Vulnerability under Article 14 of the European Convention on Human Rights

Innovation or Business as Usual?

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ABSTRACT
On the basis of a few initial judgments, the literature has identified an emerging vulnerable groups approach under Article 14 ECHR. This article enquires into how this trend has played out in subsequent case law. It provides an analysis that is firmly anchored in the full body of the European Court of Human Rights’ jurisprudence under Article 14, and asks whether the emerging vulnerable groups approach is innovative when assessed against that background. The article concludes that, while group vulnerability under Article 14 continues to have the function of facilitating stricter review and a more substantive approach in the case at hand, this may seem more novel than it actually is, since the traditional ‘suspect’ discrimination grounds approach could be described in exactly the same terms. Instead, the article argues that the novelty involved rather seems to be the potential of vulnerability to function as a tool for identifying and elaborating the instances when variations in approach may be appropriate even within the same discrimination ground. Finally, it exhibits how classic approaches are still being applied by the Court where vulnerability could be raised, and how the Grand Chamber of the Court still seems extremely cautious in adopting vulnerability as an analytic lens.

Keywords
1. INTRODUCTION

Article 14 of the European Convention on Human Rights (ECHR, the Convention) has traditionally been perceived as a relatively weak equality guarantee, as a kind of a Cinderella provision that has not been given an opportunity to shine. Scholars have, however, noted that recent developments in the case law of the European Court of Human Rights (ECtHR, the Court) have given it more bite: that Cinderella has emerged from the shadows and arrived at the ball.¹

Key milestones in the development towards a more robust equality guarantee include, firstly, the first effective application of indirect discrimination analysis in D.H. and Others v Czech Republic of 2007, which concerned segregation in the education of Roma children.² Indirect discrimination analysis was, however, slow to catch on outside this particular context, but it has recently been followed up in the context of immigration law in Biao v Denmark of 2016.³ Secondly, following up on Thlimmenos v Greece of 2000, the Court in Guberina v Croatia of 2016 and Çam v Turkey of 2016 established that a requirement of reasonable accommodation is part of the non-discrimination guarantee in Article 14. The 2016 cases concerned non-accommodation for the housing situation of a disabled child’s family and a disabled child that was denied a place at a music academy for lack of facilities.⁴ Thirdly, the Court has found that Article 14 has been violated when rights or entitlements, which States voluntarily grant to one group (i.e. not as a result of an obligation under any other Convention provision), have not been extended to other similarly situated groups. This implies a positive obligation to fulfil rights under Article 14, since the State in question must act to extend a certain beneficial treatment to new groups (although it has to be admitted that the State could also meet the Article 14 requirement by denying everyone the beneficial treatment). This occurred for example in E.B. v France of 2008, where since France had granted the right to adopt to single persons, this also had to apply to a single lesbian person, and in Konstantin Markin v Russia of 2012, where the Article 14 violation arose from the fact that parental leave allowances were only available to mothers and not

2. D.H. and Others v Czech Republic, no 57325/00, ECtHR [GC], 13 November 2007. See also Oršuš and Others v Croatia, no 15766/03, ECHR [GC], 16 March 2010, which also concerned indirect discrimination and the education of Roma children. The conceptual difference between reasonable accommodation and indirect discrimination is very unclear. Therefore, Thlimmenos v Greece, no 34369/97, ECtHR [GC], 6 April 2000 § 44, is commonly also viewed as a precursor to the adoption of indirect discrimination analysis by the Court: see for example Fredman (n 1) 7.
3. Biao v Denmark, no 38590/10, ECtHR [GC], 24 May 2016. The case concerned the rule that a person had to have had citizenship in Denmark for 28 years before he/she could apply for family unification, which obviously had different consequences for those of Danish origin and those of other ethnic origins.
4. Guberina v Croatia, no 23682/13, ECtHR, 22 March 2016; Çam v Turkey, no 51500/08, ECtHR, 23 February 2016. The precursor to this development can be identified in the approach taken in Thlimmenos v Greece (n 2) § 44, which requires that individual differences are treated differently. This is similar, but not identical, to the approach developed for indirect discrimination analysis in D.H. and Others v Czech Republic (n 2) § 175, which emphasises how ‘a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.’
to fathers.\footnote{E.B. v France, no 43546/02, ECtHR [GC], 22 January 2008; Konstantin Markin v Russia, no 30078/06, ECtHR [GC], 22 March 2012. While the positive obligation to fulfil rights is becoming increasingly clear in recent case law of this kind, the fact that States have a negative obligation not to discriminate in those arrangements they voluntarily make within the ambit of Convention guarantees has always been part and parcel of Article 14. This is exhibited by Case relating to certain aspects of the laws on the use of languages in education in Belgium v Belgium nos. 1474/62 et al, ECtHR, 23 July 1968 § 9, part IB: ‘Thus, persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol (P1-2) the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.’ See further Oddný Mjöll Arnardóttir, ‘Discrimination as a magnifying lens: scope and ambit under Article 14 and Protocol No. 12’ in Eva Brems and Janneke Gerards (eds), Shaping Rights in the ECHR – The role of the European Court of Human Rights in Determining the Scope of Human Rights (CUP 2013) 330, 337-338. On negative and positive (protect and fulfil) state obligations, see e.g. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht, January 22-26 1997) <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html> accessed 4 October 2017.}

Fourthly, and finally, the positive obligation to protect victims of violations can also be found in the ‘procedural aspect’ of Article 14, introduced in \textit{Nachova and Others v Bulgaria} of 2007, whereby States are required to investigate the motives behind violent events that have overtones of racial hatred,\footnote{Nachova and Others v Bulgaria, nos. 43577/98 and 43579/98, ECtHR [GC], 6 July 2005 § 168. See also e.g. Angelova and Iliev v Bulgaria, no 55523/00, ECtHR, 26 July 2007.} religious hatred,\footnote{See e.g. Milanovic v Serbia, no 44614/07, ECtHR, 14 December 2010.} or homophobia.\footnote{M.C. and A.C. v Romenia, no 12060/12, ECtHR, 12 April 2013.} Similarly, as established in \textit{Opuz v Turkey} of 2009, in cases of domestic violence, the Court has interpreted Article 14 as entailing an obligation to protect. This entails that States must exhibit due diligence in terms of investigating and prosecuting violations, and, if needed, to follow up on protective measures.\footnote{Opuz v Turkey, no 33401/02, ECtHR, 9 June 2009. See also Mudric v the Republic of Moldova, no 74839/10 ECtHR, 16 July 2013. In the following, all obligations to investigate, prosecute and otherwise protect victims of violence will be referred to as positive obligations of due diligence, which is a specific sub-category of the positive obligation to protect.} As will be explained in more detail in section 3 \textit{infra}, the vulnerability of applicants has been referred to by the Court in many of these judgments, although this does not seem to apply to the case law implying positive obligations to fulfil rights. Also, all these developments have correctly been referred to as moving the Court’s jurisprudence in the direction of substantive equality.\footnote{Fredman (n 1) 29; O’Connell (n 1) 214; Lourdes Peroni and Alexandra Timmer, ‘Vulnerable groups: the promise of an emerging concept in European Human Rights Law (2013) 11 International Journal of Constitutional Law 1056, 1074; and Oddný Mjöll Arnardóttir, ‘The Differences that Make a Difference: Recent Developments in the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights’ (2014) 14 Human Rights Law Review 647, 657.}

There may, of course, be a number of factors that influence legal developments like these. Theoretical developments within a range of disciplines, increased awareness of the plight of disadvantaged groups, and cross-fertilisation from other legal regimes are clearly among the key influencing factors. In ECHR case law, however, this mostly seems to boil down to an increased attention to the discrimination grounds, which in turn reflects an increased awareness of the lived realities behind them—an awareness of how some differences in status actually make a big difference in people’s lives, while other differences do not. As already mentioned, the Court increasingly seems to be approaching this issue
through the lens of vulnerability, also. This article will focus on this latest development, and enquire whether the tendency to employ vulnerability reasoning signals something new, or is simply old wine in new bottles.

