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SPECIAL ISSUE ARTICLE

Asylum Marginalisation Renewed: 'Vulnerability Backsliding' at the European Court of Human Rights

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Abstract

It is now over ten years since the European Court of Human Rights (ECtHR or Court) first established that asylum seekers are inherently and particularly vulnerable on account of their very situation as asylum seekers. This occurred in its Grand Chamber judgment in the case of *M.S.S. v Belgium and Greece*. This article critically examines the Court's subsequent asylum jurisprudence through the lens of vulnerability. The analysis reveals that the Court has engaged in 'vulnerability backsliding'. Specifically, it traces the ways in which the Court has surreptitiously reversed the very principle of asylum vulnerability it itself established in *M.S.S.* The consequence of this backsliding is not only that the judicially recognised concept of asylum vulnerability is undermined, but that some of the most vulnerable applicants that come before the Court suffer renewed marginalisation, and, in some circumstances, exclusion from the 'special protection' to which they were previously afforded courtesy of *M.S.S.*

Keywords: asylum; backsliding; ECHR; European Court of Human Rights; human rights; vulnerability

1 Introduction

Vulnerability has become an increasingly frequent feature of migration law, including in the jurisprudence of the ECtHR in cases concerning migrants entering, or seeking to enter, Europe (da Lomba and Vermeylen, 2022, p. 2; Ippolito, 2019, p. 545). This was really set in motion by the 'legally ground-breaking' (Costello, 2015, p. 262) Grand Chamber judgment in the case of *M.S.S. v. Belgium and Greece*[1] (Moreno-Lax, 2012), which concerned an asylum applicant forcibly transferred from Belgium to Greece and left to fend for himself in 'dire living conditions' (Baumgärtel, 2019, p. 152). Since *M.S.S.*, findings on applicants' vulnerability have been central to the Court's reasoning, and sometimes pivotal to the outcomes, in several judgments concerning not only asylum applicants but also those who have not sought asylum or those whose asylum applications have been rejected by Convention state authorities.[2] It is evident from the case law that applicant vulnerability acts 'as a magnifying glass, exposing a greater duty to protect and care imposed upon States' (Beduschi, 2018, p. 85). Specifically, its effect is to substantially narrow a state's margin of appreciation in respect to a particularly vulnerable applicant, for example, an asylum seeker per *M.S.S.*, and it demands that the state provide 'very weighty reasons' for any restrictions it has imposed upon that applicant (Kim, 2021, p. 617).[3] Baumgärtel has gone as far as to say that vulnerability reasoning has 'effectively elevat[ed] the level of protection that asylum seekers enjoy under Article 3 [the prohibition of torture and inhuman or degrading treatment or

[1] *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011 [GC].

[2] See, for example, *Khlaifia and Others v. Italy*, Application No 16483/12, 15 December 2016 [GC]; and *Aden Ahmed v. Malta*, Application No 55352/12, 23 July 2013, respectively.

[3] *Alajos Kiss v. Hungary*, Application No 38832/06, 20 May 2010 [GC], para. 42.

punishment under the Convention]' (2019, p. 114). Yet, vulnerability, as employed in the context of the European Convention of Human Rights (ECHR), remains a highly contested concept, and the meaning ascribed to it by the Strasbourg Court is decidedly unclear (Heri, 2021, p. 205; Kim, 2021, p. 625).

Taking *M.S.S.* as its starting point, this article examines the ECtHR's use of vulnerability in its asylum cases.[4] It identifies three categories of cases, which it names the 'comparison caveat cases', the 'absence cases', and the 'linguistic alteration cases'. These categories of cases, taken both individually and collectively, reveal a sustained, albeit not necessarily consistent or methodical, backsliding that undermines asylum vulnerability before the Court. First, the article discusses the contemporary literature on 'backsliding' and its links to the ECtHR. Second, it introduces *M.S.S.* and subsequent cases that have shed some light on the meaning and effect of 'particular vulnerability' when applied by the ECtHR to asylum applicants. Third, it traverses the ECtHR's most recent jurisprudence in a range of asylum contexts, including in respect to applicants who are physically located at Europe's external borders. Fourth, it discusses the implications of its findings, in particular, how vulnerability, either through its use or its absence, results in the renewed marginalisation of asylum seekers and other migrants in law; before, fifth, concluding. This article thus contributes to the nascent literature on migrant vulnerability at the ECtHR and to the wider field on international courts and their critical appraisal in two ways. On the one hand, it provides concrete evidence of judicial backsliding. On the other hand, it offers up vital insights into its consequences, not only for applicants but also for vulnerability as a judicial construct and the soundness of supra-national judicial reasoning in general as a factor that compounds the plight of people on the move. In this connection, the article joins the other contributions to this Special Issue in their critical appraisal of the interplay between law, vulnerability, and migration (Moreno-Lax and Vavoula, in this issue).

2 Backsliding at the ECtHR

The terminology of 'backsliding' has become increasingly prominent in recent years. This is notable in the field of politics and governance, in which accusations of 'democratic backsliding' against European (and non-European) liberal democratic states abound (see, for example, Bellamy and Kröger, 2021). Such accusations have also been levelled at the European Union (EU), including in respect to its response to persons seeking asylum in EU member states. According to Bermeo, while democratic backsliding itself is a 'frequently used but rarely analyzed' term (Bermeo, 2016, p. 5), at its base it 'denotes a wilful turning away from an ideal' (Bermeo, 2016, p. 6). As Bermeo reveals through her analysis of political case studies, backsliding need not be explicit or sudden; it is increasingly realised through more subtle forms (Bermeo, 2016, p. 6).

