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Vulnerability and the Quest for Protection: A Review of Canadian Migration Case Law

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Abstract: Although the concept of vulnerability has become increasingly prevalent in both domestic and international migration policy in recent years, its precise meaning and implications remain ambiguous and under-examined. Without a coherent understanding of what makes individuals vulnerable, the concept can either act as a justification for additional consideration or reinforce stereotypes of disempowerment. To address this lack of clarity, this article presents the results of an extensive review of Canadian case law. Drawing on data from over 750 cases primarily from the Immigration and Refugee Board and the Federal Court of Canada, this study sought to examine how the concept of vulnerability is used by both decision-makers and parties to cases involving migrants seeking legal status and various forms of protection (including, but not limited to, asylum) under national or international law in Canada. Although an analysis of case law necessarily produces only a partial image of the landscape, this review identified two understandings of vulnerability at play: a procedural one associated with the need to ensure access to justice and a fair hearing, and a substantive one where vulnerability is linked to the categorization of particular groups. In both instances, the recognized importance of the concept is offset by its narrow and inconsistent application and a failure to acknowledge the role that the institutions and mechanisms of "protection" play in creating and perpetuating vulnerability.

Keywords: migration; refugee; case law; Immigration and Refugee Board of Canada; vulnerability

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1. Introduction

Recent years have witnessed a flourishing of research pertaining to the concept of vulnerability (Freedman 2018; Atak and Nakache 2018; Brown et al. 2017; Baumgärtel 2020; Ippolito 2019). While the concept features prominently in both domestic and international migration policy, there remains a disconnect between the increasingly nuanced understanding of vulnerability in the academic literature and its rather essentialist application in the context of policy and decision-making. Despite the frequency with which 'vulnerability' and associated terms are used, a review of Canadian migration-related caselaw reveals surprisingly little substantive discussion of the concept.

The study reported on here was conducted in the context of an international research project.[1] In what follows, we present and analyze preliminary results of a case law search conducted in Canada during the first phase of the project (April–September 2020). While an analysis of case law provides only a partial image of the landscape, it allows us to draw conclusions about how the concept of 'vulnerability' is used explicitly by both decision-makers and parties to cases involving migrants seeking legal status and protection under

[1] The Canadian portion of the project is funded by the Canadian Research Council (SSHRC) and the Fonds de recherche du Québec—Société et Culture (FQRSC) as part of an international research initiative (the VULNER project) which has received funding from the European Union's Horizon 2020 research and innovation program (grant agreement no. 870845). The VULNER project includes researchers from Europe (Belgium, Germany, Italy, Norway), the Middle East (Lebanon), Africa (Uganda and South Africa) and Canada.

national or international law.[2] In Canada, vulnerable migrants can seek legal status and protection (whether temporary or permanent) through a variety of different pathways, each of which has its own specific criteria as to who can apply and under what conditions protection is granted. Additionally, legal and policy documents recognize that certain migrants are likely to experience heightened vulnerability and that their situations should be considered in procedures affecting them (for example: unaccompanied minors or stateless persons). Thus, 'protection seekers' includes individuals claiming protected person status—either as Convention Refugees, as 'Persons in need of protection' or as persons with an approved Pre-Removal Risk Assessment (PRRA). Also included are individuals claiming Convention Refugee Abroad status (thus making them eligible for government or private sponsorship), permanent resident applicants seeking to stay in Canada based on Humanitarian and Compassionate (H&C) grounds, temporary resident permit applicants, individuals arriving in Canada under the Temporary Foreign Workers Program, temporary resident applicants (victims of human trafficking), and family members being privately sponsored. For the purposes of this article, we will be focussing primarily on the claims of inland migrants, particularly those involving asylum and H&C grounds, as these represent the overwhelming majority of cases in Canada, but also the claims of stateless persons and migrant workers. Cases pertaining to overseas sponsorship have been excluded as they present different challenges. Following a brief introduction to some of the academic literature on 'vulnerability', which will help to provide context for the subsequent conclusions, this article presents a partial account of the core findings of this study. In particular, we show how the recognition of vulnerability has expanded in the context of affording those claiming protection procedural accommodations while its use in substantive decisions remains primarily as a tool of categorization. In all contexts, however, this study reveals that both the definition and the application of the concept is inconsistent and in need of further attention.

2. The Academic Framework

The concept of 'vulnerability' has been described as both ubiquitous (Brown et al. 2017) and ambiguous or malleable and imprecise (Peroni and Timmer 2013). This term "generates a sense of familiarity or assumed understandings" (Brown et al. 2017, p. 505) and yet these understandings may be contested and create room for confusion. At its core, 'vulnerability' can be defined as one's susceptibility to harm and "reduced capacity or power to protect one's interests" (Mackenzie 2013, p. 34). It bears negative connotations, often associated with weakness, dependency, and powerlessness (Gilson 2016). Too often, 'vulnerability' takes on a paternalistic dimension, reinforcing stereotypes (such as the idea that women are the "weaker" sex) and undermining, or at very the least overlooking, the agency of individuals (Peroni and Timmer 2013; Hoffmaster 2006; Freedman 2018). As it is commonly used, to categorize individuals, even when 'vulnerability' is intended as a tool to recognize the needs of certain groups and offer them special protections, it tends to essentialize them. The focus then is on specific characteristics or categories of individuals rather than on the complex contexts that produce vulnerability.

Within the academic literature, there are numerous attempts to develop a deeper, more nuanced understanding of 'vulnerability' that challenges this traditional group/category-based approach. Many of these approaches seek to shift away from labelling specific sub-groups, towards an intersectional understanding of how vulnerability is produced and functions on different levels: politically, legally, socially, economically, situationally, etc. This 'layered' (Luna 2009) approach involves greater understanding of the sources of vulnerability and highlights its relational and contextual or situational dimensions (Atak

[2] Other teams on this project undertook a detailed examination of over 377 legal and policy documents, including legislation and regulations, guidelines and ministerial instructions produced by the IRB, the IRCC and the CBSA. A summary of those results is available in the first project research report (Kaga et al. 2021). The second phase of the project (currently underway) includes interviews with decision-makers, practitioners, civil servants and migrants.

and Nakache 2018; Brown et al. 2017). Take women, for example: there is a paternalistic assumption that women are more vulnerable than men, but is a woman inherently more vulnerable than a man? While on average a woman may be physically weaker than a man, that does not necessarily translate into vulnerability. In contrast, a woman may be more vulnerable to harm, less resilient, because she is in an abusive relationship, or because of the cultural norms that prevent her from seeking employment or otherwise exercising her agency. A migrant woman may be vulnerable because she has been a victim of sexual assault and has experienced trauma, or because she is claiming asylum in a country where she does not speak the language. In each case, the source of her vulnerability is not her gender alone but social and situational factors acting upon her person. Thus, efforts to move away from an essentialist understanding of 'vulnerability' include a greater focus on the extrinsic sources of vulnerability and how they impact individuals.

Going a step further, some scholars have rejected the idea that 'vulnerability' is an exceptional state to be contrasted with that of the self-reliant, rational subject, and have put forward the idea of 'vulnerability' as being "universal and constant, inherent in the human condition" (Fineman 2008, p. 1). In this conception, vulnerability arises from our embodiment, the ever-present possibility of harm, injury, and dependency, and is an inevitable and "enduring aspect of the human condition" (Fineman 2008, p. 8). However, as noted by Fineman, "[u]ndeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command" (Fineman 2008, p. 10). The vulnerability of each individual is again viewed as a product of the relationships and circumstances (economic, political, physical, etc.) that affect him/her and can vary over time as these change. Likewise, vulnerability can be mediated or compensated for through social, political, economic, and legal processes. Irrespective of whether one adopts a more group-based intersectional approach or a universal vulnerability approach, what these conceptualizations have in common is that they represent dynamic, intersectional understandings of 'vulnerability' that have not yet been fully embraced by policymakers and state authorities (Cleveland 2008; Baumgärtel 2020; Freedman 2018).

