her affiliation to a group with special needs.48 This approach is visible in relation to migrants – the leading case of M.S.S. v Belgium and Greece49 adopts a group-based approach to vulnerability. At paragraph 232, the ECtHR held as follows: ‘the Court must take into account that the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously’.50 Although the reference to the particular experience of the applicant may point towards a vulnerability thesis as theorised by Fineman, in the subsequent paragraph the ECtHR firmly linked vulnerability with the applicant’s status as a migrant – ‘the applicant’s distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker’.51 Similarly to migrants, the group-based nature of ECtHR’s vulnerability thesis crystallises in relation to other subjects on the basis of their membership of a particular group, for example the Roma population52, British Gypsies53, or people with disabilities54. As was noted in the first chapter, Fineman warned against the utilisation of a group-based vulnerability thesis related to grounds of

48 Brandl, Czech (n 44) 259.
49 M.S.S. v Belgium and Greece ECHR 2011-I 255.
50 M.S.S. v Belgium and Greece, para 232.
51 ibid [233].
52 V.C. v Slovakia ECHR 2001-V (extracts).
53 Chapman v the United Kingdom ECHR 2001-I 41.
54 Alajos Kiss v Hungary App no 38832/06 (ECtHR, 20 May 2010).
discrimination on the basis of classifications such as race, gender or ethnicity.\textsuperscript{55} However, Peroni and Timmer argue that there is no inherent impediment to reconciling the universal and particular vulnerability thesis and the group vulnerability thesis on a conceptual level.\textsuperscript{56} In fact, the Court’s vulnerability reasoning has resulted in many context-sensitive judgments which in some ways move beyond the liberal assumptions of traditional human rights.\textsuperscript{57}

VI. VULNERABILITY OF MIGRANT CHILDREN

The first part of the analysis will focus on cases involving extreme vulnerability of migrants who are children. Given that a child is considered as initially highly vulnerable, a fact that is even reflected in the Convention on the Rights of the Child (“CRC”)\textsuperscript{58} which adopts a midway approach between a child protection and child liberation theory,\textsuperscript{59} it is unsurprising that the ECtHR has developed a substantial body of judgments in relation to migrant children.

The principal case dealing with extreme vulnerability of migrant children is \textit{Mubilanzila Mayeka and Kaniki Mitunga v Belgium},\textsuperscript{60} which is the first judgment in a series of cases concerned specifically with the detention of migrant children.\textsuperscript{61} The applicants were a five-year-old girl from the Democratic Republic of Congo and her mother, who was a refugee in Canada. The mother sought to reunite with her daughter in Canada, and she made arrangements with her brother (the child’s uncle, a Dutch national) to collect the daughter from the DRC and to look after her until she could join her mother. The uncle flew to Brussels with the child without the necessary travel documents for her. The daughter was placed in an adult detention centre in Belgium, where she stayed for two months, after which she was ordered to be released and immediately returned to the DRC.\textsuperscript{62} In finding a violation of Art. 3 of the ECHR, the court noted that the child found herself in a situation of extreme vulnerability, ‘characterised by her very young age, the fact that she was an illegal immigrant in a foreign land and the fact that she was unaccompanied by her family’.\textsuperscript{63} Thus, the migrant status and her low age were clearly essential elements in the court’s finding of a situation of extreme

\textsuperscript{55} Fineman, ‘The Vulnerable Subject and the Responsive State’ (n 8) 251-255.
\textsuperscript{56} Peroni and Timmer (n 2), 1060-1061.
\textsuperscript{57} Timmer (n 5), 162.
\textsuperscript{60} \textit{Mubilanzila Mayeka and Kaniki Mitunga v Belgium} ECHR 2006-XI 267.
\textsuperscript{62} \textit{Mubilanzila Mayeka and Kaniki Mitunga v Belgium}, para 8 et seq.
\textsuperscript{63} ibid [55].
vulnerability. While the vulnerability due to migrant status is group-based, it seems that the ECtHR adopted an individualistic vulnerability thesis in relation to the applicant’s low age. They did not refer merely to her status as a child, but in particular to her ‘very young age’. Moreover, the ECtHR explicitly considered the applicant’s personal circumstances before the finding of extreme vulnerability, pointing out the inadequacy of the detention conditions and, more importantly, to her particular age – ‘a five-year-old child is quite clearly dependent on adults and has no ability to look after itself so that, when separated from its parents and left to its own devices, it will be totally disoriented’. A further important point about the judgment is the weight which the ECtHR afforded to a finding of extreme vulnerability. The judges considered it to be ‘the decisive factor’ which ‘takes precedence over considerations relating to the second applicant’s status as an illegal immigrant’.