Yet, accusations of backsliding have not only been levelled at institutions with executive functions. The idea of 'judicial backsliding' at the European supranational level is also gaining traction. This has arisen out of the broader literature examining the resistance experienced by international courts from, *inter alia*, states. Within this literature, it is generally accepted that international courts do face resistance. Indeed, as Madsen, Cebulak and Wiebusch argue, 'contestation and disagreement over the direction and contents of law are defining features of the law' (2018, p. 202). They categorise such resistance, which occurs 'within the confines of the system but with the goal of reversing developments in law', as *ordinary* resistance, and term this 'pushback' (Madsen, Cebulak and Wiebusch, 2018, p. 203). Resistance becomes *extraordinary*

[4]The phrases 'asylum cases' and 'asylum jurisprudence' are used in this article to refer to cases in which one or more of the applicants is an asylum seeker. It is not meant to suggest that the Court itself makes a clear-cut distinction between asylum and non-asylum cases.

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when it challenges not only the law but the very structure or existence of the international court itself – this they term 'backlash' (Madsen, Cebulak and Wiebusch, 2018, p. 203). Several studies have demonstrated the resistance, both ordinary and extraordinary, experienced by the ECtHR over the past two decades (see, for example, Lemmens, 2022; Madsen, 2021; Stiansen and Voeten, 2020). That the ECtHR has faced such resistance is thus not a source of debate. The current debate instead centres on whether and to what extent the ECtHR is, in response to this resistance, regressing, in particular in respect to substantive human rights protections.

In a 2020 paper, Helfer and Voeten advance evidence that suggests the ECtHR 'is, in fact, constricting human rights in Europe' (p. 823). The evidence they provide comes in the form of what they term 'walking back dissents'. These are 'minority opinions asserting that the Grand Chamber has overturned prior rulings or settled doctrine in a way that favours the respondent government' (Helfer and Voeten, 2020, p. 799). They observe an increasing number of such dissents in the Court's jurisprudence between 1999 and 2018 (Helfer and Voeten, 2020, pp. 797, 800, 814–815, 823). They use these to support their claim that the Court appears to be 'tacit[ly] overturning' its previous precedents for the alleged purpose of 'walk[ing] back human rights in Europe after decades of dynamic rights-enhancing rulings' (Helfer and Voeten, 2020, p. 827). They identify such dissents as being especially common in cases concerning, *inter alia*, immigration (Helfer and Voeten, 2020, p. 823). The conclusions of this paper have, however, been vociferously contested by Stone Sweet, Sandholtz and Andenas (2021; 2022). They argue that the ECtHR has *not* been 'walking back rights' (2022, p. 260). Yet, their criticism of Helfer and Voeten predominantly centres on alleged inconsistencies and errors in the coding and analysis of dissents, which were revealed when they sought to replicate Helfer and Voeten's study (Stone Sweet, Sandholtz and Andenas, 2022, p. 262; Stone Sweet, Sandholtz and Andenas, 2021, pp. 902–903). Through replicating the study, Stone Sweet, Sandholtz and Andenas remain confined to the methodology and case selection made by Helfer and Voeten. As such, Stone Sweet, Sandholtz and Andenas do not themselves determinatively refute the claim that the ECtHR is 'walking back rights', only that the study's methodology was flawed.

It is in this contested space that this article focuses in on the Court's use of vulnerability in cases brought by asylum applicants. To that end, it complements similar work being undertaken by Bosch March (2021) that seeks to evidence backsliding by the Court in the context of collective expulsions of migrants (as prohibited by Article 4 of Protocol 4 ECHR). It also resonates with the work of Heri (2021), who has found that the ECtHR is referring to vulnerability less frequently under Article 3 ECHR. Moreover, instead of seeking to establish a causal relationship between pushback/backlash and judicial backsliding or restraint (for such an example, see Stiansen and Voeten, 2020), this article is concerned with the more fundamental issue of whether concrete evidence of backsliding can be found within the Court's jurisprudence and its use of vulnerability reasoning when referring to asylum/migration.

It is important at the outset to emphasise that backsliding requires a reverse trajectory, and not simply a failure to progress forwards. As Helfer and Voeten have said, '[a] Court that is less likely to endorse pleas for more expansive interpretations of human rights is not the same as a Court that is narrowing prior interpretations' (2020, p. 806). In order to assess whether and to what extent any backsliding has occurred, it is therefore necessary to look at the Court's jurisprudence to identify a baseline. This is important for two interconnected reasons. First, it provides a standard against which any backsliding can be assessed. Second, it ensures that any claims about judicial backsliding trends are grounded in the actual judgments of the ECtHR. As such, this article employs a decidedly analytical, doctrinal approach, albeit one that is enriched by political science and critical legal studies to situate arguments against their wider background and to contextualise the conclusions reached. For the purposes of this article, the baseline against which any vulnerability backsliding will be measured is the Grand Chamber's judgment in the case of *M.S.S.*, to which this article now turns.