As in other fields, the concept of 'vulnerability' has gained prominence in the migration context. UNHCR has long used the 'vulnerable' designation in a *substantive* manner to prioritize certain groups for assistance and resettlement and has highlighted the particular issues that different groups face in its guidelines. It has also applied the concept in the context of recognizing the *procedural* hurdles that some applicants may face due to their physical limitations, mental health, or other factors. More recently, the 2018 Global Compact for Safe, Orderly and Regular Migration (UN General Assembly (UNGA) (2018a)) has included as one of its key objectives addressing and reducing the vulnerabilities that migrants face and contains a list of migrants who might be deemed to be in "situations of vulnerability" (older persons, those with disabilities, victims of violence, etc.). The concept of 'vulnerability', or more specifically, 'vulnerable groups', has also gained particular traction in the EU context. According to Ippolito, the EU system demonstrates a preference for "a 'collective' vulnerability, characterised by a group-based approach" but that is mitigated with "significant elements that tend towards individualization" (Ippolito 2019, p. 7). Nevertheless, the group-based approach espoused in the EU still represents a relatively "simplistic and essentialized categorization" (Freedman 2018; Baumgärtel 2020).

Similarly, the European Court of Human Rights (ECtHR) has managed to merge a universal and a group-based approach, "recognizing that people are differently vulnerable" depending on their particular circumstances (Peroni and Timmer 2013, p. 1060). This position is perhaps best captured by a quote from a judge of the European Court of Human Rights (ECtHR): "All applicants are vulnerable, but some are more vulnerable than others" (Peroni and Timmer 2013, p. 1060). In the migration context, the Court has formally recognized the vulnerability inherent in the situation of asylum seekers, further noting in *M.S.S. v. Belgium and Greece* (2011) 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." Indeed, the Court further notes that asylum seekers constitute "a particularly underprivileged and vulnerable population group in need of special protection."[3]

In Canada, the scholarship on vulnerability in the migration context is much less developed and focuses primarily on temporary foreign workers, highlighting how the vulnerability of those migrants is constructed by the systems and rules in place, such as employer-tied visas (Atak et al. 2018). In the context of asylum seekers, the empirical research on vulnerability has centered around the decisions of the Federal Court. For instance, in her recent book, Hilary Evans Evans Cameron (2018) identified an interesting duality in that the Federal Court maintains two contrasting understandings of the refugee claimant: that of particularly vulnerable claimant, and that of ordinary litigant acting in his/her own interest. As this study will show, that dichotomy can result in troubling situations where asylum seekers are acknowledged as vulnerable but not vulnerable *enough* to warrant protection or procedural accommodations, or where claimants are caught in a catch-22 situation in which they must "prove" their vulnerability, yet that vulnerability itself prevents them from effectively presenting their case.

Given the rapidly expanding scholarship on the concept of vulnerability and its growing use in legal and policy documents, including in Canada, as specifically outlined by the recent VULNER research report on the Canadian policy framework (Kaga et al. 2021), it is critical to better understand how the concept is used and understood by both decision-makers and applicants. For the applicant, being identified as vulnerable can be disempowering, but it can also result in procedural accommodations and the increased likelihood of protection (Freedman 2018). For the decision-maker, recognizing certain migrants as vulnerable can constitute an acknowledgement of the risks associated with the process, including those associated with a failure to obtain protection, and can act as a call to action that requires state authorities to respond to certain circumstances, whether they be procedural or substantive. Unfortunately, 'vulnerability' remains under-theorized in the decision-making context and adjudicators all too often fall back on essentialized, category-based approaches.

3. Methodology

In conducting this research, the objective was to better understand under what circumstances a person is considered to be vulnerable by decision-makers and how that vulnerability is addressed. Given the overwhelming number of potentially relevant cases, the choice was made to limit the case law review to cases that were publicly available through the Lexis Advance Quicklaw database. Thus, with respect to the decisions of the Immigration and Refugee Board, the cases surveyed represent only a fraction of those decided as only a small portion of IRB decisions are published. Four main searches were conducted with several additional targeted searches. All searches were limited to Canadian cases between June 2002 (the implementation date of the 2001 Immigration and Refugee Protection Act) and August 2020. Unlike previous studies which focused on the Federal Court, the cases identified here originated in the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, Provincial Courts, and all divisions of the Immigration and Refugee Board of Canada, the administrative tribunal responsible for migration-related decision-making in Canada.[4] A small number of cases from other administrative tribunals, such as provincial human rights tribunals, were also included in the study as they offered

[3] *MSS v.* Greece and Belgium (2011). Note the dissenting opinion of Judge Sajo in which he rejects the majority's broad interpretation of 'vulnerable group' and concludes that asylum seekers "cannot be unconditionally considered as a particularly vulnerable group" in the sense in which the Court is using the term based on the fact that asylum seekers are "not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion". The Judge agrees that some asylum-seekers may indeed meet this standard of vulnerability but that they cannot be attributed this status as a group.

[4] The Refugee Protection Division (RPD), the Refugee Appeal Division (RAD), the Immigration Division (ID), and the Immigration Appeal Division (IAD).

insight into how the vulnerability of protection-seekers was understood outside of the process of claims adjudication.

In the searches conducted, cases where the only references to 'vulnerability' and related terms were found quoted or paraphrased in doctrinal works or where the only reference was a generic comment about "vulnerable groups" were excluded. The search results were initially reviewed for relevance, resulting in a secondary list of over 1500 pertinent cases. Of these, 883 were reviewed.[5] A total of 268 cases were selected as being particularly relevant and were examined in detail.[6] From the remaining cases, two other data sets were compiled. A total of 110 cases were categorized based on their treatment of the Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing before the IRB (the Vulnerability Guidelines) (Immigration and Refugee Board of Canada 2012) in order to provide a better understanding of how the Guideline was being applied.[7] A total of 389 cases were identified as referring to the vulnerability of a particular individual or group and were classified according to the basis on which vulnerability was claimed or recognized (ex: gender, membership in a religious minority, etc.).[8]

The limitations of this methodology must be noted. As mentioned above, published decisions represent only a fraction of the cases heard before the IRB. Consequently, the distribution between Federal Court cases and IRB cases reviewed is skewed in favour of the Federal Court. Additionally, this means that the results may be somewhat distorted by the fact that the cases that are heard before the Federal Court are those that have been subject to judicial review and are thus more likely to have been negative at the first instance (before the IRB). Finally, in most instances, it is not possible to trace asylum cases from the RPD or RAD to the Federal Court as asylum claimants before the IRB are only identified by initials and case numbers, while at the Federal Court, they are generally identified by name. Nevertheless, despite these methodological shortcomings, the results set out here allow general trends to be identified and provide insight into how the concept of vulnerability comes into play in migration-related decision-making in Canada.

4. General Observations

Despite the frequency with which 'vulnerability' and associated terms are used, particularly at the Refugee Protection Division (RPD) and Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB), there is surprisingly little substantive discussion of the concept in the case law, reinforcing the existence of a gap between academic scholarship and practical implementation. Perhaps because, unlike in the EU Return Directive, 'vulnerability' is not a legal term in Canada and its meaning is taken for granted, the vast majority of cases reviewed included no more than a single reference to 'vulnerability'. Moreover, out of all the cases reviewed, only six originated from the Federal Court of Appeal and only one from the Supreme Court, leading to the inescapable conclusion that the concept of 'vulnerability' in this context has not been dealt with in any meaningful manner at the higher court level.[9] Relevant cases can generally be divided into two categories that mirror the procedural/substantive dichotomy noted above. The first category contains those cases where the reference to 'vulnerability' pertains to the procedural protections afforded by decision-makers. Since 2006, this analysis has been primarily guided by the IRB's Chair-

[5] Cases not included in any of the following lists were found not to have any distinguishing features or add anything of substance to the discussion of vulnerability.

[6] The distribution of cases was as follows: Federal Court—142; Federal Court of Appeal—4; Supreme Court—1; Refugee Protection Division (IRB)—53; Refugee Appeal Division (IRB)—38; Immigration Division (IRB)—2; Immigration Appeal Division (IRB)—13; Provincial Courts of Ontario—7; Provincial Courts of British Columbia—3; Provincial Courts of Alberta—1; Law Society of Ontario—1; Ontario Human Rights Tribunal—2; BC Human Rights Tribunal—1.

[7] 12 cases from the Federal Courts and 98 from the IRB.

[8] 151 cases from the Federal Courts; 3 from provincial courts; 235 from the IRB. Although every attempt was made to try to avoid duplication, there may have been some incidental overlap between these two data sets with a small number of cases being included in both.