In Muskhadzhiyeva and others v Belgium, the ECtHR appears to give even further weight to the low age of the victims as a source of vulnerability. In Muskhadzhiyeva, the applicant and her four children (aged seven months, three and a half years, five and seven years at the material time) lived in a refugee camp in Poland. After fleeing Chechnya, they sought asylum in Belgium. However, under the EU’s Dublin Regulation, they were moved to Poland. The applicant and her children were placed in a detention centre near Brussels airport pending their removal, and they spent approximately a month there. Several psychological reports compiled during their detention cautioned about the psychological harm which the detention caused to the children. Citing Mubilanzila Mayeka, the ECtHR recalled that it had already found the detention of an unaccompanied minor in the particular transit centre contrary to Article 3 and that the extreme vulnerability of a child was paramount and took precedence over the status as an illegal alien. However, the ECtHR went even further by holding that the fact that the children were accompanied by their mother did not exempt the authorities from their obligations vis-à-vis the children. This clearly shows that a finding of extreme vulnerability caused “merely” by migration status and age will weigh heavily in the ECtHR’s analysis. Additionally, it is necessary to point out that the ECtHR emphasised the particular experiences of the children within the detention centre, the duration of their detention, and their state of health, although the link

64 Mubilanzila Mayeka and Kaniki Mitunga v Belgium, para 55.
65 ibid [50-51].
66 ibid [55].
67 Muskhadzhiyeva and others v Belgium App no 41442/07 (ECtHR, 19 January 2010).
69 ibid [56].
70 EDAL Muskhadzhiyeva (n 68); Muskhadzhiyeva and others v Belgium, paras 57-58.
71 Muskhadzhiyeva and others v Belgium, paras 59-63.
between the finding of extreme vulnerability and these considerations is not as clear-cut as in Mubilanzila Mayeka. A final point which needs to be pointed out in relation to Muskhadzhiyeva is the reference to Art. 22 of the CRC, ensuring the provision of protection and humanitarian assistance to a child asylum seeker, which was made by the ECtHR after the vulnerability assessment.\footnote{ibid [62].}

The case Kanagaratnam and others v Belgium\footnote{Kanagaratnam v Belgium App no 15297/09 (ECtHR, 13 December 2011).} is the third case which concerns the same Belgian detention centre located near Brussels Airport, centre 127 bis. Ms Kanagaratnam and her three children (13, 11 and eight years old) were Sri Lankan nationals who arrived in Belgium via the DRC. The ECtHR considered the situation to be very similar to Muskhadzhiyeva, and the approach adopted is also similar – at first, the ECtHR recalled its previous case law.\footnote{Kanagaratnam v Belgium, para 64.} Subsequently, the ECtHR looked at the particular circumstances of the applicants in the detention centre, noting that the children were older than in previous cases and that there were no medical certificates regarding the psychological harm caused to the children by their detention.\footnote{ibid [66-69].} From a vulnerability perspective, this approach is important. Although the ECtHR establishes the existence of extreme vulnerability because of an applicant’s status qua migrant and child, thus showing signs of a group-vulnerability approach, the consideration of particular circumstances brings the ECtHR closer to a universal and particular vulnerability thesis as conceptualised by Fineman.