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3 Asylum vulnerability under the ECHR

The case of *M.S.S.* thrust vulnerability into the ECtHR's jurisprudence on migration. In *M.S.S.*, the ECtHR for the first time identified asylum seekers as 'a particularly underprivileged and vulnerable population group in need of special protection'[5] (Yahyaoui Krivenko, 2022, p. 192). *M.S.S.* concerned the treatment of an Afghan male national who, having first entered the EU via Greece, travelled to Belgium, only to then be transferred back to Greece under the Dublin Regulation upon his attempt to seek asylum in Belgium.[6] The applicant claimed, *inter alia*, that his detention at Athens International Airport and his subsequent living conditions in Greece, which he characterised as a 'state of extreme poverty',[7] amounted to inhuman and degrading treatment.[8] The Court found a violation of Article 3 ECHR (the prohibition of torture and inhuman or degrading treatment or punishment) on the basis of both the applicant's detention and living conditions.[9] In respect to both, it drew upon the concept of vulnerability in its reasoning. Regarding his detention conditions, the Court asserted that it itself 'must take into account that the applicant, being an asylum-seeker, was particularly vulnerable',[10] and that 'the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum-seeker'.[11] In respect to his living conditions, the Court 'attache[d] considerable importance to the applicant's status as an asylum-seeker',[12] and considered the Greek authorities to not have had 'due regard to the applicant's vulnerability as an asylum-seeker'.[13] As such, the Court found that the authorities 'must be held responsible, because of their inaction, for the situation in which he [the applicant] has found himself for several months', noting in particular his homelessness and the lack of any means of providing for his essential needs.[14]

The Court located the source of the applicant's vulnerability in his status and situation as an asylum seeker (Moreno-Lax, 2017, p. 363) – a legal construct with material consequences that reduces the autonomy/agency of those applying for international protection (Moreno-Lax and Vavoula, in this issue). In the words of the Grand Chamber, this 'particular vulnerability' of the applicant as an asylum seeker specifically stemmed from 'everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'.[15] A similar, albeit slightly expanded, position has recently been reached by the UN Special Rapporteur on the Human Rights of Migrants, Felipe González Morales, who has stated that 'refugees ... face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination' (United Nations Human Rights Council, 2022, para. 21). In identifying this particular vulnerability as *inherent* in the situation of being an asylum seeker, the Court employed a categorical, or group-based, approach to vulnerability. This recognises an individual's vulnerability on account of their membership of a particular 'vulnerable group'.[16] The consequence of *M.S.S.* is that *all* asylum seekers are particularly vulnerable under the ECHR by default (Al Tamimi, 2016, p. 575).

[5] *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011 [GC], para. 251.
[6] *Ibid.*, paras 11–12, 33.
[7] *Ibid.*, paras 235–239.
[8] *Ibid.*, paras 205–206, 235.
[9] *Ibid.*, paras 234, 264.
[10] *Ibid.*, para. 232.
[11] *Ibid.*, para. 233.
[12] *Ibid.*, para. 251.
[13] *Ibid.*, para. 263.
[14] *Ibid.*, para. 263.
[15] *Ibid.*, para. 232. This two-pronged test of vulnerability is explored in greater depth in Hudson (2018).
[16] Further discussion of the categorical approach to vulnerability lies beyond the scope of this article, but for a critique of its use by the ECtHR, see da Lomba and Vermeylen (2022) at 2–3; Kim (2021); Heri (2021); Peroni (2014); Peroni and Timmer (2013).

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Since *M.S.S.*, vulnerability has been a central feature of the ECtHR's reasoning in many of its judgments concerning applicants who had sought asylum at the material time. This includes *Mahamed Jama v. Malta*,[17] which concerned a female, Somali national who claimed asylum a few days after arriving in Malta by boat.[18] In its judgment, the Chamber asserted that the particular vulnerability of asylum seekers is a distinct 'state' of vulnerability that 'exists irrespective of other health concerns or age factors'.[19] In *Tarakhel v. Switzerland*,[20] the eight Afghan national applicants, six of whom were minor children, successfully challenged their return to Italy by Switzerland under the Dublin Regulation.[21] In support of their claim, the applicants alleged 'the absence of individual guarantees as to how they would be taken charge of, in view of the systemic deficiencies in the reception arrangements for asylum seekers in Italy'.[22] In its judgment, the Grand Chamber drew heavily upon *M.S.S.* when assessing the alleged violation of Article 3 ECHR. It reasserted that 'as a "particularly underprivileged and vulnerable" population group, asylum seekers require "special protection"',[23] and emphasised this 'special protection' as being 'particularly important' in the case of minors, given their 'specific needs and their *extreme* vulnerability'.[24] Additionally, and also in respect to Article 3 ECHR, the ECtHR has confirmed that the vulnerability that it attaches to asylum seekers makes it 'frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and any supporting documents'.[25]

Vulnerability has also featured in judgments concerning the movement into Europe of persons who had *not* actively sought asylum at the material time. The case of *Khlaifia and Others v. Italy*[26] is particularly instructive. *Khlaifia* concerned the applications of three Tunisian males, young adults, who had attempted to cross the Mediterranean on board rudimentary vessels.[27] After being intercepted by the Italian coastguard, the applicants were detained, first on the island of Lampedusa and then in Palermo, before being returned to Tunis following 'simplified procedures' laid out in a pre-existing bilateral agreement between Italy and Tunisia.[28] Their stay in Italy totalled little more than one week,[29] a 'not insignificant period' of time in the view of the Grand Chamber.[30] In this case, the Grand Chamber, in finding against the applicants, confirmed that persons who have sought asylum experience a specific form of vulnerability that is 'inherent in that status'.[31] As such, by finding that the applicants in *Khlaifia* were *not* vulnerable, the Court reaffirmed the vulnerability of asylum seekers as had been established in *M.S.S. Khlaifia* thus cemented the relevance of vulnerability reasoning in the ECtHR's migration case law, specifically its role in distinguishing between different categories of applicants. Moreover, the Court confirmed that the absence of an asylum claim serves as proof of *non*-vulnerability in the eyes of the Court (Al Tamimi, 2016, p. 576; Heri, 2021, p. 207) – thereby in fact stratifying need and deservability of ECHR protection.