[9] These higher court cases dealt primarily with challenges to Guideline 7, with vulnerability featuring as a secondary, uncontested issue.

person's Guidelines, particularly Guideline 8, the Vulnerability Guideline (Immigration and Refugee Board of Canada 2012).[10] The second category of cases includes those in which the concept of vulnerability is attached to a particular group/category of person. In some cases, these categories are very specific, for instance, 'members of minority clans in Somalia'. In other instances, the categories are much broader, linked only by a particular characteristic such as gender, age, sexual orientation, or psychological vulnerability. In general, the study reveals that vulnerability is mainly understood as a characteristic of the person, something that is "inherent" or "personal" to the individual rather than a result of external circumstances. There is very little explicit recognition of the structural vulnerability inherent in the process of protection-seeking and, in those few cases where it is recognized, it does not necessarily have a clear impact on the decision.

5. 'Vulnerability' as a Procedural Consideration

Although 'vulnerability' is a broad and nuanced concept, its use as a rationale for providing procedural protections has been dominated by the Chairperson's Vulnerability Guideline. The Vulnerability Guideline was first introduced in December 2006 and then amended in 2012 and applies to all divisions of the Immigration and Refugee Board.[11] Its objective "is to provide procedural accommodation(s) for individuals who are identified as vulnerable persons by the Immigration and Refugee Board of Canada" (1.1). All Chairperson's Guidelines are intended to provide principles for adjudicating and managing cases. They are described as a "source of guidance for decision-makers" (Chairperson's Guidelines n.d.). Several cases have clearly stated that the Guidelines are not binding and thus a failure to apply them or a departure from them that does not result in a breach of natural justice or of fairness will not *necessarily* give rise to independent grounds for judicial review or appeal.[12] However, the Chairperson of the IRB has stated that tribunal Members "are expected to follow the Guidelines unless there are compelling or exceptional reasons for adopting a different analysis" (*Higbogun* 2010), and indeed, Federal Court jurisprudence has held that "the Guidelines ought to be considered by members of a tribunal in 'appropriate cases'." (*Higbogun* 2010).

How the guidelines are applied, however, varies substantially. In some instances, the decision-maker refers specifically to the Guidelines and decides whether to grant 'vulnerable person' status and whether accommodations are required.[13] In other cases, 'vulnerable person' status is not granted but procedural accommodations are.[14] In other cases, the decision-maker may not make any specific reference to the Guidelines and yet has clearly treated the claimant in accordance with the principles contained therein. Finally, there are cases where the decision-maker refers to the Guidelines and yet makes findings

[10] Note that the IRB Chairperson's Guidelines apply only to decisions before the IRB. However, they also feature in decisions of the Federal Court where the application of the Guidelines is one of the issues under review. The Guidelines were not a relevant consideration in the 15 cases that were drawn from Provincial Courts and other administrative tribunals.

[11] The Vulnerability Guideline was amended in 2012 to include a reference to the Refugee Appeal Division which had not been established in 2006, and to add provision 16 which draws specific attention to the potential impacts of "negative experiences due to homophobia" which LGBTI individuals may have suffered.

[12] See, e.g., *Hernandez v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ No 109; *Higbogun v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 516; *Bolombu Ndomba v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No 188. Note that with regard to *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*, the Federal Court has found that "[w]hile Guideline 4 need not be specifically mentioned in a decision and is not the law, it must be apparent from the decision that it was considered" (*Aissa v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No 1361) but, "the failure to mention or fully apply the Guidelines does not, on its own, render the decision unreasonable." (*Manege v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No 418, paras 25 & 27). Nevertheless, failure to properly consider Guideline 4 has been found to be a reviewable error (see, e.g., *Talo v. Canada (Minister of Citizenship and Immigration)* [2012] FC 478).

[13] See, e.g., *Balasubramaniam v Canada (Minister of Citizenship and Immigration)*, [2008] IADD No 2149; *CHF (Re)*, [2007] RPDD No 9; *HKL (Re)*, [2007] RPDD No 227.

[14] *IPP v Canada (Minister of Citizenship and Immigration)*, [2018] FCJ No 400; See discussion of RPD decision in *RAD File No MB4-00891*, [2014] RADD No 1219.

that are incompatible with them.[15] Generally then, the application of the Guidelines seems to be characterised by broad discretion and something of a lack of consistency in practice.

Guideline 8 employs a very specific definition of a "vulnerable person" according to which vulnerable persons are:

> "individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include but would not be limited to the mentally ill, minors, the elderly,[16] victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity." (2.1) (Emphasis added)

Importantly, Section 2.3 of Guideline 8 draws attention to the fact that "the very nature of the IRB's mandate [. . .] involves persons who may have some vulnerabilities" but that this has been accounted for in the design of the IRB proceedings and by extension in the training of IRB decision-makers. Thus, the Vulnerability Guideline is only intended to apply to those individuals "who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability" (Guideline 8, s. 2.3). This has been confirmed in several cases, where the decision-maker specifically notes the competence of the IRB with regard to vulnerable individuals, remarking on how IRB Members encounter individuals who are psychologically vulnerable on a daily basis and have received "extensive training on how to elicit evidence and conduct themselves in such circumstances".[17] In *Hurtado* (2008), the Federal Court drew attention to the fact that the Guidelines distinguish between "ordinarily vulnerable refugee claimants and those who are severely vulnerable and therefore in need of particular accommodations." It goes on to assert that "a duty to accommodate above and beyond those [accommodations] already built into IRB processes is triggered only in cases of severe vulnerability where an applicant's ability to present their cases is significantly and considerably impaired" (Emphasis added) (*Hurtado* 2008). The challenge with this definition then is that it raises the threshold of vulnerability, allowing decision-makers to potentially overlook the vulnerability inherent in the position of migrants or resulting in situations in which a claimant is vulnerable but is not vulnerable *enough* to receive procedural protections (Evans Cameron 2018; Cleveland 2008).

This distinction, or hierarchy of vulnerability, has resulted in a significant number of cases wherein the determination of the vulnerability of the claimant, and by extension the application of Guideline 8, becomes a key point of contention. According to the case law, it is for the Board to decide whether the claimant's vulnerability goes beyond the normal, expected vulnerability and reaches a level such that it might interfere with the claimant's ability to present his/her case or is such that he/she is unable to appreciate the nature of the proceedings or the questions at a hearing.[18] The result can occasionally be somewhat perverse; for instance, in an application for a stay of removal on Humanitarian and Compassionate grounds, an applicant who was a diagnosed schizophrenic was found *not* to be a vulnerable person for the purposes of the Guidelines (*Gardner* 2008). In another case, the RAD overturned a decision of the RPD noting that the lower tribunal had applied an overly narrow definition of a vulnerable person when assessing an application for a postponement.[19] In that case, the RPD had defined a vulnerable person as someone with

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15 See, e.g., *FAM v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 604.

16 Importantly, the Federal Court found, in *Shmagin v. Canada*, that "age is not in itself a sufficient ground for concluding that [the claimant] was vulnerable." *Shmagin v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 1345

17 *RKN (Re)*, [2004] RPDD No 14. See also, e.g., *Hurtado v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 345; *LA v Canada (Minister of Citizenship and Immigration)*, [2016] FCJ No 1378.

18 See, e.g., "No one other than the person presiding at the hearing was in a better position to assess the way the applicants testified, to verify if their psychological vulnerability prevented them from properly responding to the questions or understanding them, and to assess their credibility." *Sharma v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 1142, para 24.

19 *RAD File No TB4-04669*, [2015] RADD No 307.

mental incapacity and denied this status to an unrepresented female claimant who had minimal education and was a victim of gender-based violence. As evidenced from these examples, the responsibility of the Member to evaluate the vulnerability of the migrant results in a substantial degree of variation and inconsistency in the determination of what *in practice* constitutes vulnerability that goes beyond the norm.

5.1. Who Is Considered Vulnerable under the Guidelines?

In the majority of cases, 'vulnerable person' status under Guideline 8 is granted based on a claim of psychological vulnerability. This can mean anything from post-traumatic stress disorder to schizophrenia to emotional fragility. Nevertheless, a finding of psychological vulnerability is not a guarantee of recognition as a "vulnerable person". Indeed, the Federal Court found that there is no automatic obligation for a panel to undertake an inquiry into the claimant's understanding of the process simply because there has been a diagnosis of mental illness: "Such an inquiry is triggered by the panel's own opinion" (*Hillary* 2011).