Rahimi v Greece\footnote{Rahimi v Greece App No 8687/08 (ECtHR, 5 April 2011).} is an even stronger affirmation of the ECtHR’s affinity towards a vulnerability analysis which gives due regard to the particular circumstances of an applicant rather than adopting a group-based approach. In Rahimi, the applicant was a 15-year-old unaccompanied boy from Afghanistan who fled to Greece. He was detained for two days in a detention centre for adults. Upon release from the detention centre, the total lack of support from Greek authorities meant that the applicant was homeless for several days.\footnote{European Database of Asylum Law, ‘ECtHR – Rahimi v. Greece, Application No. 8687/08 (European Database of Asylum Law) <http://www.asylumlawdatabase.eu/en/content/ecthr-rahimi-v-greece-application-no-868708-1> accessed 14 May 2017; Rahimi v Greece, para 5 et seq.} The vulnerability analysis of the ECtHR is more akin to Mubilanzila Mayeka rather than Muskhadzhiyeva and Kanagaratnam. The judges first addressed the particular circumstances of the applicant,\footnote{Rahimi v Greece, paras 81-85.} and subsequently found a situation of extreme vulnerability on account of his age and particular personal situation.\footnote{ibid, para 86.} It is also interesting to note that a finding of extreme vulnerability was made despite the brief duration which the applicant spent in detention.
The *Popov v France*[^80] case, however, is very much in line with the ECtHR’s approach in *Muskhadzhiyeva*. The case concerned the two-week detention of a family—two parents, one three-year-old and one infant—whose claim for asylum was eventually recognised.[^81] The ECtHR first noted the extreme vulnerability of the children, emphasising paragraph 55 of the *Mubilanzila Mayeka* judgment which refers to the decisive nature of a migrant child’s extreme vulnerability.[^82] The judges highlighted that ‘children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status’.[^83] In the same passage, the ECtHR referred to Art. 22 of the CRC, echoing the relevance of the provision recognised in *Muskhadzhiyeva*.[^84] After these general considerations relating to the children’s extreme vulnerability, the ECtHR embarked on an assessment of the applicant’s particular circumstances. While the detention centre was authorised to house families with children by French law,[^85] an examination of the conditions therein led the judges to hold:

[T]hat the conditions in which the children were held, for fifteen days, in an adult environment, faced with a strong police presence, without any activities to keep them occupied, added to the parents’ distress, were manifestly ill-adapted to their age. The two children, a small girl of three and a baby, found themselves in a situation of particular vulnerability, accentuated by the confinement.[^86]

Interestingly, *Popov* is also the first case within this analysis in which the ECtHR explicitly applied the situation of extreme vulnerability of migrant children when considering a violation of Art. 5 paragraph 4 of the ECHR, in addition to its usual utilisation of the concept in respect of violations of Art. 3 ECHR.[^87]

The final case to be addressed pertaining to the extreme vulnerability of migrant children is *Tarakhel v Switzerland*.[^88] The case concerned a deportation of an Afghan family from Switzerland to Italy under the EU’s Dublin Regulation. The applicants (parents and six children, ranging from an infant to a 13-year-old) sought asylum in Switzerland, but the Swiss authorities rejected their application

---

[^80]: *Popov v France* App nos 39472/07 and 39474/07 (ECtHR, 19 January 2012).
[^82]: *Popov v France* [91].
[^83]: ibid.
[^84]: ibid.
[^85]: ibid [93].
[^86]: *Popov v France* [102].
[^87]: ibid [119].
[^88]: *Tarakhel v Switzerland* ECHR 2014-I (extracts).
on the grounds that Italian authorities agreed to take charge of the applicants.\textsuperscript{89} The significant difference in comparison to previously discussed case-law is the fact that the family was not detained in Switzerland. The substance of the applicants’ complaint related to the systematic deficiencies of the Italian asylum system, which, they argued, would amount to inhuman and degrading treatment. The ECtHR adopted a familiar pattern in its assessment of the case. First, the judges recognised generally the extreme vulnerability of migrant children, the decisive nature of this consideration, whilst also making a reference to Art. 22 of the CRC as in \textit{Popov}.\textsuperscript{90} The ECtHR then went on to consider the particular conditions within Italy’s reception system. Addressing the speed of the reception procedure,\textsuperscript{91} the capacity within reception facilities,\textsuperscript{92} and the conditions existing within those reception facilities,\textsuperscript{93} the ECtHR found that:

\begin{quote}
While the structure and overall situation of the reception arrangements in Italy cannot [...] act as a bar to all removals of asylum seekers to that country, the data and information set out above nevertheless raise serious doubts as to the current capacities of the system.\textsuperscript{94}
\end{quote}

With respect to the applicant’s individual situation, the ECtHR reiterated that migrant children have specific needs, in lieu of their extreme vulnerability – their reception conditions must be adapted to their age.\textsuperscript{95} The possibility that a significant number of asylum seekers removed to Italy, including the applicants, may be left without accommodation or would be accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, was not unfounded.\textsuperscript{96} Thus, in the absence of specific assurances obtained relating to the needs of the applicant children by the Swiss authorities from the Italian authorities, the removal of the applicants would amount to a violation of Art. 3 of the ECHR.\textsuperscript{97} Thus, although the children’s extreme vulnerability was asserted by the ECtHR in a general manner, the call for explicit provisions taking into account the specific needs of the applicant children is again an indication of an individualistic approach to vulnerability.