[17] *Mahamed Jama v. Malta*, Application No 10290/13, 26 November 2015.
[18] *Ibid.*, paras 1, 6, 13.
[19] *Ibid.*, para. 100.
[20] *Tarakhel v. Switzerland*, Application No 29217/12, 4 November 2014 [GC].
[21] *Ibid.*, para. 1.
[22] *Ibid.*, para. 3.
[23] *Ibid.*, para. 118.
[24] *Ibid.*, para. 119 (emphasis added).
[25] *K.I. v. France*, Application No 5560/19, 15 April 2021, paras 139–140.
[26] *Khlaifia and Others v. Italy*, Application No 16483/12, 15 December 2016.
[27] *Ibid.*, paras 10–11.
[28] *Ibid.*, paras 11–15, 17–18, 36–40.
[29] *Ibid.*, paras 11–17.
[30] *Ibid.*, para. 249.
[31] *Ibid.*, para. 194.

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4 Vulnerability backsliding in the ECtHR's asylum-related jurisprudence

Having ascertained the *M.S.S.* benchmark of asylum vulnerability, this article now turns to assess in detail the presence and use of vulnerability in the ECtHR's more recent asylum-related jurisprudence. This research identifies three categories of such judgments. First, there are judgments in which, despite recognising the 'particular vulnerability' of asylum seekers as a group, the Court has caveated the vulnerability of the specific applicants through a comparison with other asylum seekers in the same situation (the 'comparison caveat cases'). Second, there are judgments in which the ECtHR has failed to mention or give due regard to the inherent and particular vulnerability associated with being an asylum seeker under the Convention (the 'absence cases'). Third, there are judgments in which the ECtHR has linguistically altered the *M.S.S.* vulnerability principle that particular vulnerability is inherent to one's situation as an asylum seeker, to the detriment of claimants (the 'linguistic alteration cases'). All the identified cases fit into at least one of these three categories – in other words, inclusion within one category does not preclude inclusion within another. Jointly, this body of case law represents a vivid illustration of the 'vulnerability backsliding' thesis at the heart of this article, which confirms the role of law as a pathogenic, vulnerability-generating intervention in the configuration of migrant/non-citizen status as precarious (Moreno-Lax and Vavoula, in this issue).

4.1 The 'comparison caveat cases'

As introduced above, the case of *Mahamed Jama v. Malta* concerned a young, female, Somali national who in 2012 sought asylum in Malta. The applicant alleged, *inter alia*, that the conditions of her detention in the Hermes Block of Lyster Barracks breached Article 3 ECHR.[32] In its assessment of the applicant's Article 3 ECHR claim, the Chamber, drawing upon *M.S.S.* as authority, accepted that the applicant was, by virtue of being an asylum seeker, 'particularly vulnerable'.[33] However, the Chamber then proceeded to attach a caveat to this. Specifically, the Chamber said that 'the Court does not lose sight of the fact that the applicant in the present case was not *more vulnerable than any other adult asylum seeker* detained at the time'.[34] In making this statement, the Chamber drew, *a contrario*, on its 2013 judgment in the case of *Aden Ahmed v. Malta*.[35] This was a factually similar case, given that the applicant was also detained in the Hermes Block of Lyster Barracks, albeit three years before. Timing aside, a pivotal difference between both cases is that, in *Aden Ahmed*, the applicant was considered by the Court to be vulnerable on account of both her migratory status and her health. In respect to her migratory status, the Court noted that the applicant was an irregular immigrant at the material time, given that 'the entire duration of the detention complained of was subsequent to the rejection of the applicant's asylum claim'.[36] In respect to her health, the Court characterised this as 'fragile', considering her 'insomnia, recurrent physical pain and episodes of depression'.[37] The cumulative effect of her detention, migratory status and ill health were found by the Court to amount to degrading treatment and thus a violation of Article 3 ECHR.[38] However, in *Mahamed Jama*, by contrasting the applicant's personal circumstances with those of the applicant in *Aden Ahmed*, the Court found the conditions in Hermes Block not to have reached the minimum level of severity needed to constitute a violation of Article 3 ECHR,[39] despite her generally accepted particular vulnerability as an asylum seeker, given the absence of additional distinguishing factors.

[32] *Mahamed Jama v. Malta*, Application No 10290/13, 26 November 2015, paras 18, 46.

[33] *Ibid.*, para. 100.

[34] *Ibid.*, (emphasis added). The applicant's age was disputed between the parties, with the applicant stating she was 16 years old, but the respondent Government ultimately finding her to be an adult, not a minor.

[35] *Aden Ahmed v. Malta*, Application No 55352/12, 23 July 2013.

[36] *Ibid.*, para. 144.

[37] *Ibid.*

[38] *Ibid.*, para. 99.

[39] *Mahamed Jama v. Malta*, Application No 10290/13, 26 November 2015, para. 102.