In addition to psychological vulnerability, 'vulnerable person' status may be granted based on other grounds. Two key grounds are the claimant's status as a minor and the assertion that the claimant is a victim of gender-based violence.[20] In addition to psychological vulnerability, gender-based violence and youth, other potential considerations included old age, illiteracy (*El Romhaine* 2011), being a victim of abuse (*Hernandez* 2009), hearing impairment (*Enriquez* 2010), being a witness to a genocide (*CHR (Re)* 2007), being a victim of torture (*Wardi* 2012), and sexual orientation. In a fair number of cases, the basis on which 'vulnerable person' status is granted is not discussed in any detail by the decision-maker in the reasons and is consequently difficult to ascertain. In many cases, multiple contributing factors of vulnerability may combine to afford a grant of 'vulnerable person' status. For example, old age on its own was rarely found to be sufficient to establish vulnerability, whereas in combination with other factors (illiteracy, abuse, etc.), it sometimes was.[21] Note that this highlights the importance of the idea of intersectionality in the context of the assessment of vulnerability, even though the concept itself is largely absence from the jurisprudence.

Importantly, not every person who asserts psychological vulnerability or gender-based violence will be recognized as a vulnerable person for the purposes of the Guidelines, for, as noted above, in this context vulnerability must be established by the claimant and pertains to his/her ability to present his/her case. The degree to which that ability must be impaired is somewhat debatable. Although Guideline 8 uses the term "severely impaired," at times, the tribunals and courts have used other terminology including "significantly and considerably impaired" (*Hurtado* 2008), "face particular difficulty" (*IYT (Re)* 2007), and "unable to appreciate the nature of the proceedings or the questions at a hearing" (*Sharma* 2008).

The consequence of a grant of 'vulnerable person' status is also variable and does not necessarily entitle individuals to any particular accommodations. Applicants may make requests and the Guidelines set out a list of possible procedural accommodations, but the determination of what is appropriate remains up to the decision-maker (*RPD File No. TB2-13682* 2019). Moreover, even when 'vulnerable person' status is not formally granted, the decision-maker may decide to implement procedural accommodations as set

[20] e.g., *RAD File No TB4-00407*, [2016] RADD No 352; *RAD File No MB3-01675*, [2013] RADD No 45; *Tawos v Canada (Minister of Citizenship and Immigration)*, [2009] IADD No 758;*JKM v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 1146; *Ndjizera v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 521; *RAD File No TB3-06702*, [2014] RADD No 1252.

[21] See, e.g., In *El Romhaine v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 693, the claimant was found to be vulnerable not just because of her old age but because of her age in conjunction with her illiteracy and her dependence on a son who was abusing her. In *Kandiah v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1817, old age was a critical factor but exacerbated by the claimant's lack of education. In *Nwaeme v Canada (Minister of Citizenship and Immigration)*, [2017] FCJ No 757, the claimant is found to be vulnerable not just because of her age but because she is an unmarried, childless woman with mental health problems.

out in Guideline 8, including reversing the order of questioning, appointing a designated representative, allowing frequent breaks, etc.[22] In other words, 'vulnerable person' status is not necessary to grant procedural accommodation.

5.2. The Timing of Claims under Guideline 8

Although both Guideline 8 and the case law assert that vulnerability may be assessed at any time, it is clear that early identification is preferable and that counsel for the claimant bears the greater burden as he/she is considered to be best placed to bring it to the attention of the IRB.[23] Assertions of vulnerability must be supported by evidence whenever possible (including psychiatric or medical assessments as detailed in Section 8 of the Guideline itself). Expert reports can provide valuable evidence in an assessment of vulnerability, but they are merely one factor among many to be considered and the weight that they are given is often greatly variable (Cleveland 2008). As one might expect, within this category of cases, vulnerability (or the Vulnerability Guideline) was most often raised by the claimant, particularly on appeal, though IRB Members did raise it occasionally on their own initiative as well.

The timing of a claim of vulnerability is also a factor that is raised implicitly in many cases, particularly since the implementation of the Refugee Appeal Division. A significant number of appeals at the RAD and a lesser number of applications for judicial review at the Federal Court are based at least in part on an assertion that the decision-maker at the RPD failed to take the Vulnerability Guidelines into consideration, did not grant 'vulnerable person' status when it was requested, or did not grant appropriate procedural accommodations. As the application of the Guidelines is a question of procedural fairness, it is reviewable at the RAD on a standard of correctness. At the Federal Court, there appear to be differing opinions on whether questions of procedural fairness, such as those raised by the application of the Guidelines, are reviewable on a standard of correctness[24] or reasonableness.[25]

Both the Federal Court and the RAD have been willing to overturn the decisions of lower tribunals when there has been a failure in terms of procedural justice.[26] However, there is a subsection of these cases in which claimants are appealing based on a failure to apply the Vulnerability Guidelines when issues of vulnerability were never raised in the first instance. The RAD often notes the failure of the claimant to raise the issue of vulnerability, and the result is frequently a finding that there has been no violation of procedural justice, either because 'vulnerable person' status is not warranted or because the initial decision-maker took any apparent vulnerability into consideration on his/her own initiative. Thus, although according to Guideline 8 the issue of vulnerability may be raised at any time before the IRB, decision-makers seem to be highly skeptical of appeals based on Guideline 8 when no issue of vulnerability or concerns regarding procedural

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[22] See, e.g., *Pjetri v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 429; *RAD File No MB8-01238*, [2019] RADD No 1182; *RAD File No TB4-01725*, [2015] RADD No 1226; *TKM v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 1154.

[23] See, e.g., *Gilles v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 6; *RAD File No MB5-02903*, [2016] RADD No 74; *RAD File No TB4-04948*, [2014] RADD No 586.

[24] See, e.g., *Castillo Avalos v Canada (Minister of Citizenship and Immigration)*, [2020] FCJ No 361 at para 27; *Sharma v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 1142; *Mission Institution v. Khela*, 2014 SCC 24 at para 79; *AVU v Canada (Minister of Citizenship and Immigration)*, [2012] FCJ No 758 at para 29; *Sherpa v. Canada (MCI)*, 2009 FC 267.

[25] See, e.g., *Ibrahim v Canada (Minister of Citizenship and Immigration)*, [2020] FCJ No 1227, paras 11, 17; *Juarez v. Canada* (Minister of Citizenship and Immigration, 2010 FC 890 at para 12; Galyas v. Canada (Minister of Citizenship and Immigration), 2013 FC 250 at para 27.

[26] See, e.g., *FAM v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 604; *RAD File No MB4-00891*, [2014] RADD No 1219; *RAD File No MB3-01675*, [2013] RADD No 45. Note that in *Hernandez v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ No 109, the Federal Court found that while the Guidelines are intended to ensure the conduct of a fair hearing "a departure from the Guidelines which does not result in a breach of natural justice or a breach of fairness would not necessarily give rise to independent grounds for judicial review."

accommodations were raised in the first instance.[27] The practice at the IRB appears to embody an expectation that the claimants will know to raise and be able to 'prove' their vulnerability at the start. As noted by Evans Evans Cameron (2018), this expectation can be highly problematic; if the vulnerability of the claimant is serious enough to impact her ability to present her case such that it warrants accommodations under Guideline 8 (already a high standard), that vulnerability may also impede the claimant's ability to claim those accommodations in the first instance.

5.3. Credibility and Claims of Vulnerability

One interesting point of contention is the interplay between the Vulnerability Guideline and the assessment of the credibility of the claimant as set out in Section 5 of the Guideline, which arose in over forty of the cases reviewed. In theory, the determination of whether a protection seeking claimant is vulnerable under the Guidelines should be kept separate from an evaluation of the merits of the case given that the vulnerability assessment will generally be based on assertions whose credibility has not been tested (Cleveland 2008). In practice, the line between the procedural assessment of vulnerability and the determination on the merits can become blurred (Evans Cameron 2018). In the case law, discussions of the impact of a finding that a claimant is a 'vulnerable person' on an assessment of his/her credibility arose (1) when 'vulnerable person' status was being granted, (2) in discussions of expert reports submitted in support of an assertion of vulnerability, and (3) in appeals based on the Vulnerability Guideline. In the first of these types of cases, the decision maker often draws explicit attention to the fact that a grant of vulnerability status does not imply an acceptance of the alleged underlying facts on which that vulnerability is based (which may later be used to establish a "well-founded" fear of persecution) (Guideline 8, s. 5.2).