2. CLASSIC ANALYTIC APPROACHES UNDER ARTICLE 14

To set the stage and place recent developments in context, it is necessary to give an overview of the key elements of classic approaches under Article 14 ECHR. This facilitates the assessment made in section 4 of whether increased references to vulnerability under Article 14 indicate an innovative shift in the Court’s approach, or a continuation of classic doctrine.

It is well known that Article 14 is an accessory right that applies only in conjunction with other Convention rights. Further, as the express list of discrimination grounds gives examples and refers to ‘other status’, it has been the traditional understanding that Article 14 can include any and all discrimination grounds. This may be part of the reason why, as compared with EU non-discrimination law, which operates with reference to a limited list of discrimination grounds, it has taken so long for the Court to acknowledge and apply the concept of indirect discrimination. Under the Convention, the perceived injustice could always be addressed directly by reference to the express reason for different treatment (educational aptitude as in D.H. and Others, or 28 years of citizenship as in Biao) instead of indirectly by reference to the groups most disadvantaged by the rule or practice in question (Roma children, or persons of minority ethnic origin). Therefore, while the open approach to discrimination grounds allows the Court to tackle grounds not mentioned, such as sexual orientation and disability, it probably also delayed for a long time development in the direction of identifying and reacting to apparently neutral rules and practices that disadvantage persons belonging to marginalised groups.

In a number of cases against the United Kingdom from 2010 and 2011, the classic open model approach was challenged, and the Court was invited to conclude that the protection of Article 14 only reached a limited number of discrimination grounds, namely those that relate to inherent personal characteristics or deeply held convictions or beliefs. For a while the case law was unclear as to whether the Court was actually responding to this challenge by narrowing down the scope of Article 14. It seems, however, that the Court

11. D.H. and Others v Czech Republic (n 2); Biao v Denmark (n 3).
12. Carson v United Kingdom, no 421804/05, ECtHR [GC], 16 March 2010; Springett and Others v United Kingdom, no 34726/04 et al, ECtHR (decision), 27 April 2010; Clift v United Kingdom, no 7205/07, ECtHR, 13 July 2010; Bah v United Kingdom 56328/07, ECtHR, 27 September 2011.
13. See generally Janneke Gerards, ‘The Discrimination Grounds of Article 14 of the European Convention on Human Rights’ (2013) 13 Human Rights Law Review 99; and Arnardóttir, ‘The Differences that Make a Difference’ (n 10) 658-663. In the period immediately after this challenge most judgments followed the traditional line, whereas the following admissibility decisions and judgments did not: Springett and Others v United Kingdom; Peterka v Czech Republic, no 21990/08, ECtHR (decision), 4 May 2010; Yordanova and Tochev v Bulgaria, no 5126/05, ECtHR, 2 October 2012; Čadek and Others v Czech Republic, no 31933/08, ECtHR, 22 November 2012; and Maktouf and Damjanovc v Bosnia and Herzegovina, nos. 2312/08 and 34179/08, ECtHR [GC], 18 July 2013.
has settled the issue by carving in stone the classic approach, as it now routinely states that ‘[t]he words “other status” have generally been given a wide meaning […] and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent’. The non-discrimination guarantee, therefore, continues to cover a rich plethora of discrimination grounds, including, for example, length and kind of prison sentence, or holding fishing rights in different areas.

Given this open-ended nature of Article 14, the Court clearly needs some analytic tools to manage it. When positive obligations of due diligence are at stake, the analytic approach is quite straightforward and focuses simply on whether the national authorities have in fact acted to investigate, prosecute or protect the applicants. Otherwise, however, the analytic approach under Article 14 is a rather complex structure, which was recently summed up by the Grand Chamber in Biao. The first important point to note is that there has never been a requirement of intent to discriminate under the Convention, so this issue is never addressed in the Court’s analytic approach. Second, there is a certain division of the burden of proof as the applicant must establish that there has been a difference in treatment, that it is based on a certain discrimination ground (‘causation’), and possibly also persuade the Court that he/she is in a similar situation to some other person/group that receives a more favourable treatment (‘comparability’). Once these elements have been established, the burden of persuasion falls on the respondent state, which will have to show that the relevant treatment was justified. Third, and related to this justification more specifically, the Court’s analytic test stipulates that ‘[a] difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved’. Finally, when performing this objective and reasonable justification test, the Court gives the respondent state ‘a certain margin of appreciation’. Notably, the State can argue that ‘differences in otherwise similar situations justify a difference in treatment’. This, again, points towards comparability, which can thus be the burden of either of the two parties. The omnipresence of comparability clearly speaks to the fact that the Aristotelian equality maxim that likes shall be treated alike and differences differently is a key conceptual element of non-discrimination. Conceptually, therefore, the Court is already in the business of deciding who is entitled to what treatment when it addresses the question of comparability.

These analytic elements, however, play out differently in relation to different discrimination grounds, and it is necessary to have a clear picture of how this functions in practice.

14. Biao v Denmark (n 3) § 89. This judgment cited Carson v United Kingdom (n 12) and Clift v United Kingdom (n 12) in support of this position of principle. See also, for example, Lupeni Greek Catholic Parish and Others v Romania, no 76943/11, ECtHR [GC], 29 November 2016 §163.
15. Clift v United Kingdom (n 12).
17. Biao v Denmark (n 3) § 92.
18. Ibid, § 90.
20. Ibid.
before it is possible to assess whether vulnerability has something new to offer into the analytic process. Importantly in this context, the discrimination grounds can be conceptualised as running along a spectrum. For discrimination grounds at the ‘top end’, which relate to certain inherent personal characteristics or deeply held convictions or beliefs (identities), comparability seems taken as a given and it is therefore the burden of the respondent State to convince the Court that differences in otherwise similar situations justify different treatment. The State’s margin of appreciation is also narrower, and findings of violations are more common. From here, however, there is a sliding scale of increasingly lenient review all the way down to the ‘bottom end’, which consists of discrimination grounds that are not (or only very loosely) related to personal status. Here, the burden of persuasion for comparability rests with the applicant, and the lack thereof often provides the reason why the Court finds no violation. In addition, in case this burden is met, the relevant state generally enjoys a wide margin of appreciation when arguing objective and reasonable justification.21

The discrimination grounds at the ‘top end’ are often referred to as ‘suspect’ discrimination grounds. They have been identified in the literature with reference to how the Court has developed specific analytic standards for them, and the list of such grounds comprises discrimination based on gender/sex, ethnic origin/race, sexual orientation, disability, religion, nationality and birth out of wedlock.22 The Court has, thus, referred to the express test that very weighty or particularly convincing reasons are needed to justify different treatment, or stated that the margin of appreciation is considerably reduced in cases of this kind. In the context of racial discrimination, it has even stated that ‘no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures’.23 All the suspect discrimination grounds, further, can relate to groups of persons that have historically been marginalised or disadvantaged in some sense.

It is interesting to note in this context that the key milestones in the development towards a more robust substantive equality guarantee (indirect discrimination, reasonable accommodation, positive obligations to fulfil rights and positive obligations of due diligence) are judgments concerning five of the seven suspect discrimination grounds—namely gender/sex, ethnic origin/race, sexual orientation, disability and religion—but not the suspect grounds of birth out of wedlock or nationality.24 This points to the fact that there is also a certain variety within the group of suspect grounds in how strict the Court is in its review.