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A similar caveat also featured in the Court's judgments in the case of *Ilias and Ahmed v. Hungary*.[40] The applicants in this case were two Bangladeshi males in their thirties.[41] They alleged, *inter alia*, that the conditions of their 23-day stay, during which they were confined in 'accommodation containers' in the Röszke transit zone that lies just inside the Hungarian border with Serbia, amounted to inhuman and degrading treatment contrary to Article 3 ECHR.[42] The applicants pleaded their particular vulnerability to the Court, and before the Grand Chamber argued that the Chamber had failed to consider this sufficiently.[43] In this respect, they emphasised their 'severe psychological condition'.[44] A psychiatric assessment conducted while the applicants were in the transit zone resulted in both applicants being diagnosed with post-traumatic stress disorder (PTSD) and the second applicant being additionally diagnosed as having an episode of depression.[45] The psychiatrist stated that 'the applicants' mental state was liable to deteriorate due to the confinement'.[46] In the Chamber judgment, the Court drew upon *M.S.S.* in reiterating that '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'.[47] Yet, it then caveated this assertion by taking from *Mahamed Jama* that 'the applicants in the present case were not *more vulnerable* than any other adult asylum-seeker detained at the time',[48] this despite the psychiatric diagnoses of PTSD and depression. In its judgment, the Court said it '[took] cognisance of' these diagnoses, but that these related to 'alleged events in Bangladesh [that] appear[ed] to have occurred years before the applicants' arrival in Hungary'.[49] Moreover, in this connection, the Court emphasised that the applicants had 'spent only a short time in Serbia . . . and did not refer to any incidents in other countries'.[50] The Court also noted that the psychiatrist's reports did not give 'any indication of urgent medical or psychological treatment'.[51] The Chamber ultimately found that, despite the lack of a legal basis for the applicants' deprivation of liberty and the 'inevitable element of suffering and humiliation involved in custodial measures', 'the satisfactory material conditions and the relatively short time involved' meant their treatment did not meet the minimum level of severity to constitute inhuman treatment under Article 3 ECHR.[52] As in the Chamber judgment, the Grand Chamber too stated that 'there [was] no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015'.[53] Once again, this was despite the psychiatric diagnoses of PTSD and depression, which the Grand Chamber did 'not consider . . . decisive'.[54] The Grand Chamber concluded that 'the psychiatrist's observations [could not] lead to the conclusion that the otherwise acceptable conditions at the Röszke transit zone were particularly ill-suited in the applicants' individual circumstances to such an extent as to amount to ill-treatment contrary to Article 3 [ECHR]'.[55] Overall, the Grand Chamber reaffirmed the Chamber's decision that the applicants' situation did not constitute a violation of Article 3 of the Convention.[56]

[40] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 14 March 2017 [C] 21 November 2019 [GC].
[41] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 21 November 2019 [GC], paras 7, 10, 11.
[42] *Ibid.*, para. 180.
[43] *Ibid.*, para. 183.
[44] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 14 March 2017 [C], para. 10.
[45] *Ibid.*, paras 19, 20.
[46] *Ibid.*, para. 21.
[47] *Ibid.*, para. 87.
[48] *Ibid.*, (emphasis added).
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*, para. 21.
[52] *Ibid.*, paras 88–89.
[53] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 21 November 2019 [GC], para. 192.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*, para. 194.

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Although there is no reference to *Mahamed Jama* anywhere in the Grand Chamber's *Ilias and Ahmed* judgment, the language used echoes that of the Chamber in the former case. The caveat has thus been transposed into the Grand Chamber's jurisprudence. The use of the caveat, that the applicants before the Court are not more vulnerable than any other asylum seekers detained at the time, downplays the vulnerability of the specific applicants in the individual case. It does so through a hollow comparison with other asylum seekers that are present in the same location at the same time. This comparison is indeed hollow because the Court has not provided any criteria for its assessment. Looking only at the cases of *Aden Ahmed* and *Mahamed Jama*, one could reasonably conclude that a diagnosed health condition is sufficient to differentiate between otherwise similarly placed asylum applicants. Yet, this conclusion is undermined by the subsequent judgment in *Ilias and Ahmed*, in which the applicants had both been diagnosed with recognised mental health conditions relevant to their specific situation at the material time, but were deemed to be no more vulnerable than any other adult asylum seeker in Röszke transit zone in the same period. This may have been factually and medically true – every adult asylum seeker in Röszke transit zone at that time may very well have been suffering from PTSD and/or depression. But the logical conclusion of the comparison caveat reasoning employed by the Court is that *none* of the asylum seekers would be more vulnerable than any of the others. Such a conclusion thus downplays the vulnerability of *all* asylum seekers by accepting the normalisation of mental health conditions among asylum seekers. It also means that mental health is not by itself a differentiating factor that calls for raising the bar of what constitutes Convention-compliant conditions for, or treatment of, asylum seekers whatever their severity. If all asylum seekers suffer from mental health conditions, then the comparison caveat reasoning, taken to its logical consequence, dictates that no adjustment is required to secure Convention compliance. In sum, rather than taking issue with the medical reality of states confining asylum seekers in conditions in which their already vulnerable 'mental state [is] liable to deteriorate',[57] mental health is used as an argument *against* any need for enhanced Convention protections for vulnerable asylum applicants. This therefore exacerbates rather than remedies their plight (on the ambivalence of vulnerability reasoning, see Moreno-Lax and Vavoula, in this issue).

4.2 The 'absence cases'

Turning now to the next category of cases, here termed the 'absence cases'. These are cases in which the applicants sought asylum but the ECtHR has failed to factor in the inherent and particular vulnerability of asylum seekers, deviating in this way from the Grand Chamber ruling in *M.S.S.*

The cases of *Mohammed v. Austria*[58] and *Mohammadi v. Austria*[59] concerned individual male asylum seekers who sought to challenge the Convention compatibility of Dublin Regulation transfers back to Hungary on the grounds of an alleged violation of Article 3 ECHR should they be so returned. Chamber judgments were handed down in 2013 and 2014, respectively – therefore, at approximately the same time as a similar challenge was heard by the Grand Chamber in *Tarakhel* (discussed above). One important factual difference between the two cases is that in *Mohammadi* it was undisputed that the applicant was a minor (aged approximately fifteen or sixteen years) at the time he lodged an asylum application,[60] whereas the applicant in *Mohammed* was approximately thirty years of age.[61] Nonetheless, in neither case did the Court entertain any discussion of vulnerability, with no mention whatsoever of the applicants being vulnerable on

[57]To use the phrasing taken from the psychiatrist in *Ilias and Ahmed v. Hungary*, Application No 47287/15, 14 March 2017 [C], para. 21.