Similarly, in the second of these categories of cases, the expert evidence (usually a psychologist's or psychiatrist's report) is adduced to support an assertion of vulnerability. Although the expert reports may be influential, they are merely one element among many others and are not determinative. It is up to the decision-maker to assess the evidence provided and make a determination as to whether, taking account of all circumstances, the claimant should be granted 'vulnerable person' status. Regardless of the decision-maker's determination regarding vulnerability, the reasons in these cases note that Guideline 8 is very clear that experts should not offer opinions on the merits of the case and that an expert's opinion is not proof of the truthfulness of the facts and assertions on which the opinion is based (Immigration and Refugee Board of Canada 2012).[28]

Last but not least, cases in the third category tend to be appeals or applications for judicial review on the basis of a failure to appropriately apply the Vulnerability Guideline, where the second instance decision-maker finds that—regardless of the application of Guideline 8—the issue is in fact one of credibility which cannot be mended by the procedural accommodations in the Guideline (*RAD File No MB3-01977* 2013). "An identification of vulnerability does not result in acceptance of the alleged underlying facts, nor does it predispose a member to make a particular determination of the case on its merits. It is made for the purpose of procedural accommodation only" (*Pavlov* 2016). As one Federal Court Justice noted, "[t]he purpose of the Guidelines is to make sure that persons recognized as vulnerable are heard with sensitivity by the panel and not to remedy the defects of testimony that is full of major contradictions and implausibilities" (*Mubiala* 2011). The Vulnerability Guideline seems to have somewhat inadvertently created a new body of case law, particularly at the RAD, by becoming a basis for a substantial number of (largely unsuccessful) appeals.

This category of cases highlights the confusion that surrounds Guideline 8. On the one hand, Guideline 8 is intended to provide procedural protections, and a finding of

[27] See, e.g., *Shmagin v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 1345.

[28] See, e.g., *Joseph v Canada (Minister of Citizenship and Immigration)*, [2015] FCJ No 349; *Pavlov v Canada (Minister of Citizenship and Immigration)*, [2016] FCJ No 283; *RAD File No MB3-01675*, [2013] RADD No 45; *RAD File No MB4-00200*, [2014] RADD No 1029.

vulnerability does not change the substantive requirements of a claim for protection. On the other hand, the very characteristics that make applicants vulnerable for the purposes of the Guideline and severely impair their ability to present their cases (age, mental health, psychological vulnerability, status as a woman fearing SGBV, LGBTQ status) may also impact how credibility is assessed (Evans Cameron 2018; Immigration and Refugee Board of Canada 1996b; Immigration and Refugee Board of Canada 2017; Cleveland 2008; Aberman 2014). Thus, a failure to properly apply the Guidelines may impede a fair and equitable analysis of credibility. Likewise, those same characteristics may make it difficult for the applicants to effectively assert their vulnerability in the first place (as a result of loss of memory, difficulty concentrating, social/religious norms, etc.), thus resulting in a denial of procedural protections. This "catch-22" makes for a somewhat circular argument with much depending on the discretion of the decision-maker.[29]

Although the IRB's explicit adoption of vulnerability as an important procedural concept helps to ensure the fairness and integrity of the decision-making process, the restriction of vulnerable person status to only those cases of *particular* vulnerability where the claimant's ability to present his case is *severely impaired* is extremely limiting. This limitation fails to adequately account for the vulnerability inherent in the position of the migrant seeking protection and the diverse ways in which different sources of vulnerability can impact individuals.

6. Vulnerability in the Substantive Assessment of Protection Claims

While the Guidelines have dominated the discussion of 'vulnerability' in the procedural context, 'vulnerability' and its related concepts have also frequently arisen in discussions of the substance of protection-related claims. These specific cases demonstrate the disconnect between vulnerability scholarship and the concept's use in practice. Decision-makers applied an overwhelmingly essentialist, category-based understanding of vulnerability in which there was little, if any, substantive discussion of the concept. Consequently, the following section has been sub-divided to highlight the key categories of claimants and characteristics with which vulnerability is associated when considering the substantive grounds for claims of protection in the case law.[30]

6.1. Psychologically Vulnerable Persons

We begin this section with psychological vulnerability as this was the source of vulnerability most frequently raised in the case law—either in the context of requesting vulnerable person status under Guideline 8 or as part of the basis for a claim of protection.[31] The umbrella category of psychological vulnerability encompasses a wide range of conditions, as well as undefined "mental health" issues: PTSD, drug addiction, trauma resulting from gender-based violence, battered-woman syndrome, neuro-cognitive problems, impaired cognitive functioning, volatile mental health, 'highly emotional state', schizophrenia, depression, suicidal tendencies, psychotic depression, psychological fragility and/or distress, mental capacity issues, dementia, bipolar disorder, memory issues, Parkinson's, cognitive dysfunction, etc. Psychological vulnerability was primarily raised in the context of requesting that the claimant be recognized as a vulnerable person under Guideline 8 but was also raised in conjunction with other factors as a ground for claiming protection. For instance, it was often linked to gender-based violence or domestic abuse.

As noted in the discussion of Guideline 8, psychological vulnerability is generally established (whether under the Guideline for procedural purposes or in the body of the claim for substantive purposes) through the provision of medical/psychological/psychiatric

[29] See *Higbogun v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 516.

[30] The categories reported here represent only those that were most prevalent. Full results can be obtained from the author.

[31] Frequently in the case of psychological vulnerability, it is not possible to draw a clear line between the procedural treatment of vulnerability and its role as a substantive factor in the evaluation of a claim for protection, hence its inclusion in both Part 5 and Part 6 of this article.

assessments. In many instances, it is in the expert report that 'vulnerability' is specifically noted, though on some occasions, the decision-maker raised this issue on their own initiative. As noted previously, it is the decision-maker who is responsible for evaluating the expert report and determining whether the claimant is a vulnerable person for the purposes of Guideline 8. While medical conditions do not entitle claimants to any particular outcome, they must be taken into consideration in terms of how they might affect the claimants' behaviour during the hearing (*RPD File No MA7-06247* 2011). Indeed, a number of cases turned on whether or not the decision-maker had properly evaluated the expert evidence and the impact that psychological vulnerability might have on the hearing.[32]

Nevertheless, the evaluation of expert reports is a controversial area insofar as they are afforded variable levels of deference by the decision-makers. In certain cases, the Federal Court and RPD have been willing to overturn decisions in which IRB Members either ignored or misunderstood a psychiatric or psychological report (Evans Cameron 2018; Cleveland 2008).[33] Yet in other instances, the Court has found that the Member is free to reach his own conclusions on the evidence presented and cautions "that psychological or psychiatric reports 'should not be given exalted status,' and in fact, that 'caution should be exercised in accepting them at face value'" (Evans Cameron 2018, p. 111). The challenge is that issues of psychological vulnerability and credibility often become intertwined as discussed above. Decision-makers consistently assert that the psychological reports do not establish the facts upon which they are based or the credibility of the applicant and reject claims based on the finding that the claimant's psychological vulnerability could not resolve the deficiencies in the applicant's case.[34] However, a failure to properly consider the claimant's mental health could result in the decision-maker overlooking challenges, such as memory problems, that *may* in fact impact the credibility assessment.[35]

6.2. Asylum Seekers

A review of the case law reflects a general willingness to accept that refugee claimants are a vulnerable category of individuals. Perhaps interestingly, this conclusion is most clearly stated in cases where refugee claimants are not making a claim for protection. For example, one of the most conclusive statements regarding the vulnerability of asylum seekers is made by Justice MacTavish of the Federal Court in *Canadian Doctors for Refugee Care v. Canada (Attorney General)* (2014). In that case, the judge describes the Government's limits on the Interim Federal Health Program as "the intentional targeting of an admittedly poor, vulnerable and disadvantaged group". Later, Justice MacTavish notes that the distinction created by the government "serves to perpetuate the historic disadvantage suffered by members of an admittedly vulnerable, poor and disadvantaged group" (*Canadian Doctors for Refugee Care* 2014). Similarly, she quotes both a letter from the Ontario Health Minister and the Premier of Saskatchewan, both of whom note that the federal government's actions impact individuals who are "some of the most vulnerable in our society" (para 132). Similar statements regarding refugee claimants being "particularly vulnerable and dependent" can be found in cases involving administrative or criminal misconduct on the part of those providing services to refugee claimants. Indeed, the vulnerability of the victims is often regarded as an aggravating factor in those cases.[36] In contrast, in asylum claims before the IRB, this inherent vulnerability of asylum seekers goes largely unnoted as it is (theoretically) already accounted for in the design and procedures of the tribunals thus apparently

[32] See, e.g., *Sokhi v Canada (Minister of Citizenship and Immigration)*, [2009] FCJ No 189; *RAD File No MB5-02903*, [2016] RADD No 74; *Omekam v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 401.