21. For a more detailed overview of the Court’s approaches in this respect, see Arnardóttir (n 10) 649-652 and 654-658, with references to case law.
22. Ibid, 649-650, with references to case law. O’Connell (n 1) 224 highlights all the same discrimination grounds, except disability, but Fredman (n 1) 6 only highlights the discrimination grounds of ethnic origin, gender, sexual orientation and disability.
23. Timishev v Russia, nos. 55762/00 and 55974/00, ECtHR, 13 December 2005 § 58, (instructions not to admit any Chechens into one of Russia’s republics, violation). Similarly, Nachova and Others v Bulgaria (n 6) § 145; D.H. and Others v Czech Republic (n 2) § 176; and Biao v Denmark (n 3) § 94.
24. See the judgments referred to in section 1.
Thus, although the Court is consistently strict in cases where discrimination based on birth out of wedlock is raised, the discrimination ground of nationality provides a somewhat different picture. In Gaygusuz v Turkey of 1996, the Court indeed reasoned that different treatment based on nationality required ‘very weighty reasons’ to be justifiable. It has since referred to this judgment to reiterate that nationality is a suspect discrimination ground, most recently in the Biao judgment, where the Court simply stated that different treatment based on nationality could only be allowed on the basis of ‘compelling or very weighty reasons’. At the same time, however, it should be noted that the Court has mostly restricted its Article 14 case law on nationality to the situation where, like in Gaygusuz, legally resident aliens are denied social security benefits, which is a practice that hardly exists in Europe anymore, while still allowing various other different treatment based on nationality. Indeed, as the Court stated in Ponomaryovi v Ukraine of 2011:

The Court starts by observing that a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory. For instance, the preferential treatment of nationals of member States of the European Union […] may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship.

The discrimination ground of religion actually also stands somewhat apart within the group of suspect discrimination grounds. In Vojnity v Hungary of 2013, the Court indeed referred to the importance of freedom of religion and stated that the ‘very weighty reasons’ test applied to different treatment based on religion. The case concerned access rights to the applicant’s son after divorce, and follows a long line of judgments on custody and access disputes where the Court has applied a strict standard of review and stated that distinctions based on religion are ‘not acceptable’ under the Convention. In Milanovic v Serbia

25. See e.g. Inze v Austria, no 8695/79, ECtHR, 28 October 1987; Pla and Puncernau v Andorra, no 69498/01, ECtHR, 13 July 2004; Fabris v France, no 16574/08, ECtHR [GC], 7 February 2013; and Wolter and Sarfert v Germany, nos. 59752/13 and 66277/13, ECtHR, 23 March 2017.
26. Gaygusuz v Austria, no 17371/90, ECtHR, 16 September 1996 § 42.
27. Biao v Denmark (n 3) § 114: “The burden of proof must shift to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and was the result of objective factors unrelated to ethnic origin (see paragraphs 115 to 137 below). Having regard to the fact that no difference in treatment based exclusively or to a decisive extent on a person’s ethnic origin is capable of being justified in a contemporary democratic society and a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons (see paragraphs 93 and 94 above), it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 taken in conjunction with Article 8 of the Convention.”
29. Ponomaryovi v Ukraine, no 5335/05, ECtHR, 21 June 2011 § 54.
30. Vojnity v Hungary, no 29617/07, ECtHR, 12 February 2013 § 36.
31. Hoffmann v Austria, no 12875/87, ECtHR, 23 June 1993 § 36.
of 2010, the Court also equated violence with overtones of religious hatred to that involving racial hatred, in the sense that treating such ‘violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights’.32 This approach is, perhaps, not surprising when taking into account how the discrimination grounds of ethnic origin and religion are closely interwined.33 At the same time, however, the Court has given States a wide margin when discrimination is raised in connection with the role of religion in education and public life, like in *Lautsi and Others v Italy* of 2011, where Article 14 was invoked but the Court did not find it necessary to review the discrimination claim, and in *S.A.S. v France* of 2014, where the Court found that the ban on wearing the full-face veil in public had an objective and reasonable justification under Article 14.34 Finally, it may be mentioned that despite the Court’s approach that ‘particularly convincing and weighty reasons’ are required to justify a difference in treatment based on sexual orientation,35 the Court still maintains its position that the Convention does not require equal treatment in terms of access to marriage.36

3. VULNERABILITY UNDER ARTICLE 14: THE STATE OF PLAY

It has been pointed out in the literature that the Court has traditionally not provided much explanation of the reasons why it has developed specific analytic tests indicating strict review for certain discrimination grounds, except for simply referring to the common ground that exists under international and domestic legal developments. Apart from that the Court has not elaborated, although it has added some limited comment on certain discrimination grounds or situations, such as mentioning that racial discrimination is particularly invidious, that hate crimes are particularly destructive of fundamental rights, and that there is a need to foster the integration of disabled persons in society.37 Recently, however, the Court seems to be beginning to develop a ‘vulnerable groups’ approach under Article 14, which casts a clearer light on variations in the strictness of its review and the reasons behind them.38 The present section will take a closer look and give a full descriptive account of all the Article 14 judgments that refer to vulnerability or stereotypes in

32. *Milanovic v Serbia* (n 7) § 97. The Court found a violation of Article 14 in conjunction with Article 3. In the context of the Court’s finding of an independent violation of positive obligations to protect under Article 3, it also reasoned that the applicant ‘was a member of a vulnerable religious minority’ (§ 89).

33. *Timishev v Russia* (n 23) § 55. See also Dagmar Schiek, ‘A New Framework on Equal Treatment of Persons in EC Law?’ (2002) 8 European Law Journal 290, 312. Similarly, the discrimination grounds of ethnic origin and nationality are often closely intertwined, see *Biao v Denmark* (n 3) § 114; *Ponomaryovi v Ukraine* (n 29) § 49.

34. *Lautsi and Others v Italy*, no 30814/06, ECtHR [GC], 18 March 2011, concerning religious symbols in the classroom; and *S.A.S. v France*, no 43835/11, ECtHR [GC], 1 July 2014, concerning a general ban on full-face veils in public. See also Fredman (n 1) 6, who argues that the Article 14 case law on religion is in a flux.

35. *L. and V. v Austria*, nos. 39392/98 and 39829/98, ECtHR [GC], 9 January 2003 § 53; *E.B. v France* (n 5) § 91.


37. Arnardóttir (n 10) 650, with references to case law.

38. The first case law indicating this development was identified and discussed in Lourdes Peroni and Alexandra Timmer (n 10) 1085; and Arnardóttir (n 10) 654.
order to identify how, more precisely, the Court has engaged with these issues. The case-
law research performed on HUDOC reaches all judgments until 31 August 2017, where
Article 14 was raised, and where the search term ‘vulnerab*’ appeared. This rendered a total
of 24 judgments (in English and French) where the applicants’ vulnerability was directly
addressed under Article 14 by the majority of the Court. These were chosen for closer
analysis.39 The HUDOC database was also searched for Article 14 judgments where the
search term ‘stereotyp*’ appears. As references to stereotypes are commonly part and parcel
of the Court’s vulnerable groups approach under Article 14, both searches included many
of the same judgments (in English and French alike). As part of its reasoning under Article
14, the Court used stereotypes without referring also to vulnerability in only three judg-
ments.40 This, of course, confirms how attention to the harmful effects of stereotypes is
part and parcel of the emerging vulnerable groups approach. To place this case-law analysis
in context, the literature on vulnerability was also consulted to identify leading judgments
on vulnerability in cases where Article 14 was not invoked.