[58]*Mohammed v. Austria*, Application No 2283/12, 6 June 2013.

[59]*Mohammadi v. Austria*, Application No 71932/12, 3 July 2014.

[60]*Ibid.*, para. 7. The applicant's exact date of birth was unknown, but it was known he was born in 1995 (para. 6) and entered Austria on 20 October 2011 and lodged an asylum application.

[61]*Mohammed v. Austria*, Application No 2283/12, 6 June 2013, paras 6–7.

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account of their situation as asylum seekers. This was even though vulnerability concerns had been *explicitly* raised before the Court by the intervening NGO, the Hungarian Helsinki Committee. Specifically, that 'Hungarian legislation concerning the immigration police did not set forth different rules to be applied to vulnerable people with specific needs', despite concrete obligations in this regard contained in the Reception Conditions and Asylum Procedures Directives under EU law (a factor that was expressly taken into consideration in *M.S.S.*),[62] went unheeded by the Court.

In the 2016 case of *J.K. and Others v. Sweden*,[63] the Court again, this time in the Grand Chamber, failed to engage in a discussion of the applicants' vulnerability as asylum seekers. The applicants alleged, *inter alia*, that their removal from Sweden to Iraq would result in a violation of Article 3 ECHR,[64] primarily on the grounds that the first applicant belonged to 'the group of persons systematically targeted for their relationship with American armed forces'.[65] The application was successful, with the Grand Chamber finding that 'substantial grounds ha[d] been shown for believing that the applicants would run a real risk of treatment contrary to Article 3 [ECHR] if returned to Iraq'.[66] Yet, vulnerability did not explicitly feature in the Court's assessment, despite the fact that both parties expressly raised it in their submissions. Indeed, the applicants contended that '[t]he Swedish authorities should also have taken into consideration the first applicant's previous experiences and his *vulnerability* resulting from cooperation with the American forces in Iraq',[67] and the respondent Government rebutted that 'there was no reason to believe that the first applicant and his family would find themselves in a particularly *vulnerable* situation upon returning to Baghdad'.[68]

As in the case of *Ilias and Ahmed,* already discussed, the Court was again called upon to consider the conditions in the Röszke transit zone at the Hungarian-Serbian border in *R.R. and Others v. Hungary*.[69] The applicants in this instance were an Iranian-Afghan family consisting of three minor children (aged seven months, six years and seven years)[70] and their parents.[71] They were confined in the transit zone for almost four months.[72] The Court explicitly distinguished the facts of *R.R. and Others* from those of *Ilias and Ahmed* on the bases of age and duration of confinement. In particular, it noted that the applicants in the latter case were both adult asylum seekers,[73] and that their stay in the Röszke transit zone was 'relatively short' (twenty-three days).[74] *R.R. and Others* was additionally distinguished on account of the mother being pregnant and having a 'serious health condition',[75] and the undisputed fact that the father had not been provided with food during his four-month stay in the transit zone.[76] It is evident that these distinguishing factors were sufficient to reach the conclusion that there had been violations of the Convention in respect to the applicants in *R.R. and Others*, which included, *inter alia*, a violation of Article 3 ECHR in respect to all five applicants.[77] Although vulnerability and asylum seeker status were both mentioned many times in the judgment, on only one occasion were the two connected. This was in respect to the children specifically, when the Court noted that 'the

[62] *Ibid*., para. 44. See further Moreno-Lax (2012) on this point.
[63] *J.K. and Others v. Sweden*, Application No 59166/12, 23 August 2016 [GC].
[64] *Ibid*., para. 3.
[65] *Ibid*., para. 117.
[66] *Ibid*., para. 123.
[67] *Ibid*., para. 64 (emphasis added).
[68] *Ibid*., para. 72 (emphasis added).
[69] *R.R. and Others v. Hungary*, Application No 36037/17, 2 March 2021.
[70] *Ibid*., para. 59.
[71] *Ibid*., para. 1.
[72] *Ibid*.
[73] *Ibid*., para. 52.
[74] *Ibid*., para. 51.
[75] *Ibid*., para. 52.
[76] *Ibid*., paras 53, 57.
[77] *Ibid*., paras 57, 65.

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confinement of minors raises particular issues … since children, whether accompanied or not, are considered *extremely vulnerable* and have specific needs related in particular to their age and lack of independence, but also to their asylum-seeker status'.[78] Regarding the parent applicants, their particular vulnerability as asylum seekers was not mentioned. In respect to the mother, the Court's predominant focus was instead on the vulnerabilities associated with her health.[79] In respect to the father, vulnerability did not feature in the Court's assessment in any way, regardless of the lack of food and the specific hardships he had endured as an asylum applicant.[80] Even in respect to the children, it was their young age, rather than their asylum seeker status, which appears to have been determinative in reaching the conclusion that the conditions experienced exceeded the minimum severity threshold needed to constitute a violation of Article 3 ECHR.[81] This case thus evidences, most notably in respect to the father, an absence of any discussion of the inherent and particular vulnerability associated with asylum seeker status.