[33] See, e.g., *Ors v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No 1151; *Olalere v. Canada (Minister of Citizenship and Immigration)*, [2017] F.C.J. No. 382.

[34] See, e.g., *RAD File No MB3-01675*, [2013] RADD No 45; *RAD File No MB4-00200*, [2014] RADD No 1029; *Mubiala v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 1368.

[35] See, e.g., *RAD File No MB4-01838*, [2014] RADD No 421; *RAD File No TB4-01590*, [2014] RADD No 1192.

[36] See, e.g., *Law Society of Upper Canada v. Jaszi* [2015] LSDD No. 256, para 17. See also: *R v. Ellis* [2013] OJ No. 5583, 2013 ONCA 739.

negating the need for any special consideration, but in fact merely (and ironically) raising the bar for what is considered 'vulnerability'.

6.3. Stateless Persons

Although the Federal Court has explicitly recognized the vulnerability associated with statelessness, noting that "[p]eople who are unable to establish nationality are vulnerable and marginalized," (*Canada (Public Safety and Emergency Preparedness)* 2017) it is not consistently a determining factor in the cases at any level. For example, in one case before the Immigration Appeal Division in which the claimant's application for relief of residency requirements on humanitarian and compassionate (H&C) grounds was refused, the IAD found that although the appellant's Canadian children were vulnerable being with their stateless Palestinian mother (who herself was also recognized as being vulnerable), the children's best interests were served by being with their parents who were being returned to Libya (in 2013). In that case, the Member found that the fact that the mother was stateless prior to obtaining Canadian permanent residency and failed to stabilize her life in Canada actually counted against her claim, ignoring any external factors within Canada that could have contributed to her vulnerability (Kalloub 2013).

Similarly, in *Zeinah* (2014), the claimant's argument that both he and his children would be stateless if they lost permanent residency in Canada (they had lived as stateless Palestinians in Syria and had residency in the UAE through his employment) and that the precarious status of being a stateless person should be considered in his H&C analysis was rejected as the Member found that there was a lack of foreseeable hardship. In contrast, in *Abeleira* (2017), Amnesty International submitted a letter of support, asserting "that being a non-refugee stateless person in Canada means that such as person: [. . .] is in an extremely precarious situation: vulnerable and marginalized . . . " The immigration officer's failure to acknowledge or address the information submitted by Amnesty International or to explain how he considered the claimant's statelessness or why it did not "excite in him a desire to relieve the misfortunes of Mr. Abeleira" were important factors in the Federal Court's finding that the decision was unreasonable.

6.4. Age

Children are another frequently recognized category of 'vulnerable' persons and feature in over 30 of the cases reviewed. As in the case of statelessness, the vulnerability of youth is generally acknowledged by decision-makers but does not produce any consistent results in terms of the outcomes of cases (as opposed to its success in ensuring the implementation of procedural accommodations discussed earlier). Nevertheless, several conclusions can be drawn from the cases reviewed. The first conclusion is that previously mentioned: that children are inherently vulnerable and in need of special protection.[37] The particular vulnerabilities of children must be taken into consideration when assessing persecution as "[c]hildren exist in a state of vulnerability which might make them more susceptible to 'persecution' than adults" (*Kim* 2011).[38] Thus, consistent with the *Convention on the Rights of the Child*, the threshold for persecution of children is lower than that for adults.[39] For instance, in *Voskova* (2011), the Federal Court found that the RPD had committed a reviewable error when it rejected the applicants' claims. The applicants in that case were two Roma children from the Czech Republic, ages 3 and 5. The Federal Court referred to the jurisprudence noting that both the *Convention on the Rights of the*

[37] See, e.g., *Kim v Canada (Citizenship and Immigration)*, [2011] 2 FCR 448; *Kreishan v Canada (Minister of Citizenship and Immigration)*, [2018] FCJ No 486; *PDB v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 1335; *RKN (Re)*, [2004] RPDD No 14.

[38] A small number of cases also made reference to the Convention on the Rights of the Child and/or the UNHCR guidelines on Unaccompanied Children.

[39] See, e.g., *Pryce v Canada (Minister of Citizenship and Immigration)*, [2020] FCJ No 378 "I have always understood that the lower threshold should apply to the degree of suffering of children because of their vulnerability, and particularly their susceptibility to long-term development sequelae that may reasonably manifest later in their lives."

Child and the Guidelines, particularly Guideline 3: *Child Refugee Claimants: Procedural and Evidentiary Issues* (Immigration and Refugee Board of Canada 1996a), add 'nuance' to the determination of whether a child fits the definition of a refugee under IRPA s. 96 and that these "nuances are based on an appreciation that children have distinct rights, are in need of special protection, and can be persecuted in ways that would not amount to persecution of an adult" (*Voskova* 2011). In short, the Federal Court found that the RPD could not simply treat children's claims in the same way they would those of an adult with a greater capacity to endure prejudice and discrimination. It should also be noted that in many of the cases involving children that were decided in the claimant's favor, other aggravating factors were also present (history of abuse, sexual abuse, human trafficking, etc.). Indeed, while age may be sufficient to establish vulnerability for procedural purposes, age on its own rarely seems to be *the* determining factor for successfully claiming protection.

In a much smaller number of cases, old age was raised as a factor in claims for protection. While decision-makers appeared willing to take advanced age into consideration, it was determinative in an even smaller number of cases than youth or status as a minor. In cases that were decided in favor of the claimants, advanced age was generally found to intersect or combine with other factors (poor health, being a widow or unmarried, separation from/emotional dependence on family, financial or other dependence),[40] though in some cases, it was viewed on its own as an aggravating factor in the assessment of risk of persecution (*Bayrak* 2013). In other cases, advanced age was not found to be sufficient to establish a need for protection[41], and in one case in particular, *GSJ (Re)* (2006), the age of the claimants, their poor health and frailty were in fact found to undermine the claim that they would be at risk of persecution due to past political activities and symbolism as a leader among Shi'a Muslims in Pakistan. Recall, however, as noted above, that in determining whether the Vulnerability Guidelines should be applied, the Federal Court has found that age (referring to old age) "is not in itself a sufficient ground for concluding that [the claimant] was vulnerable" (*Shmagin* 2010).

6.5. Gender

The association between (female) gender and vulnerability is one that has been widely critiqued (Freedman 2018; Foster 1999). While women asylum claimants (and other migrants) *may* be vulnerable, the assumption that they *are* is often made "without real consideration of the structural and contextual causes of this vulnerability" (Freedman 2018, p. 1) and has the potential to emphasize paternalistic narratives of victimhood and disempowerment as opposed to highlighting a more balanced understanding of risk and agency. As Freedman notes in the EU context, "[t]heir vulnerability to violence is not intrinsic to their status as women, but created by the conditions of migration and exacerbated by EU policies" (Freedman 2018, p. 4). Nevertheless, along with children, women are perhaps the most consistently recognized 'vulnerable' group in domestic and international migration policy. In the cases reviewed for this study, gender is frequently associated with vulnerability and features as a basis for claiming protection, often in conjunction with gender-based violence or some other ground (age, poverty, marital status, psychological vulnerability, etc.); thus, the discussions of vulnerability associated with gender often, though not always, raise issues of intersectionality.[42] Gender-related concerns are primarily raised by the claimants

[40] See, e.g., *Nwaeme v Canada (Minister of Citizenship and Immigration)*, [2017] FCJ No 757 (age, gender, unmarried, mental heath problems); *Ramprashad-Joseph v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 2091 (age, dependence of partner); *El Romhaine v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 693 (age, dependence on an abusive son, illiteracy); *Hristovski v Canada (Minister of Citizenship and Immigration)*, [2006] IADD No 323 (age and health).