3.1 Recent Case-Law Developments Indicating an Emerging Vulnerable Groups Approach

3.1.1 Introduction

Looking back towards the origins of the emerging vulnerable groups approach under
Article 14,41 the development seems to have begun in earnest with the 2007 Grand
Chamber judgment of D.H. and Others, which concerned racial discrimination in edu-
cation. Here, the Court provided an unusually detailed rationale for its strict approach,
which, as already indicated, led to its first finding that indirect discrimination had taken
place. Taking its cue in the Buckley v the United Kingdom and Chapman v the United
Kingdom judgments,42 the Court reasoned that ‘as a result of their turbulent history and
constant uprooting the Roma have become a specific type of disadvantaged and vulnerable
minority’ and that ‘they therefore require special protection’.43 The more specific contours
of a ‘vulnerable groups’ approach were, however, elaborated in two subsequent Chamber
judgments. The first judgment is Alajos Kiss v Hungary of 2010, which actually did not
concern Article 14, but the voting rights of persons with mental disabilities under Article

39. A total of 141 judgments came up on HUDOC and were analysed, but in most instances the vulnerability of
the applicant was raised by the parties but not addressed by the Court, only raised in separate opinions, or not
argued/addressed under Article 14.
40. Konstantin Markin v Russia (n 5); Khomtchou and Aksenchik v Russia, no 60367/08 and 961/11, ECtHR [GC], 24
January 2017; Carvalho Pinto de Sousa Morais v Portugal, no 17484/15, ECtHR, 25 July 2017. All three concerned
gender-based discrimination.
41. See also Peroni and Timmer (n 10) 1063; and Arnardóttir, (n 10) 652-654.
42. Buckley v United Kingdom, no 20348/92, ECtHR, 25 September 1996 § 96; Chapman v United Kingdom, no
27238/95, ECtHR, 18 January 2001 § 96. Both judgments concerned Article 8 and simply referred to ‘the vul-
nerable position of Gypsies as a minority’ and reasoned that ‘this means that some special consideration should
be given to their needs and their different lifestyle’.
43. D.H. and Others v Czech Republic (n 2) § 182. On similar notes, see Sampanis and Others v Greece, no 32526/05,
ECtHR, 5 June 2008 § 86, and Muños Díaz v Spain, no 49151/07, ECtHR, 8 December 2009 § 61.
3 of Protocol 1. The Court, nevertheless, drew on *D.H. and Others* on racial discrimination, and Article 14 case law on the suspect discrimination grounds of gender and sexual orientation, and reasoned that ‘if a restriction on fundamental rights applies to a particularly vulnerable group in society […], then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question’.44 The Court even went on to elaborate the reasons behind this approach by stating:

The reason for this approach, which questions certain classifications *per se*, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.45

The Court, thus, tied together the classic suspect grounds approach and the vulnerable groups approach, emphasising a social-contextual understanding of group membership. This line of reasoning was, then, imported verbatim back into Article 14 case law in *Kiyutin v Russia* of 2011, which concerned discrimination against persons with HIV-positive status. The *Kiyutin* judgment, however, expressly listed sex, race or ethnicity, sexual orientation, and disability as discrimination grounds potentially related to vulnerable groups, thus adding the discrimination ground of disability to the list as originally set out in *Alajos Kiss*.46 Also, when applying the vulnerable groups approach to the facts of the case, the Court focused on the ‘widespread stigma and exclusion’ experienced by people living with HIV/AIDS.47

The above judgments provide the clearest examples of the emergence of a vulnerable groups approach under Article 14, but a closer look at how vulnerability has played out in the case law under Article 14 renders the following bigger picture.

### 3.1.2 Discrimination Based on Gender/Sex

In the Chamber judgment of *Opuz v Turkey* of 2009, the Court referred to the vulnerability of women in south-east Turkey when applying Article 3 in a domestic violence case, but did not mention vulnerability under Article 14. The Court nevertheless found a violation of both Articles.48 In subsequent case law, however, the Court has extended the vulnerable groups approach to its reasoning under Article 14, but only when raised in conjunction with Article 3 in the context of the positive obligation of due diligence to protect victims of

44. *Alajos Kiss v Hungary*, no 38832/06, ECtHR, 20 May 2010 § 42.
45. Ibid.
46. *Kiyutin v Russia*, no 2700/10, ECtHR, 10 March 2011 § 63.
47. Ibid, § 64.
48. *Opuz v Turkey* (n 9) § 160. When pronouncing on the positive obligation to protect under Article 3, the Court referred to the vulnerable situation of women in south-east Turkey, and proceeded on the premise that the applicant (an adult woman) fell within the group of vulnerable individuals. See also *Eremia v The Republic of Moldova*, no 3564/11, ECtHR, 28 May 2013, and *Mudric v Republic of Moldova* (n 9), where the Court took the same approach and did not raise the vulnerability of victims of domestic violence under Article 14. Interestingly, when introducing its list of vulnerable groups and including gender on that list, the Chamber in *Kiyutin v Russia* (n 46), did not mention the *Opuz* line of judgments, but referred instead to Article 14 judgments and the classic approach established in *Abdulaziz, Cabales and Balkandali v the United Kingdom*, nos. 92148/0 et al, ECtHR, 28 May 1985.
domestic violence. Thus, in the Chamber judgments of T.M. and C.M. v the Republic of Moldova of 2014, Halime Kılıç v Turkey of 2016, Talpis v Italy of 2017, and Bălșan v Romania of 2017, the Court referred to the vulnerability of victims of domestic violence, and found that the respondent State had not honoured its positive obligation under Article 14 to protect the applicant. The Court did not expressly note public attitudes or the general situation of women in the relevant country, except in Bălșan, where it took note of the fact that official statistics show that domestic violence is tolerated and perceived as normal in Romania. In Rumor v Italy of 2014, which also is a Chamber judgment in a case of this kind, the Court also reasoned more generally that ‘[c]hildren and other vulnerable individuals, in particular, are entitled to State protection’ and found that ‘the applicant was a «vulnerable individual» having regard to the physical injuries she suffered […] and her fear of further violence.’ The Court, however, found no violation as the State had sufficiently discharged its positive obligation to protect the applicant.

Despite the abstract mention of gender as potentially constituting vulnerability in Kiyutin, the Court has only expressly applied vulnerability reasoning under Article 14 in cases concerning gender-based violence. When gender/sex discrimination is raised outside the context of gender-based violence, however, the Court has looked at social context through stereotypes instead of vulnerabilities. In fact, it seems that the Grand Chamber prefers this to the vulnerable groups approach. Thus, in Konstantin Markin v Russia of 2012, the Grand Chamber referred to the evolution of legislation in the member states towards granting parental leave allowances to men. Significantly, and with reference also to the case law of the Court of Justice of the European Union, it emphasised how the different treatment of fathers with respect to parental leave allowances unjustifiably perpetuates the gender stereotypes of the female as the primary caretaker of children and the male as the breadwinner. It added that gender stereotypes could not be used to justify the different treatment ‘any more than similar stereotypes based on race, origin, colour or sexual orientation’, but made no mention of the vulnerability of men in this context.

Interestingly, however, the Court took a very different approach in the Grand Chamber judgment of Khamtokhu and Aksenchik v Russia of 2017, where a sentence of life imprisonment could not be passed on women (or persons under the age of 18 or over the age of 65). Here, the Court nodded towards its case law on how stereotypes cannot be relied on to justify different treatment, but nevertheless by 10 votes to seven found that this was not

49. In such cases of positive obligations, the ‘very weighty reasons’ test for vulnerable groups is not applicable as such, since it is focused on justifications for restrictions on rights (i.e. justifications for different treatment). In asserting the positive obligation to protect the Court, therefore, takes a slightly different approach.

50. T.M. and C.M. v the Republic of Moldova, no 26608/11, ECHR, 28 January 2014 § 60; Halime Kılıç v Turkey, no 63034/11, ECHR, 26 June 2016 § 120; Talpis v Italy, no 41237/14, ECHR, 2 March 2017 §§ 99 and 115; and Bălșan v Romania, no 49645/09, ECHR, 23 May 2017 § 82.

51. Rumor v Italy, no 72964/10, ECHR, 27 May 2014 §§ 58 and 60 respectively.

52. Konstantin Markin v Russia (n 5) § 140.


54. Konstantin Markin v Russia, ibid, § 143. In the context of Article 34 and the right of access to the ECtHR, however, the Court referred to the vulnerability of applicants to the Court.
discriminatory towards men under Article 14. In support, it ‘[took] note of various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood’ and found that the State had remained within its margin of appreciation for differentiating between men and women in this way.\(^{55}\) Despite the fact that both parties argued around the concept of vulnerability, the majority of the Court seems consciously to have avoided references to vulnerability in its reasoning. A large part of the dissenting judges noted, however, that the instruments referred to concerned only specific ‘categories of women who are particularly vulnerable (pregnant women, breastfeeding women and mothers with young children)’\(^{56}\) or temporary special measures aimed at achieving equality, which could not be referred to in order to justify a permanent separate sentencing regime for men and women.\(^{57}\) Similarly, in its amicus brief the Equal Rights Trust urged the Court to find a violation and follow the case law where it had ‘rejected arguments based on paternalism and perceptions that women were more “vulnerable” than men and in need of “protection”’.\(^{58}\) The case highlights some of the difficulties raised by the concept of vulnerability, which are revisited in section 3.3 infra.