While the aforementioned judgments contained some, albeit minimal or limited, mention of vulnerability, since 2018 there has been a spate of cases in which vulnerability has been altogether absent from the ECtHR's deliberations, as recorded in its published judgments. The cases of *Z.A. and Others v. Russia*,[82] *S.A. v. the Netherlands*,[83] *M.S. v. Slovakia and Ukraine*,[84] *Shenturk and Others v. Azerbaijan*,[85] *M.A. and Others v. Bulgaria*[86] and *D.A. and Others v. Poland*[87] all concerned adult, predominantly male, asylum applicants. In all these instances, while the ECtHR was satisfied that the applicants had sought asylum, the particular vulnerability inherent in their status as asylum seekers under the Convention failed to feature even once.

Similarly, in *M.A. and Others v. Lithuania*,[88] only Judge Pinto de Albuquerque, in his concurring opinion, raised the applicants' vulnerability as asylum seekers. Referencing *M.S.S.*, Judge Pinto de Albuquerque emphasised that '[t]he domestic authorities … failed to take into account … "the applicant's status as an asylum-seeker and, as such, a member of a particularly

[78]*Ibid.*, para. 49 (emphasis added).

[79]*Ibid.*, see paras 58–65 for this assessment in respect to the mother, the 'second applicant'.

[80]*Ibid.*, see paras 53–57 for this assessment in respect to the father, the 'first applicant'.

[81]*Ibid.*, para. 65.

[82]*Z.A. and Others v. Russia*, Applications Nos 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019 [GC]. The applicants were four adult males, aged twenty-seven to thirty-nine years. One was an Iraqi national, one held a passport issued by the Palestinian Authority, one was a Somalian national, and one was a Syrian national. The applicants had sought asylum in Russia during their stay in the Sheremetyevo Airport Transit Zone in Moscow.

[83]*S.A. v. the Netherlands*, Application No 49773/15, 2 June 2020. The applicant was a young, male, Sudanese national who had claimed asylum in the Netherlands on several occasions.

[84]*M.S. v. Slovakia and Ukraine*, Application No 17189/11, 11 June 2020. The applicant was a young male, born in Afghanistan. The applicant's age was disputed by the parties. The ECtHR ultimately concluded that the applicant had 'not provided the Court with cogent elements which would lead it to depart from the findings of fact reached by the domestic authorities in respect of his age' (para. 79), namely that he was a young adult and not a minor. It was undisputed that the applicant had sought asylum in Ukraine.

[85]*Shenturk and Others v. Azerbaijan*, Applications Nos 41326/17, 8098/18, 8147/18 and 8384/18, 10 March 2022. The applicants were four adult males, all Turkish nationals, all aged in their forties. Asylum applications were made in Azerbaijan by the applicants, or on their behalf by their spouses or friends. The respondent Government disputed that the first applicant had applied for asylum in Azerbaijan, but the ECtHR found this conflicted with evidence that an asylum application had been lodged on his behalf with the UNHCR and others (para. 113).

[86]*M.A. and Others v. Bulgaria*, Application No 5115/18, 20 February 2020. The applicants were five Uighur Muslims from the Xinjiang Uighur Autonomous Region in China, aged approximately twenty-three to thirty-four years. All five applicants sought asylum in Bulgaria in December 2017.

[87]*D.A. and Others v. Poland*, Application No 51246/17, 8 July 2021. The applicants were three Syrian nationals, aged approximately twenty-four to thirty years. The first and second applicants were brothers, with the first and third applicants married to each other. While the respondent state disputed whether the applicants had expressed a wish to seek asylum at the Polish-Belarus border, the ECtHR was convinced that the applicants had expressed a wish to apply for international protection and that the Polish Government was aware of this (see paras 60–70).

[88]*M.A. and Others v. Lithuania*, Application No 59793/17, 11 December 2018. Although it was disputed whether the applicants had submitted asylum applications, the Court found in favour of the applicants on this point (para. 113).

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underprivileged and vulnerable population group in need of special protection"'.[89] Yet, not only was it the domestic authorities who failed to take this into account, but also the ECtHR itself. This is all the more surprising given that five of the seven applicants in this case were children.[90] In the 2020 case of *M.K. and Others v. Poland*,[91] several of the applicants were also children – eight of the thirteen applicants.[92] Although the third-party interveners emphasised 'the *special vulnerability* of children in respect of asylum procedures',[93] and the Court itself referred to a specific obligation arising under Article 34 of the Convention in respect to 'situations where applicants are *particularly vulnerable*',[94] it did not assert these applicants' vulnerabilities either as asylum seekers or as children in the judgment itself.

Perhaps unsurprisingly, not only does vulnerability appear to have been forgotten in these asylum cases, but also *M.S.S.* itself in this connection. While *M.S.S.* features in ten of the twelve judgments categorised under this heading of 'absence cases', only once is this related to asylum vulnerability. This is in the *Z.A. and Others v. Russia* Grand Chamber judgment.[95] In its assessment of the Article 3 ECHR minimum level of severity, the ECtHR notes that 'three of the applicants were eventually recognised by the UNHCR [United Nations High Commissioner for Refugees] as being in need of international protection ... which suggests that their distress was accentuated on account of the events that they had been through during their migration'.[96] This has echoes of the asylum vulnerability finding from *M.S.S.*, specifically that events that have occurred during migration can exacerbate distress. However, the word 'vulnerability' does not feature and the Court's use of 'suggests' means this is far from emphatic.