[41] See, e.g., *Kandiah v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1817 (The Board was found to have been sensitive to the claimant's age and lack of education); *RAD File No MB7-21421*, [2018] RADD No 333 (age and cultural considerations did not prevent the claimant from presenting his case); *RPD File No MA6-05674*, [2008] RPDD No 346 (claimant was an elderly widow but it was found that Romania has legal and institutional frameworks that can provide protection).

[42] e.g., *AB v Canada (Minister of Citizenship and Immigration)*, [2020] FCJ No 368. In this case the claimant successfully applied for judicial review of a removal order to Iran. Although the claim was based primarily on

(which is to be expected if gender forms the basis of the claim for protection); however, Members at the IRB will also on occasion raise the issue themselves.

At the IRB, concerns related to gender-based violence cases are specifically addressed in the asylum context by Guideline 4—*Women Refugee Claimants Fearing Gender-Related Persecution* (Immigration and Refugee Board of Canada 1996b), which includes both guidance on the assessment of credibility and the substance of protection claims, as well as special problems which women refugee claimants may have during their hearings. Procedural accommodations may thus be granted under Guideline 4, though in many cases they will also be applied for under Guideline 8.[43]

In comparing cases involving the application of Guideline 4 and Guideline 8, it is interesting to note that appeals and cases of judicial review based on a failure to apply Guideline 4 tend to be more successful than those based on a failure to apply Guideline 8.[44] Additionally, there appears to be some flexibility in the application of the criteria of vulnerability and the Guideline 8 requirement that the individual's vulnerability pertain to her ability to present her case when it comes to gender-based violence cases. A claim of psychological vulnerability under Guideline 8 requires not only external expert evidence that the claimant is vulnerable but also that that evidence demonstrates that his/her psychological issues will impact the hearing directly. In contrast, decision-makers appear more willing to grant 'vulnerable person' status to women fearing gender-based violence without an in-depth inquiry.

In addition to considering gender more generally, many cases involve gender as one characteristic of a specific vulnerable social group. These groups are often asserted by the claimant and sometimes, but not always, recognized by the decision-makers. Examples of these groups include Roma women and their vulnerability to becoming victims of human trafficking and sexual exploitation (as well as being vulnerable as members of the Roma community),[45] Tamil women (generally rejected), Nigerian women (including women at risk of female genital mutilation and attractive, young single women),[46] and women fearing forced or proxy marriages. With respect to this last category, the Federal Court has explicitly noted that the Government of Canada "has made it a priority to address the vulnerability of women in the immigration context and has taken steps to address the issue of forced marriage" (*Jahan* 2018).

In a curious finding, 47 cases were identified in which Haitian women were claiming protection, in most cases unsuccessfully, often due to gender-based violence. In these cases, the IRB adopted a particular conception of who a 'vulnerable Haitian woman at risk of persecution by reason of her gender' is (linked to factors such as residing in a camp or shantytown, being displaced, living alone, etc.) and used those criteria to deny the vast majority of claims because the claimants failed to fit this profile (they were married, educated, etc.).[47] This is an example of the way in which vulnerability can be used as a tool of categorization not just to offer protection but also to exclude people from it.

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gender and sexual orientation, the Federal Court noted that the claimant's profile (LGBTQ, female, unmarried, single mother, criminal record, refusal to wear the hijab) created overlapping layers of vulnerability.

43 In the 268 cases reviewed in detail, 47 referred to Guideline 4. Of these 22 also included references to Guideline 8.

44 See, e.g., *Ndjizera v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 521; *Abbasova v Canada (Minister of Citizenship and Immigration)*, [2011] FCJ No 40; *Bibby-Jacobs v Canada (Minister of Citizenship and Immigration)*, [2012] FCJ No 1258.

45 See, e.g., *Djubok v Canada (Minister of Citizenship and Immigration)*, [2014] FCJ No 672; *Konya v Canada (Minister of Citizenship and Immigration)*, [2013] FCJ No 1041; *RAD File No MB4-03652*, [2015] RADD No 380 (Claimant was found not to be a part of this vulnerable group); *IF v Canada (Minister of Citizenship and Immigration)*, [2005] FCJ No 1856.

46 See, e.g., *RAD File No. TB4-06280*, [2014] R.A.D.D. No. 1338; *Otti v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1297; *RAD File No TB3-03367*, [2015] RADD No 1081.

47 E.g., *RAD File No. MB5-01988*, [2015] R.A.D.D. No. 1216; *RAD File No MB8-03438*, [2019] RADD No 188.

6.6. SOGIE

There seems to be little dispute that in certain countries, non-conformity with socially accepted sexual orientation and gender identity expression (SOGIE) norms may result in increased vulnerability. In the majority of relevant cases, SOGIE considerations form the basis of the claim and so SOGIE-related vulnerability is raised by the claimant. In 2017, the IRB implemented Chairperson's Guideline 9—*Proceedings Before the IRB Involving Sexual Orientation and Gender Identity and Expression* (Immigration and Refugee Board of Canada 2017). This guideline outlines both procedural and substantive considerations and sets out a series of principles for assessing credibility and evidence in these cases. While a full review of the Guideline is beyond the scope of this article, suffice it to say that it embodies a relatively progressive, though imperfect, approach to SOGIE cases (Dustin and Ferreira 2017). Of relevance here, the Guideline specifically notes the particular vulnerability that certain individuals with diverse SOGIE may experience (ex: minors and trans and intersex individuals). In addition to being recognized in Canadian immigration law and policy, the vulnerability of these groups is noted indirectly in cases by reference to international sources (for instance in cases referring to the Mexican government's assertion that homosexuals are a vulnerable group[48] or the acknowledgement by the ombudsman in Costa Rica that persons with "distinct sexual preferences" are a vulnerable group[49]). Interestingly, the case law review did not produce many cases that involved any substantive analysis of vulnerability associated with SOGIE. Most of the cases identified were decided to the detriment of the claimant; however, this finding may be a result of the data sampling as the majority of the cases identified were either appeals or judicial reviews and many of the asylum decisions at first instance are not publicly accessible. Those cases that were identified tended to include instances where there was some question as to the credibility of the claimant, countries where there was found to be state protection, or instances where protection could only be granted when exacerbating factors were present. For instance, in one rejected refugee claim, it was found that vulnerability to harm was related to socio-economic standing as well as sexual orientation—that "working-class homosexuals are more vulnerable to harm" and that the claimant did not fall within that category (*Gorria* 2004).

6.7. Administrative Vulnerability

The theories presented at the start of this paper pointed to a need to focus on the diverse *sources* of vulnerability. The findings of this study reported above have shown that decision-makers have largely tended to focus on vulnerability as it pertains to intrinsic characteristics (gender, age, mental capacity, etc.) and predetermined categories or, at most, on the way in which certain external factors act upon those intrinsic characteristics (ex: gender discrimination based on cultural context). The exceptions to this are those cases where the focus is on *situational* vulnerability, that is, situations "where the term is used to demarcate or describe particular adverse experiences, transgressions or groups of people who may be in circumstances of social difficulty," (Brown et al. 2017, p. 299) for instance, asylum seekers or victims of human trafficking. Administrative vulnerability, on the other hand, focuses on the administrative and structural sources of vulnerability *within* a particular system—in this case, the Canadian immigration system. Thus, in certain instances, a migrant's vulnerability is a result of the very process he/she is engaged in or the institutions he/she interacts with. It is the administrative and judicial procedures, policies and practices (for instance, migration detention) that create the vulnerability that is asserted. In these cases, the migrant does not arrive vulnerable but is instead *made* vulnerable through his/her interaction with a particular system or institution. While

[48] See, e.g., *Melchor v Canada (Solicitor General)*, [2004] FCJ No 467; *Hernandez v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 1665; *Quinatzin v Canada (Minister of Citizenship and Immigration)*, [2008] FCJ No 1168.