Finally, the Chamber judgment in \textit{Carvalho Pinto de Sousa Morais v Portugal} of 2017 also exhibits how the Court avoids relying on vulnerability outside the context of gender-based violence. Here, the Court found that Article 14 had been violated in conjunction with Article 8 when the relevant domestic court had referred to gender-based stereotypes about women’s sexuality in order to lower the amount of damages awarded to the applicant in a medical negligence case. The judgment actually referred to \textit{Alajos Kiss} with regard to the observation that stereotyping prohibits the individualised evaluation of the capacity and needs of the persons concerned, but omitted any reference to the vulnerable groups approach.\(^{59}\) Again, then, the Court preferred reasoning from stereotypes in an individual case to the more general vulnerable groups approach in the context of gender/sex discrimination.

\subsection*{3.1.3 Discrimination Based on Ethnic Origin/Race}

As regards ethnic origin/race, vulnerability was emphasised by the Grand Chamber in \textit{D.H. and Others} of 2007 and \textit{Oršuš and Others v Croatia} of 2010, which both concerned indirect discrimination and the disproportionate placement of Roma children in special schools or special classes. With reference to their ‘turbulent history and constant uprooting’, the Court identified the Roma people as a ‘disadvantaged and vulnerable minority’, and added that this ‘means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.’\(^{60}\) A vulnerable groups approach has since been referred to in a number

\begin{itemize}
  \item \textit{Khamtokhu and Aksenichik v Russia} (n 40) § 82.
  \item Ibid, dissenting opinion of judges Sicilianos, Møse, Lubards, Mourou-Vikström and Kucsko-Stdlmayer § 7.
  \item Ibid, dissenting opinion of judges Sicilianos, Møse, Lubards, Mourou-Vikström and Kucsko-Stdlmayer §§ 6-13.
  \item Ibid, § 50.
  \item \textit{Carvalho Pinto de Sousa Morais v Portugal} (n 40) § 46.
  \item \textit{D.H. and Others v Czech Republic} (n 2) §181-182; \textit{Oršuš and Others v Croatia} (n 2) §§ 147-148.
\end{itemize}
of Chamber judgments concerning the education of Roma children.  

Vulnerability was, further, emphasised in a direct discrimination case in the Chamber judgment of *Muños Diaz v Spain* of 2009, which concerned survivors’ pensions for spouses under Roma marriages, not officiated under Spanish law.  

The Chamber judgment of *Makhashevy v Russia* of 2012, concerned the different question of whether ‘racial prejudice was a causal factor’ in police beating of Chechen detainees (raising the issue of the negative substantive obligation not to discriminate) and the lack of investigation into the incident (raising the issue of the positive obligation of due diligence). The Court found that there had been a violation of Article 3 taken together with Article 14, both in its substantive and procedural aspect. Interestingly, as regards the substantive violation, the Court referred to its established approach in Article 3 cases that ‘persons in custody are in a vulnerable position’, but did not refer to the approach that ethnic origin may also generate vulnerability.  

Subsequently, however, in *Balázs v Hungary*, a Chamber judgment from 2015, the Court referred to the vulnerability of Roma people when finding that the State had not discharged its positive obligation under Article 14 in conjunction with Article 3, to investigate the alleged racist motives behind a violent attack.  

Interestingly in *Biao* of 2016, when finding that there had been indirect racial discrimination vis-à-vis persons of non-Danish ethnic origin, the Grand Chamber did not refer to vulnerability at all, and relied on the classic suspect discrimination grounds approach instead.  

Within the discrimination ground of ethnic origin/race, therefore, the Court has only raised group vulnerability in relation to Roma people.

### 3.1.4 Discrimination Based on Disability

The third potentially vulnerable group mentioned in the *Kiyutin* judgment was defined by reference to ‘mental faculties […] or disability’. More specifically, the Court concluded that HIV-positive status created a disability, or a form thereof, and that HIV-positive persons were ‘a vulnerable group with a history of prejudice and stigmatisation and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment’. Since this judgment, the Court has relied on similar reasoning in comparable cases. In 2016, the Court also referred to

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61. Sampanis and Others v Greece (n 43) § 72; Horváth and Kiss v Hungary, no 11146/11, ECtHR, 29 January 2011 § 102; Sampani and Others v Greece, no 59608/09, ECtHR, 11 December 2012 § 76; Lavida and Others v Greece, no 7973/10, ECtHR, 30 May 2013 § 62.


64. *Balázs v Hungary*, no 15529/12, ECtHR, 20 October 2015 § 53.

65. *Biao v Denmark* (n 3). In the Chamber judgment overturned by the Grand Chamber, however, the dissenting judges emphasised how the indirect discrimination in question reinforced a negative stereotype of immigrants: see *Biao v Denmark*, no 38590/10, ECtHR, 25 March 2014, joint dissenting opinion of judges Sajó, Vučinić and Kürüs § 16.

66. *Kiyutin v Russia* (n 46) § 63.

67. Ibid, § 64.

68. *I.B. v Greece*, no 552/10, ECtHR, 3 October 2013 § 81; and Novruk and Others v Russia, no 31039/11 et al, ECtHR, 15 March 2016 § 100: ‘The Court has found that people living with HIV have to face a whole host of problems, not only medical but also professional, social, personal and psychological, and to confront deeply rooted prejudice even from among highly educated people […]’. The prejudice was born out of ignorance about the routes of transmission of HIV/AIDS, and has stigmatised and marginalised those who live with the virus. Consequently,
vulnerability when introducing reasonable accommodation for persons with physical or sensory disability: see the Chamber judgments of Guberina v Croatia, where the vulnerable groups approach as set out in Alajos Kiss and Kiyutin was referred to, and Çam v Turkey, where the Court simply referred to the ‘particular vulnerability of children with disabilities’. 

3.1.5 Discrimination Based on LGBTI Status

In Kiyutin, the Court also stated that groups defined with reference to sexual orientation are potentially in a vulnerable position, and in direct discrimination cases originating both before and after this judgment, the Court has indeed referred to sexual orientation as an ‘intimate and vulnerable sphere of an individual’s private life’ which calls for ‘particularly weighty reasons’ to justify different treatment. In the Chamber judgment of Identoba and Others v Georgia of 2015, the Court also found a breach of the State’s positive obligations of due diligence under Articles 3 and 11, both in conjunction with Article 14, as marchers for LGBT rights had not been protected against verbal and physical aggression. The Court referred to the history of public hostility towards LGBT persons in Georgia, and stated that they constituted a ‘vulnerable community’. In M.C. and A.C. v Romania of 2016, which also concerned the positive obligation to protect in the context of persons belonging to the LGBTI community, the Chamber took the approach that ‘[c]hildren and other vulnerable individuals, in particular, are entitled to effective protection’, and acknowledged that ‘the LGBTI community in the respondent State finds itself in a precarious situation, being subject to negative attitudes’. From these judgments, it seems safe to conclude that the whole LGBTI community (which, of course, is not only defined by reference to sexual orientation) would fall within the parameters of Article 14’s concept of vulnerable groups.

3.1.6 Intersecting Discrimination Grounds

Finally, it should be highlighted how the Court often seems to adopt vulnerability as an argumentative tool in support of enhanced protection in complex situations where more than one factor points in the direction of particular disadvantage. This may take the form of specifically mentioning groups living with HIV as a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on account of their health status.