\textsuperscript{89} ibid [8].
\textsuperscript{90} ibid [99].
\textsuperscript{91} \textit{Tarakdel v Switzerland} ECHR 2014-I (extracts), [107].
\textsuperscript{92} ibid [108].
\textsuperscript{93} ibid [111].
\textsuperscript{94} ibid [115].
\textsuperscript{95} ibid [119].
\textsuperscript{96} ibid [120].
\textsuperscript{97} ibid [122].
VII. HEALTH-RELATED EXTREME VULNERABILITY OF MIGRANTS

Whilst the ECtHR’s approach to extreme vulnerability of migrant children seems to show signs of coherence, the same cannot be said of applicants who are extremely vulnerable because of their migrant status and because of health-related vulnerability. As will become clear, the ECtHR struggles to settle on a single path forward and the case law has been developed in different directions.

Two important cases have been decided before the ECtHR’s seminal judgment in M.B.S., which recognised the particular vulnerability of migrants. As both have been decided before the widespread use of vulnerability rhetoric by the ECtHR, the judgments do not make any references to the vulnerability of the applicants.

In D. v United Kingdom, the applicant was a HIV-positive man from St. Kitts. After arriving in the UK, he was detained and sentenced for the possession of large quantities of cocaine. During his term, the applicant had been diagnosed with HIV and AIDS. After serving his prison sentence, he was set to be removed back to St. Kitts. However, the ECtHR held that the removal would amount to a violation of the applicant’s rights under Art. 3 ECHR. Two facts which refer to the applicant’s individual circumstances were highly relevant – he was in a late stage of the illness, and had a life expectancy of between eight and 12 months, and he had no family in St. Kitts capable to care for him. The abrupt withdrawal of health and care facilities which the applicant had in the UK would entail the most dramatic consequences for him. In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant’s fatal illness, the ECtHR held that the removal would amount to a violation of Art. 3 ECHR. It seems that the ECtHR has detected a particular vulnerability of the applicant but – consciously or unconsciously – chose not to use that term. Nevertheless, the approach very much resembles the vulnerability approach applied in the migrant children cases, with emphasis being placed on the particular vulnerabilities and circumstances of the subject.

A similar set of facts appeared before the ECtHR in the case of N. v United Kingdom. In N., a refused asylum seeker who was HIV-positive claimed that her removal to Uganda would violate Art. 3 ECHR because she would not have access

98 D. v the United Kingdom ECHR 1997-III.
99 ibid [6].
100 ibid [15].
101 ibid [18].
102 ibid [51-52].
103 ibid [53].
105 N. v the United Kingdom ECHR 2008-III 227.
to the necessary treatment,\textsuperscript{106} and as a result her health would significantly deteriorate. In contrast to \textit{D.}, however, the applicant in \textit{N.} was not in a terminal stage of AIDS, and the medication she needed would be available in Uganda, albeit at considerable expense and hard to obtain. Moreover, the basic level of healthcare was also significantly lower in Uganda.\textsuperscript{107} The ECtHR emphasised the exceptional nature of the decision in \textit{D.}\textsuperscript{108} and asserted that the situation in \textit{N.} was not sufficiently exceptional to meet this threshold. Notably, the judges did not use the language of vulnerability in this case either.