[49] See, e.g., *BXY (Re)*, [2003] RPDD No 8; *Montero v Canada (Minister of Citizenship and Immigration)*, [2004] RPDD No 248.

increasingly willing to recognize vulnerable persons, the Canadian system currently fails to fully account for its own role in creating vulnerability in most cases.[50]

One small group of cases that falls under this administrative vulnerability category linked vulnerability to the lack of legal counsel (or inadequate counsel). This correlation is consistent with an extensive study of asylum cases conducted a decade ago, which found that "access to competent and qualified counsel [. . .] is a key determinant of outcomes in life and death refugee determinations" (Rehaag 2011, p. 93). The inability of some applicants to access competent and qualified counsel brings into question the fairness of the refugee determination process and leaves them in a position of vulnerability (Kaga et al. 2021; Nakache et al. 2021). Even when claimants are represented by counsel, their dependence on that counsel still puts them in a vulnerable position, as noted by decision-makers in several cases.[51] Similarly, decision-makers have recognized a claimant's inability to communicate in English or French and thus his/her dependence on interpreters and translators to make a claim and the potential for misunderstandings that flow from that, as a factor that can increase vulnerability (Evans Cameron 2018, p. 57).[52]

With the exception of the few instances noted above, decision-makers in asylum cases largely failed to give much consideration to the ways in which the structures, processes and policies of the asylum system (for instance short timelines, use of detention, securitization measures, etc.) either create or exacerbate the vulnerability of claimants, perpetuating the idea that vulnerability is something that is either intrinsic to the claimant or, at the very least, something that happens "out there," as opposed to something for which the administrative authorities bear some responsibility. This oversight also contributes to the perception noted by Luna (2009) that vulnerability is a permanent condition, "a label that is attached to someone and that persists throughout its existence" (p. 129) rather than a variable state that is the result of particular circumstances, relationships and interactions and thus subject to change over time, including throughout the course of the refugee determination administrative process.

6.8. Summary

The specific ways in which different categories or factors of vulnerability are addressed by the courts and tribunals in their substantive assessment of claims for protection allow some insight into how the concept is currently understood by decision-makers. For instance, the recognition that multiple factors of vulnerability, each insufficient on its own, can combine to create a situation where international protection is warranted is an acknowledgement of importance of intersectionality in an assessment of vulnerability. Yet this more dynamic, flexible conception is still hampered by a reliance on a traditional, category-based understanding of vulnerability.

7. Conclusions

A case-law analysis is necessarily an imperfect method of study (as are most methods, of course) insofar as it allows us to examine only that which is made explicit by the decision-maker. Although the reasoning provided by decision-makers is intended to be relatively complete, subjective beliefs, interpretations, and value judgments are not necessarily evident in the decisions. Supplementing a case-law review with individual interviews would likely provide a more nuanced understanding of how vulnerability is approached

[50] The one context in which administrative or structural vulnerability has been recognized (if inadequately addressed) by the courts is with respect to temporary foreign workers and the vulnerability created by low wages, fear of deportation, employer-tied contracts, etc. See, e.g., *Fraser v. Canada (Attorney General)*, [2005] O.J. No. 5580; *Hosein et al v. Ontario (Ministry of Community Safety and Correctional Services)*, [2018] OHRTD no. 240.

[51] See, e.g., *Abasher v Canada (Minister of Citizenship and Immigration)*, [2019] FCJ No 1469; *Peredo v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 451; *Gulyas v Canada (Minister of Citizenship and Immigration)*, [2015] FCJ No 189.

[52] *Andreoli v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 1349; *Peredo v Canada (Minister of Citizenship and Immigration)*, [2010] FCJ No 451; *Gulyas v Canada (Minister of Citizenship and Immigration)*, [2015] FCJ No 189; *RAD File No MB7-16465*, [2019] RADD No 854.

by decision-makers. Nevertheless, the critical public record provided by case law reveals several important trends or tendencies that highlight the persistent (though narrowing) gap between the holistic understanding of vulnerability in the academic literature and its application in practice. This article, and the broader project of which it is a part, seeks to draw specific attention to these trends with the objective of providing both academics and policymakers with the information needed to bridge that divide and strengthen the international protection regime.

In reviewing the case law, it is interesting to note the extent to which discussions of vulnerability in the procedural context have overtaken all other dimensions of the concept in the consideration cases related to protection-seeking (Evans Cameron 2018, p. 99). Indeed, an entire body of jurisprudence concerning the application of the Chairperson's Guidelines on Vulnerability has been developed. In many instances, it might be possible for the decision-makers to insulate their decisions more effectively (and thereby reduce the number of appeals, both successful and unsuccessful) simply by providing a clearer explanation in the first instance of how they are applying the Guidelines and/or accommodating any potential vulnerability in the procedure and in their decision-making. Too often at the RPD, the only reference to the Vulnerability Guidelines is merely a statement to the effect that they have been considered and, as the Federal Court has noted, "[a]s a matter of law, it is not sufficient to merely mention the Guidelines without demonstrating their application."[53] Yet the broad discretion afforded decision-makers means that simply demonstrating that a decision was well-reasoned might be sufficient to ensure against appeal. Still, that approach would do nothing to change the reality that vulnerability as referred to in the Guidelines is a very narrow concept that excludes far more people from procedural protection than it includes. By limiting the application of the guidelines to only those cases of severe vulnerability affecting a claimant's ability to present his case, the Guidelines may very well be overlooking many cases of true vulnerability where the claimants are simply deemed to not be vulnerable *enough*.

As a substantive factor in the determination of protection cases, the use of the concept of vulnerability is widespread but unsatisfactory, with little discussion by the courts or tribunals of what the implications of vulnerability are and how to define, quantify, and recognize vulnerability. The adjudicators generally employ a category-based, essentialized understanding of vulnerability that may serve the interests of some (for instance allowing certain groups to be deemed more "worthy" of protection, such as women fleeing gender-based violence) but can also overlook much of the nuance and diversity in the experiences of migrants. Both the Gender and SOGIE Guidelines provide good examples of efforts to address both the procedural and substantive impacts of certain forms of vulnerability. The challenge that remains is to address the situation of those claimants who are vulnerable but do not fall into these two sub-groups, perhaps either by issuing a revised and more expansive vulnerability guideline or by developing guidelines to address the situation of additional sub-groups, for instance, claimants with psychological vulnerabilities.

The case-law review demonstrates that consistency is also a problem. Perhaps with the exception of cases dealing with children, there does not seem to be much consistency in the weight attributed to vulnerability. At what point does vulnerability on the part of a claimant require action beyond procedural accommodation—in other words, protection—on the part of the State? Indeed, a lack of consistency is characteristic of the treatment of 'vulnerability' in both the procedural and substantive contexts. While the existence of the Guidelines should provide a degree of uniformity, the fact that they are not legally binding and the broad discretion afforded decision-makers mean that their application is uneven.

Nevertheless, the case review reveals some reasons for optimism. The frequency with which the concept of 'vulnerability' is mentioned does point to a recognition of its importance as both a substantive and procedural factor. Similarly, the fact that decisions

[53] See *Evans v Canada (Minister of Citizenship and Immigration)*, 2011 FC 444; *Yoon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1017; *DT v Canada (Minister of Citizenship and Immigration)*, [2012] FCJ No 729.

about vulnerability often identify multiple types or sources of vulnerability that affect a single claimant (age, gender, religion, socio-economic status, etc.) is an implicit recognition of the importance of adopting an intersectional approach to the assessment of vulnerability. Finally, despite the inconsistencies in application and their narrow scope, the Vulnerability Guidelines provide an important framework for ensuring procedural fairness in cases of severe vulnerability.

Perhaps the greatest weakness in the treatment of vulnerability is the failure to adequately consider the vulnerability created by the policies, institutions, administrative structures and processes of the protection system itself. Failure to acknowledge these sources of vulnerability inevitably leads to a failure to address or account for them within those processes. The IRB has accepted that all asylum seekers (and perhaps migrants more broadly) are inherently vulnerable, and this recognition is beneficial in terms of the fact that it allows protections to be built into the procedures and training of the IRB. However, it is also problematic in that it raises the bar for who is considered 'vulnerable'. Vulnerability has a relative dimension—a vulnerable person is one who has limited or reduced capacity, power or control *relative* to others (Atak et al. 2018), and this dimension has the potential to be lost. If all asylum seekers are vulnerable, how do we accommodate that? We are left wondering whether the implicit acceptance of the vulnerability of those who come before the IRB may actually act to obscure that vulnerability and its potentially devastating impact, in the eyes of the decision-makers.

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