69. Guberina v Croatia (n 4) § 73; and Çam v Turkey (n 4) § 67.

70. See the following judgments concerning direct discrimination: Alekseyev v Russia, no 4916/07 et al, ECtHR, 21 October 2010 § 108 (ban on gay pride marches); Kozak v Poland, no 13120/02, ECtHR, 2 March 2010 § 92 (succession to a tenancy after the death of a partner denied); Genderdoc-M v Moldova, no 9106/06, ECtHR, 12 June 2012 § 51 (ban on an assembly in support of the gay community); X v Turkey, no 24626/09, ECtHR, 9 October 2012 § 50 (the separation of the applicant from other inmates).

71. Identoba and Others v Georgia, no 73235/12, ECtHR, 12 May 2015 § 72. Note also the reference to the vulnerability of minority groups or groups upholding unpopular beliefs in § 94, which draws on case law under Article 11, see e.g. Baczkowski and Others v Poland, no 1543/06, ECtHR, 3 May 2007 §64.

72. M.C. and A.C. v Romania (n 8) §§ 114 and 118.

73. See too the Court’s judgment in Christine Goodwin v United Kingdom, no 28957/95, ECtHR [GC], 11 July 2002, which although it concerns Article 8 and is older than the vulnerable groups approach under Article 14, referred to the feelings of vulnerability a transgender person might experience if she cannot legally assume her post-operative gender: see § 77.
of intersectional situations where more than one identity marker intersects in a person to create unique burdens or protection needs. This was visible already in the Grand Chamber judgments of *D.H. and Others* and *Oršuš*, where the Court reasoned that the Roma were a disadvantaged and vulnerable minority and added that ‘[t]he present case therefore warrants particular attention, especially as when the applications were lodged with the Court the applicants were minor children for whom the right to education was of paramount importance.’ Subsequently, the Court seems to be adopting the approach that applicants in intersectional situations may be ‘particularly vulnerable’. This is visible in *Çam*, where the Court approached an intersectional situation from the perspective of the ‘particular vulnerability’ of children with disabilities, and in *B.S. v Spain* of 2012 the Court applied vulnerability reasoning where race and gender intersected. Here, the applicant complained under Articles 3 and 14 of police harassment and brutality, and the lack of investigation into, *inter alia*, the racist and/or sexist motives behind it. The Court, when finding a violation of Article 14 in conjunction with Article 3 in its procedural aspect (i.e. regarding the positive obligation of due diligence) reasoned that ‘the domestic courts failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute’. The particular disadvantage the Court seeks to address through vulnerability reasoning, however, is not only related to intersectional situations in the above sense. In other cases, where only one discrimination ground is at stake, ‘particular vulnerability’ may also be created by the social circumstances the applicant finds herself in. This is borne out by the case law on vulnerability in the context of domestic violence.

3.2 What Kind of Vulnerability?

With reference to the *Alajos Kiss* judgment, the *Kiyutin* judgment endeavoured to put forward a definition of the vulnerable groups approach under Article 14, and this definition clearly emphasises histories of prejudice that have resulted in social exclusion and negative stereotypes for persons belonging to such groups. The Court’s concept of group vulnerability, thus, is not created by any essential or innate characteristic of the relevant individuals themselves, but through social structures. In *Kiyutin*, the Court, further, identified groups defined by reference to gender/sex, ethnic origin/race, sexual orientation and disability as potentially vulnerable in this sense. This definition of group vulnerability has been repeated verbatim in three Chamber judgments, but it has never been taken up by the Grand Chamber. The Grand Chamber, in fact, has only relied on vulnerability as an argumentative tool in cases concerning the education of Roma children, which predate

75. *D.H. and Others v Czech Republic* (n 2) § 182; *Oršuš and Others v Croatia* (n 2) § 147.
76. *Çam v Turkey* (n 4) § 67.
77. *B.S. v Spain*, no 47159/08, ECtHR, 24 July 2012 § 62.
78. *Novruk and Others v Russia* (n 68); *I.B. v Greece* (n 68); *Guberina v Croatia* (n 4).
the *Kiyutin* judgment. As the preceding case law analysis has established, it is nevertheless possible to identify significantly increased references to vulnerability in various different forms in the Article 14 case law, and in most cases this is indeed accompanied by references to histories, prejudices, stereotypes, and/or the otherwise disadvantageous social situation of the relevant group. This, of course, reflects the same social-contextual understanding of vulnerability as the one elaborated in *Kiyutin*. The case law, thus, continues to confirm the conclusions reached on the basis of the very first judgments indicating the emergence of a vulnerable groups approach, namely that the Court’s understanding of group vulnerability is relational/social-contextual.79 It should be noted, however, that such a social-contextual understanding of vulnerability does not emerge when the Court applies the concept in relation to children. Here, the vision seems, rather, to be of vulnerability as an inherent or essential characteristic of the child.80

The nascent vulnerable groups approach has also, from the beginning, been conceptualised by the Court as a development or elaboration of its suspect discrimination grounds approach. This is most clearly visible through the emphasis on specific discrimination grounds and the reduced margin of appreciation, which (except in cases of positive obligations, which are not analysed with reference to the objective and reasonable justification test) translates into the requirement that States must have ‘very weighty reasons’ to justify the disadvantageous treatment complained of.81 As such, therefore, the vulnerable groups approach under Article 14 draws on specific identity markers that relate to membership in distinct groups of persons, instead of vulnerability being conceptualised as the universal human condition where everyone is potentially vulnerable depending on context.82 From the case law analysis, it also stands out that the vulnerable groups approach under Article 14 is restricted in many ways. Firstly, it seems restricted to the four key discrimination grounds of gender/sex, ethnic origin/race, sexual orientation/LGBTI status, and disability, elevating those to an even higher standing than the suspect grounds of birth outside marriage, nationality and religion. This development is indeed the logical continuation of

79. Peroni and Timmer (n 10) 1064; Arnardóttir (n 10) 654. In the context of disability this reflects the relational understanding of disability, which directs attention to how disability is not a feature of the person herself, but the result of social barriers that hinder her full participation in society. Such an understanding (often referred to as the ‘social model of disability’) underpins the UN Convention on the Rights of Persons with Disabilities 2515 UNTS 3 Article 1(2). It has, however, been pointed out that, in other contexts, the Court has also conceptualised persons with mental disabilities as inherently vulnerable due to the limitations on agency that are associated with their condition, see Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Albertson Fineman and Anna Grear (eds), *Vulnerability Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 152.


81. *Alajos Kiss v Hungary* (n 44) § 42; *Kiyutin v Russia* (n 46) § 63.

82. Peroni and Timmer (n 10) 1064 refer to this as the ‘particular’ understanding of vulnerability. This contrasts with Fineman’s ‘post-identity’ theory of vulnerability, which she proposes as an alternative to classic group-centred approaches to non-discrimination law: Martha Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law & Feminism* 1.
the Court’s classic case law on the suspect discrimination grounds, as nationality and religion have not commanded strict review as consistently as the other suspect grounds. It confirms the well-known fact that the Court treats different discrimination grounds differently, and highlights that this applies even within the group of suspect discrimination grounds. Vulnerability analysis, however, may also be further restricted to the most disadvantaged sub-groups within the larger identity group. Thus, in the context of gender/sex discrimination, it has only been applied to victims of gender-based violence, and within the category of ethnic origin/racial discrimination, it has only been applied to people of Roma origin (and by the Grand Chamber only when children of Roma origin are concerned). This adds even more nuance to the classic suspect grounds approach, highlighting particularly clearly how the Court’s analysis is social-contextual in that it does not only look at the relevant identity marker per se, but focuses instead on how the consequences of being associated with that identity marker are shaped by history and other social forces that create and perpetuate disadvantage, and how the experiences of different individuals within the larger group may not all be the same. This confirms and accentuates yet another classic characteristic of Article 14 case law, which has always been somewhat sensitive to the different social contexts in which discrimination claims arise.84

3.3 The Implications of the Court’s Emerging Approach

Depending on the normative stance adopted, the fact that vulnerability is (still) restricted to only four discrimination grounds—and sometimes even only to certain sub-groups within these discrimination grounds—can either be seen as a good thing in terms of highlighting the most acute problems and facilitating appropriate legal responses, or as a bad thing, by excluding others from the enhanced protection that the emerging vulnerable groups approach seems to facilitate. In relation to this issue, it is noteworthy that outside the context of Article 14, the Court has taken a wider approach to vulnerability, reasoning from the vulnerability of individuals in various precarious situations without relying on membership in specific identity-based groups.85 The text of Article 14 and settled non-dis-

83. In Guberina v Croatia (n 4) §§ 78-79, the applicant himself did not have a disability, but the Court acknowledged disability discrimination by association.