A change of attitude by the ECtHR in favour of vulnerability is apparent in recent case law, which reflects on the approach towards migrants adopted in \textit{M.S.S}. In \textit{Aden Ahmed v Malta},\textsuperscript{109} the applicant was an irregular migrant of Somalian nationality, who claimed asylum in Malta. Her application was refused, however, she managed to escape from immigration detention and reach the Netherlands where she again applied for asylum. The Dutch authorities transferred her back to Malta under the EU’s Dublin Regulation. The applicant became pregnant in the meantime. Back on Malta, the applicant was charged for fleeing detention and supplying incorrect information during her asylum process, and was sentenced to six months’ imprisonment. Whilst in prison, she had a miscarriage, and after serving her sentence, she was again placed in immigration detention.\textsuperscript{110} The applicant submitted,\textsuperscript{111} and the judges recognised it within their judgment,\textsuperscript{112} that she suffered from, \textit{inter alia}, insomnia, recurrent physical pain and episodes of depression. The ECtHR held that the applicant was in a particularly vulnerable position not only because she was an irregular immigrant and because of her specific past and her personal emotional circumstances, but also because of her fragile health.\textsuperscript{113} Although not explicitly mentioned, this is a clear example of a situation of extreme vulnerability, with emphasis being on the specific circumstances and vulnerabilities of the applicant.

The final case to be mentioned is \textit{Sufi and Elmi v United Kingdom}.\textsuperscript{114} The case concerned two Somali men living in the UK since they were 16 and 19 years old respectively. The applicants’ commission of a number of serious criminal offences led to the issuing of deportation orders against them. The ECtHR assessed whether their removal to Somalia would constitute a violation of Art. 3 ECHR, given the volatile situation in Somalia. The ECtHR held that in fact a violation would occur if the applicants were removed. However, one of the applicants, who

\begin{itemize}
\item[\textsuperscript{106}] Da Lomba (n 32) 353.
\item[\textsuperscript{107}] \textit{N. v the United Kingdom}, [12].
\item[\textsuperscript{108}] ibid [42-43].
\item[\textsuperscript{109}] \textit{Aden Ahmed v Malta} App No 55352/12 (ECtHR, 23 July 2013).
\item[\textsuperscript{110}] \textit{Aden Ahmed v Malta}, para 6 et seq.
\item[\textsuperscript{111}] ibid [79].
\item[\textsuperscript{112}] ibid [97].
\item[\textsuperscript{113}] ibid.
\item[\textsuperscript{114}] \textit{Sufi and Elmi v the United Kingdom} App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).
\end{itemize}
suffered from post-traumatic stress disorder, was considered particularly vulnerable because of his psychiatric illness and this was explicitly noted by the judges. Again, the approach to extreme vulnerability adopted is different than in the migrant children cases, and extreme vulnerability is not directly mentioned in the judgment, although the facts show a clear example of a case falling under this heading. The recognition of vulnerability caused by the mental illness is of particular importance, as it is safe to say that the first applicant’s vulnerability due to circumstances not related to his health (risk of ill-treatment given his vulnerable situation as a migrant, and due to the situation in Somalia) would be sufficient to amount to a violation of Art. 3. Nevertheless, the judges deemed it necessary to point out the health-related vulnerability.

VIII. EXTREME VULNERABILITY AND THE ECtHR – WHAT DOES THE PICTURE LOOK LIKE?

The final chapter of this article will draw the threads of chapter one and two back together. How does the doctrine of extreme vulnerability operate in ECtHR’s case law and how can it be related to the vulnerability thesis conceptualised in the first chapter? Probably the most accurate description is the same as applied to describe the vulnerability thesis at the beginning of chapter one – neither the ECtHR’s approach to extreme vulnerability nor the relationship to Fineman’s vulnerability thesis are straightforward.

Firstly, in relation to the general relationship between Fineman’s vulnerability thesis and the ECtHR’s approach to extreme vulnerability, some academics have suggested that the ECtHR applies vulnerability to asylum-seekers as a group-centred concept. However, in light of the analysis conducted in chapter two, it is clear that this statement is not entirely accurate. Both in cases involving migrant children and migrants with health issues the ECtHR reflected on the particular experiences and conditions of the migrants and connected their vulnerability to those considerations. Timmer recognises that the closest the ECtHR comes to embracing Fineman’s vulnerability thesis is in its case law relating to children. And although the connection is less obvious in relation to migrants with health difficulties, the judgments in Aden Ahmed and Sufi and Elmi are indicators that the ECtHR moves towards a vulnerability thesis which reflects the particular vulnerabilities of applicants. Yet we must be careful not to overstate this relationship, especially when it comes to the ‘universal’ nature of Fineman’s thesis. Whilst the ‘particular’ nature of vulnerability is reflected within ECtHR jurisprudence; the universality of vulnerability is not. The ECHR subject is