84. See e.g. Stce and Others v the United Kingdom, nos. 65731/01 and 65900/07, ECtHR [GC], 12 April 2006 § 66, where the Court concluded that measures ‘originally intended to correct the disadvantaged economic position of women’ were still justified and did not constitute discrimination vis-à-vis men. See also the analysis of older case law in Oddný Mjöll Arnardóttir, Equality and Non-Discrimination under the European Convention on Human Rights (Martinus Nijhoff 2003) 164-168.

85. See e.g. Konstantin Markin v Russia (n 5) § 159 (‘regard must be had to the vulnerability of the complainant [in the context of the right of application to the ECtHR under Article 34] and his or her susceptibility to influence exerted by the authorities’); Baczkowski and Others v Poland (n 71) § 64 (‘This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation’); Sørensen and Rasmussen v Denmark, no 52562/99 and 52620/99, ECtHR [GC], 11 January 2006 § 59 (‘individuals applying for employment often find themselves in a vulnerable situation’); Salman v Turkey, no 21986/93, ECtHR [GC], 27 June 2000 § 99 (‘Persons in custody are in a vulnerable position’); Akdivar and Others v Turkey, no 21893/93, ECtHR [GC], 16 September 1996 § 73 (‘vulnerability of the applicants’ position following the destruction of their homes and the fact that they must have become dependent on the authorities in respect of their basic needs’); and Salduz v Turkey, no 36391/02, ECtHR [GC], 27 November 2008 § 54
crimination doctrine, of course, solicit the group-based approach through their emphasis on discrimination grounds, but the possibility that the Court may extend a more individualised vulnerability reasoning to discrimination based on ‘other status’ cannot be excluded. Age, in particular, comes to mind here as the Court has repeatedly referred to the vulnerability of children in various contexts, and has also referred to the vulnerability of elderly patients in care facilities. Even though the discrimination ground of age has not been considered among the suspect discrimination grounds, the Court seems likely to continue to address the vulnerability of children, and may possibly in future also reason from the situational vulnerability of some groups of elderly people. For example, in *Khantokhu and Aksenchik* where the vulnerability of children and the elderly was raised in support of an exemption from life imprisonment, it seemed almost a non-issue for the Court to conclude that this raised no issue under Article 14 (although the Court chose not to reason from vulnerability in that instance).

The more likely future development, however, is that the vulnerable groups approach might be extended to more discrimination grounds or sub-groups within them. Here, the Court could also draw on its case law under different Convention Articles where group vulnerability has been emphasised. Under Article 3, the Court has, for example, reasoned that all asylum seekers are *prima facie* vulnerable, while some are more vulnerable than others. This has led to enhanced legal protection under the Convention for the most vulnerable of asylum seekers. Another line of case law concerns religious groups. On a number of occasions, in situations where there is widespread prejudice and hostility towards minority religious groups, the Court has noted the vulnerable situation of their members. This has been a significant aspect of the Court’s reasoning in finding violations of the substantive and/or procedural limb of Article 3, and the Court has further noted the vulnerability

('an accused often finds himself in a particularly vulnerable position'). For the literature on vulnerability in the Court’s reasoning in various different contexts see Peroni and Timmer (n 10); Timmer (n 79) 147; and the contributions of various authors in Francesca Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015).

86. See e.g. *Çam v Turkey* (n 4) § 67 (‘particular vulnerability’ of children with disabilities in the context of Article 14 in conjunction with Article 2 Protocol 1); *Tarakhel v Switzerland* (n 86) § 119 (‘extreme vulnerability’ of children who seek asylum in the context of Article 3); *A v United Kingdom*, no 25599/94, ECtHR, 23 September 1998 § 22 (‘Children and other vulnerable individuals, in particular, are entitled to State protection’ under Article 3.).

87. *Heinisch v Germany*, no 28274/08 ECtHR, 21 July 2011 § 71.

88. *British Gurkha Welfare Society and Others v the United Kingdom*, no 44818/11, ECtHR, 15 September 2016 § 88: ‘The Court has recognised that age might constitute «other status» for the purposes of Article 14 of the Convention […], although it has not, to date, suggested that discrimination on grounds of age should be equated with other «suspect» grounds of discrimination.’ See also Arnardóttir (n 10) 651-652.

89. *Khantokhu and Aksenchik v Russia* (n 40) §§ 80-81.

90. See e.g. *M.S.S. v Belgium and Greece*, no 30696/09, ECtHR [GC], 21 January 2011 § 232 (vulnerability of asylum seekers); *Tarakhel v Switzerland*, no 29217/12, ECtHR [GC], 4 December 2014 § 119 (‘extreme vulnerability’ of children who seek asylum); and *Ilias and Ahmed v Hungary*, no 47287/15, ECtHR, 14 March 2017 § 87 (‘While it is true that asylum seekers are considered particularly vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously […], for the Court, the applicants in the present case were not more vulnerable than any other adult asylum-seeker detained at the time’).

91. See e.g. *Milanovic v Serbia* (n 7) § 89 and *Begheluri and Others v Georgia*, no 28490/02, ECtHR, 7 October 2014 § 113.
of those belonging to minority groups in various other contexts. In light of the fact that the Court has expressly extended the ‘very weighty reasons’ test under Article 14 to the discrimination grounds of religion and nationality, it seems rather likely that minority groups within these two discrimination grounds may be added to the Article 14 vulnerable groups approach.

There are complications, nevertheless, involved in the development of vulnerability analysis under the Convention. Extending the concept of vulnerability too far might water down its potential as a tool to facilitate enhanced protection for the most disadvantaged. At the same time, however, the narrower approach of focusing on specific identity groups under Article 14 also means that the case law is susceptible to a different kind of criticism. This is the criticism that generalisable vulnerability theory seeks to avoid, namely that the classification of a group as vulnerable can reinforce negative stereotypical images of the relevant groups and thus, in the end, reproduce disadvantage. Even though the Court carefully steered away from the concept of vulnerability, this danger played out in Khamtokhu and Aksenchik, where the majority of the Court referred to the need to protect women, while dissenting judges and the Equal Rights Trust argued that this was a paternalistic approach entrenching stereotypical ideas about women. Indeed, in many cases the vulnerability categorisation might not be welcome by the applicant herself, as exhibited by the Pretty v United Kingdom judgment where the applicant did not identify with those vulnerable individuals the ban against assisted suicide was intended to protect and claimed respect for her autonomy under Article 8. That case exhibits the additional danger that vulnerability reasoning may function as a limitation on the agency or rights of the persons involved.

This, however, is the perpetual condition of non-discrimination law, as it seems that each argumentative tool invented to facilitate analysis and enhanced protection (differ-

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92. See e.g. D.H. and Others v Czech Republic (n 2) § 182 (Roma children in the context of Article 14 in conjunction with Article 2 of Protocol 1); Baczkowski and Others v Poland (n 71) § 64 (a march in support of various minority groups (and women) in the context of Article 11); M.Y.H. and Others v Sweden, no 50859/10, ECHR, 27 June 2013 § 73 (Christian minority in Iraq, and the relocation alternative in a non refoulement case under Article 3).
93. Vojnity v Hungary (n 30) § 36; Biao v Denmark (n 3) § 114.
94. See also Peroni and Timmer (n 10) 1070. At the time of writing their article the vulnerable groups approach under Article 14 had only been extended to Roma people and persons with disabilities, and the Court had begun conceptualising asylum seekers as a vulnerable group under Article 3. Peroni and Timmer argued for the potential that national minorities, religious minorities and LGBT people might be added to the Court’s vulnerable groups approach. As exhibited by the analysis in section 3.1, the case law has already partly progressed beyond their prediction, as the Court has now applied the vulnerable groups approach to women who are victims of domestic violence, and the whole LGBTI community.
95. See generally also Peroni and Timmer (n 10) 1071-1073.
96. Fineman (n 82) 8.
97. Khamtokhu and Aksenchik v Russia (n 40).
98. Pretty v United Kingdom, no 2346/02, ECHR, 2 April 2002. The case-law analysis performed for this article revealed a number of additional judgments where the protection of vulnerable groups was referred to by States as a defence against the applicants’ complaints of discrimination or as the justification under other Convention Articles for limitations on rights: see Dudgeon v United Kingdom, no 7526/76, ECHR, 22 October 1981; Stubbs v United Kingdom, nos. 22083/93 and 22095/93, ECHR, 22 October 1996; Waite v United Kingdom, no 53236/99, ECHR, 10 December 2002; Luczak v Poland, no 77782/01, ECHR, 27 January 2007; and Bayev and Others v Russia, nos. 67667/09 et al, ECHR, 20 June 2017.
ence, disadvantage, stigma, stereotypes, vulnerability) has the potential to boomerang and reproduce the problems it aims to solve. The Grand Chamber still seems cautious towards adopting a vulnerable groups approach in its reasoning, but when it has, it has clearly emphasised how such vulnerability is socially constructed. Indeed, the contextualised approach thus indicated by the Grand Chamber might have been capable of averting the problems identified by the dissenting judges and the Equal Rights Trust in Khamtokhu and Aksenchik as, in the context of imprisonment, most women are not necessarily more vulnerable than most men.

4. INNOVATION OR BUSINESS AS USUAL?

Across the Convention, the Court’s application of the concept of vulnerability is diverse and multifaceted. It seems sometimes relational in character but sometimes essentialist; it sometimes focuses on group identities, but sometimes on otherwise precarious situations; and it sometimes enables a reaction to intersectional situations, while sometimes being used outside that context. Under Article 14, however, it seems 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. This may seem more novel than it actually is, since the traditional suspect discrimination grounds approach, as explained in section 2 supra, could be described in exactly the same terms. However, the case law analysed in section 3 supra also clearly exhibits that references to the vulnerability of applicants often function as a tool to single out the most disadvantaged sub-groups within the larger group defined by the relevant discrimination ground. This seems novel compared with the classic approach, although unexplained variations in strictness of review within discrimination grounds have occurred before in the case law. In the final analysis, therefore, the potential of vulnerability as a tool for identifying and elaborating the instances when such variation may be appropriate seems to be the key innovative element of vulnerability analysis.

As already mentioned, however, the Grand Chamber still seems to avoid taking a stance on this vulnerable groups approach emerging through different Chamber judgments.

99. D.H. and Others v Czech Republic (n 2) § 182 (‘as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority’); Oršuš and Others v Croatia (n 2) § 147 (‘The Court has noted in previous cases that as a result of their history, the Roma have become a specific type of disadvantaged and vulnerable minority’).


101. See Peroni and Timmer (n 10); and Arnardóttir (n 10).

Except in cases concerning the education of Roma children, it actually refrains from adopting vulnerability reasoning in its judgments. This is evidenced by the Biao judgment on indirect race discrimination, and the Khantokhu and Aksenchik judgment on direct sex and age discrimination, where the majority of the Grand Chamber carefully steered away from vulnerability and relied only on the classic suspect grounds approach. It should also be noted that, in most cases—even those that concern the four discrimination grounds identified in the Kiyutin judgment, or those sub-groups thereof that the Court has previously concluded are vulnerable—the Court still does not refer to vulnerability at all. For example, 16 out of the 24 judgments on Article 14 pronounced in 2016 concerned these four discrimination grounds (67%), while only five judgments (31%) thereof were adjudicated with reference to the vulnerability of the applicant. Similarly, nine out of the 14 judgments pronounced in the first eight months of 2017 concerned the same discrimination grounds (64%), while only one judgment (11%) thereof was adjudicated with reference to the vulnerability of the applicant. In this context, however, it should be noted that the Court’s reasoning often becomes more concise again in judgments subsequent to important and more elaborate ones. Thus, while the vulnerable groups approach is not always mentioned, or is mentioned without elaboration of the relational understanding informing it, the awareness of social context and vulnerability implied may still inform the judgment.

Using vulnerability as an argumentative tool is, nevertheless, clearly an emerging trend. The Court’s approach when applying vulnerability in the context of Article 14 can perhaps most accurately be described as an ‘identity plus’ approach—an approach that is anchored in one or more group-defining identity markers (i.e. suspect discrimination grounds), but allows the Court to target the more complex and deeply embedded situations of disadvantage by looking towards social context. This has, in turn, allowed the Court to further substantiate its findings in parts of its more substantive case law involving indirect discrimination, reasonable accommodation and positive obligations of due diligence. The vulnerable groups approach, therefore, actually does something in a judgment, and it is a distinct step in the direction of imbuing Article 14 with clearer normative content. At the same time, however, the restricted approach to vulnerability under Article 14, focus-

103. Biao v Denmark (n 3); Khantokhu and Aksenchik v Russia (n 40).
104. See e.g. the following judgments where the Court found violations of Article 14: Karić and Others v Slovenia, no 26828/06, ECHR [GC], 26 June 2012, concerning the discrimination ground of race/ethnic origin; Vallianatos and Others v Greece, no 29381/09, ECHR [GC], 7 November 2013, concerning the discrimination ground of sexual orientation; Boacă and Others v Romania, no 40355/11, ECHR, 12 January 2016, concerning individuals of Roma origin and the discrimination ground of race/ethnic origin; and Carvalho Pinto de Sousa Morais v Portugal (n 40), concerning the discrimination ground of sex/gender.
105. Three of the six judgments in 2016 and 2017 concerned domestic violence: see Halime Kılıçv Turkey (n 50); M.G. v Turkey, no 646/10, ECHR, 22 March 2016; and Bălșan v Romania (n 50). Note that the M.G. v Turkey judgment only addressed the applicant’s vulnerability under Article 3, but not under Article 14. The three other judgments concerned disability: see Guberina v Croatia (n 4); Çam v Turkey (n 4); and Novruk and Others v Russia (n 68).
106. See e.g. Boacă and Others v Romania (n 102).
107. Peroni and Timmer (n 10) 1075.
108. Arnardóttir (n 10) 63-65.
ing only on groups defined by certain identity markers, or sub-groups thereof, is simply the logical continuation of long lines of judgments where the Court has differentiated its approach vis-à-vis different discrimination grounds, or different sub-groups thereof depending on social context. The Court’s references to group vulnerability thus reframe the issues, and give more information about the reasons behind the Court’s approaches, but they have not introduced anything radical which could not have been achieved without them.\(^{109}\) In conclusions, therefore, the Court’s emerging vulnerable groups approach under Article 14 can be seen as a development that provides the Court with tools to bolster its reasoning, notably in the most substantive case law, while at the same time it mostly confirms elements of its classic approach. Indeed, the Court also continues to conduct its business as usual under the suspect discrimination grounds approach, which, as we see for example in \textit{Biao v Denmark}, can render the same results.\(^{110}\) Be that as it may, it is at least safe to conclude that the Court is gradually becoming more attentive to complex intersectional situations and social context. Therefore, while not embracing all the detail and subtlety of Crenshaw’s intersectionality theory or Fineman’s vulnerability theory, which both spring from a critique of classic approaches in non-discrimination law,\(^{111}\) the Court, in its own way, has become more responsive to the plight of the most disadvantaged in European societies.

\(^ {109}\) Interestingly, for example, Fredman (n 1) discusses some of the same case law and the move towards a more substantive approach without any reference to the role of vulnerability in the Court’s reasoning under Article 14.

\(^ {110}\) \textit{Biao v Denmark} (n 3).

\(^ {111}\) Crenshaw (n 74); Fineman (n 82).