115 Brandl and Czech (n 44) 252.
116 Sufi and Elmi v the United Kingdom [303].
117 Brandl and Czech (n 44) 249.
118 Timmer (n 5) 152.
modelled on the traditional international human rights law subject and, as such, is anchored in liberal tradition and is not inherently vulnerable.¹¹⁹ The ECtHR’s subjects are examples of marginalised or stigmatised subjects – they do not function as an alternative to the liberal subject, but are classic examples of liberalism’s ‘Others’.¹²⁰ In this regard, the one-sided emphasis on extreme vulnerability is reductionist, as it shows only one dimension of the image of migrants in situations of extreme vulnerability¹²¹ – their capacity for suffering.

A second point relating both to cases concerning migrant children and those concerning migrants with fragile health is the possible distortion of the vulnerability thesis given the serious circumstances of all the cases. With the notable exception of Popov, in all the cases discussed in this article, the extreme vulnerability thesis was developed in the context of a violation of Art. 3 ECHR, which prohibits torture and inhuman and degrading treatment. As the ECtHR has stressed on numerous occasions,¹²² the protection under Art. 3 is absolute and consideration must be given to this factor. Another important contextual factor is that the majority of these cases involved the standards within detention facilities, thus involving activities directly perpetrated by states. However, this argument is weakened by the decisions in Tarakhel, Aden Ahmed, and Sufi and Elmi, where the applicants did not complain of treatment of detention, but addressed the non-refoulement obligations of states.

In respect of migrant children in situations of extreme vulnerability, there are also several conclusions to be made. Timmer claims that when the ECtHR is of the opinion that an applicant is vulnerable on multiple grounds, it is inclined to attach great importance to this fact, even leading to a situation where a founding of compounded vulnerability trumps all other considerations.¹²³ While the cases concerning migrants with health-issues are not clearly supportive of this account, it certainly holds true for cases of migrant children. As was already mentioned, the overriding nature of a finding of extreme vulnerability in cases concerning migrant children was noted by the ECtHR itself.¹²⁴ Not only is the ECtHR extremely vigilant while assessing the arbitrariness of the prolonged detention of minors,¹²⁵ the decision in Tarakhel shows a move towards a strong emphasis on extreme vulnerability even outside the context of detention cases. Because extreme vulnerability is given such importance, considerations which otherwise might provide a counterweight to the interests of the applicants are given a lesser role.

¹¹⁹ Da Lomba (n 32) 359.
¹²⁰ Timmer (n 5) 162.
¹²¹ Vandenhole and Ryngaert (n 59) 70.
¹²² e.g. Mubilanzila Mayeka and Kaniki Mitunga v Belgium, para 55.
¹²³ Timmer (n 5) 161.
¹²⁴ Muskhadzhiyeva and others v Belgium, para 56; Mubilanzila Mayeka and Kaniki Mitunga v Belgium, para 55.
For example, whether minor asylum-seekers are vulnerable does not depend on whether they are unaccompanied or travel together with their parents or other relatives who take care of them.\footnote{126} Brandl and Czech note that the ECtHR’s consideration of children’s special needs is owed not least to the CRC, and that references to the CRC in judgments are not to be understood as lip service.\footnote{127} However, the influence of the CRC on the parts of ECtHR judgments which deal with extreme vulnerability is questionable at best. In \textit{Mubilanzila Mayeka}, the ECtHR did not refer to the CRC at all in its judgment. The references to the CRC did start with \textit{Muskhadzhiyeva} and have continued in later cases, but they did not play a major role in the reasoning. When addressing violations of Art. 3 ECHR, which is the provision under which the ECtHR has been developing its approach to extreme vulnerability, the judgments have only referred to CRC provisions which deal with the scope of the positive obligations of the state to provide support for migrant children and children in detention (particularly, Articles 22 and 37 CRC). Surprisingly, no references were made to the requirement of the best interests of a child being the primary consideration, which is articulated in Art. 3 CRC. Vandenhole and Ryngaert do remind that a grand chamber of the ECtHR has submitted that the court never considers the provisions of the Convention as the sole framework of reference for the interpretation of rights enshrined therein, but takes into account any relevant rules and principles of international law.\footnote{128} Yet, the view that the concept of best interests does influence the reasoning on the extreme vulnerability doctrine and violations of Art. 3 ECHR is further undermined by the fact that Art. 3 CRC and the concept of best interests of a child have been considered and recognised in parts of judgments which deal with a violation of Art. 5 ECHR.\footnote{129} This paradoxical inclusion in relation to Art. 5 and non-inclusion in relation to Art. 3 ECHR lends support to the argument that extreme vulnerability, and vulnerability more generally, is being developed as a stand-alone concept, and that vulnerability as interpreted by the ECtHR is being shaped in a particularistic rather than group-based manner.

In contrast to the development of extreme vulnerability of migrant children, the development in the context of migrants with fragile health is less forceful, proceeds at a slower pace, and in a subtler manner. Vulnerability in these cases does not function as a trump card. The judgments in \textit{D.} and \textit{N.} show that the ECtHR’s deployment of the concept of vulnerable group in health-related cases is subject to resource and immigration control considerations,\footnote{130} which are considerations which would have only limited relevance, if any at all, in cases involving migrant children. This tendency to give weight to other considerations

\footnotesize{\bibliography{main}}
than the individual vulnerability of the applicant was more prevalent before the M.S.S. judgment. As Aden Ahmed and Sufi and Elmi show, a move away from the older case law has occurred and there is an increasing recognition of vulnerability as a relevant criterion to be applied in addition to, or even as a substitute of, the exceptional circumstances standards applied in D.\textsuperscript{131} Lastly, the references to vulnerability are still made in a subtle manner, as the ECtHR does not make explicit references to the concept of vulnerability, although the considerations which are taken into account clearly reflect a vulnerability approach similar in many respects to that adopted when dealing with extreme vulnerability of migrant children.

CONCLUSION

The reference to George Orwell’s Animal Farm at the outset of this article provided a reminder of how societies which profess equality as their essential pillar may fail to achieve this ideal. As the on-going migrant crisis highlighted, even modern liberal societies are susceptible to such failures when individuals do not fit into the mould of the traditional liberal subject. The particular experiences of migrants give rise to vulnerabilities which are difficult to reconcile with the autonomy and independence usually attributed to the liberal subject. In order to better reflect the needs of groups such as migrants, this article calls for a major change of attitude in political, social, and legal theory. Fineman’s vulnerability thesis advocated herein represents a challenge to the liberal status quo which, it is argued, has the potential to bring about such a change. As the first chapter of this article showed, the universal and particular approach to vulnerability not only represents a departure from the traditional liberal subject, but also represents a break from the classical approach to vulnerability centred around membership of a stigmatised group. Moreover, the vulnerability thesis should not be ignored within the human rights discourse. It has the potential to provide both a conceptual underpinning for human rights as well as to be used as a practical tool to enhance the protection of those most at risk, including migrants. As the analysis in the second chapter shows, the ECtHR is cognisant of this, and it has been steadily using vulnerability reasoning within its jurisprudence.

In both categories of cases which were covered in this article, that is case law concerning migrant children and migrants with fragile health, the concept of vulnerability has been already used by the ECtHR on a number of occasions. As a result, some attributes of the ECtHR’s approach to vulnerability are gradually crystallising. For example, the vulnerability thesis applied by the ECtHR in these cases resembles Fineman’s vulnerability thesis, at least in relation to its ‘particular’ element. Thus, the claim that the ECtHR’s vulnerability jurisprudence concerning migrants is entirely group-based is inaccurate. On the other hand, the importance

\textsuperscript{131} Flegar (n 104) 160.
of the vulnerability thesis should not be overstated, as the court’s willingness to protect victims can be linked to other considerations such as the severity of violations which were covered or the combined effect of numerous failures by the authorities.

Moreover, the ECtHR jurisprudence also shows that the extreme vulnerability doctrine is not developed in a blanket manner. The two lines of cases analysed show that differences exist between various categories of applicants. While in the fragile health cases the ECtHR adopts an approach, which balances the extreme vulnerability of the victims with other factors, in cases concerning migrant children their extreme vulnerability trumps any other considerations. It will be interesting to see whether the ECtHR will adopt a more uniform approach to vulnerability in the future. In the meantime, it can be concluded that vulnerability is important for ECtHR’s jurisprudence concerning migrants, but its weight must not be overstated as it is merely one of many elements which influenced the decision-making in the cases which were analysed.