In sum, in this category of cases, the Court does not explicitly discuss the inherent and particular vulnerability associated with asylum seeker status that the Grand Chamber established in *M.S.S.* While *M.S.S.* itself has not been forgotten entirely, in none of these cases is its asylum vulnerability finding expressly mentioned. The Court has not entertained discussion of asylum applicants' vulnerability even when prompted by either or both of the parties and/or third-party interveners. This has occurred not only in respect to vulnerability as an asylum seeker, but also vulnerabilities on the basis of young age, as seen in *M.A. and Others* and *M.K. and Others*. It is clear, therefore, that the omission is not an isolated incident, as it has occurred in at least a dozen asylum cases in the past decade. Moreover, it is in the most recent years, since 2018, that the majority of these judgments have been handed down, revealing a marked shift away from asylum vulnerability since its heyday in *M.S.S.* The Court appears to have tacitly normalised the failure to recognise the vulnerability of asylum seekers and the resistance to employ its own vulnerability reasoning. The consequence of this is not only a disregard for the judicially recognised vulnerability of asylum seekers but also a trivialisation of the factual vulnerability to which asylum seekers are exposed (United Nations Human Rights Council, 2022, para. 21).

4.3 The 'linguistic alteration cases'

While there have been a substantial number of asylum cases in which vulnerability has not featured in the Court's judgments, it would be incorrect to say that it has altogether disappeared. Yet, a trend that is even more curious than a failure to mention vulnerability by name or to factor

[89] *Ibid.*, see concurring opinion of Judge Pinto de Albuquerque, para. 25.

[90] *Ibid.*, para. 1. The applicants were seven Russian nationals who lived in the Chechen Republic, five children and their parents (paras 1, 5).

[91] *M.K. and Others v. Poland*, Applications Nos 40503/17, 42902/17 and 43643/17, 23 July 2020. The facts were very similar to those in *D.A. and Others v. Poland*. Although disputed by the respondent state, the Court attached more weight to the applicants' version of events that they were seeking asylum (para. 174).

[92] *Ibid.*, para. 1.

[93] *Ibid.*, para. 165 (emphasis added).

[94] *Ibid.*, para. 229 (emphasis added).

[95] *Z.A. and Others v. Russia*, Applications Nos 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019 [GC].

[96] *Ibid.*, para. 193.

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it into the Court's reasoning is that of surreptitiously altering the very legal principle set by the Grand Chamber in its *M.S.S.* judgment.

Ilias and Ahmed, which was discussed above in the 'comparison caveat' category of cases, also falls to be examined here, given its pivotal role in the linguistic alteration of the *M.S.S.* vulnerability principle. To recap, the case concerned two adult males who sought asylum during their stay in Röszke transit zone.[97] In the Chamber, the applicants' Article 3 ECHR complaint failed on account of the treatment falling short of the necessary minimum level of severity.[98] The Chamber nonetheless accepted that the applicants were particularly vulnerable as asylum seekers (per *M.S.S.*), albeit '*not more vulnerable* than any other adult asylum-seeker detained at the time' (the 'comparative caveat').[99] The Grand Chamber agreed that the conditions fell short of the minimum level of severity needed to constitute a violation of Article 3 of the Convention.[100] In reaching this conclusion, the Grand Chamber, too, assessed the applicants' vulnerability argument. Yet, in doing so, the Grand Chamber *misquoted* the Chamber when it said the following:

> 'The Grand Chamber endorses the Chamber's view that while it is true that asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously (see *M.S.S. v Belgium and Greece*, cited above, paragraph 232), there is no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015 (see paragraph 87 of the Chamber judgment)'.[101]

The second part of the sentence is an accurate representation of the Chamber's point, albeit with the word 'detained' having been softened to 'confined'. However, the first part is simply incorrect. The Chamber did not say that asylum seekers '*may* be considered vulnerable'. The Chamber asserted that asylum seekers '*are* considered *particularly* vulnerable'.[102] Moreover, the Grand Chamber has here additionally misrepresented its own judgment in *M.S.S.* The Grand Chamber in *M.S.S.* did not say that asylum seekers '*may* be considered vulnerable', but that 'the applicant, being an asylum-seeker, *was particularly* vulnerable'.[103] As explained above, the Grand Chamber in *M.S.S.* also stated that it 'attache[d] considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection'.[104] This unambiguous position in respect to asylum vulnerability was then later reiterated by the Grand Chamber in its judgment in *Khlaifia and Others*, when it said that the applicants in that case, 'who were not asylum-seekers, did not have the specific vulnerability inherent in that status'.[105]

A similar linguistic alteration is evident in the Court's 2021 Chamber judgment in the case of *K.I. v. France*.[106] The applicant in *K.I.* was a young male, Russian national of Chechen origin.[107] He was not an asylum seeker at the material time, but had had refugee status until it was withdrawn on account of a criminal conviction for acts of terrorism.[108] The applicant was

[97] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 21 November 2019 [GC], paras 7–8.
[98] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 14 March 2017 [C], para. 89.
[99] *Ibid.*, para. 87 (emphasis added).
[100] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 21 November 2019 [GC], para. 194.
[101] *Ibid.*, para. 192.
[102] *Ilias and Ahmed v. Hungary*, Application No 47287/15, 14 March 2017 [C], para. 87 (emphases added).
[103] *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011 [GC], para. 232 (emphasis added).
[104] *Ibid.*, para. 251.
[105] *Khlaifia and Others v. Italy*, Application No 16483/12, 15 December 2016 [GC], para. 194.
[106] *K.I. v. France*, Application No 5560/19, 15 April 2021.
[107] *Ibid.*, para. 2.
[108] *Ibid.*

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successful in that the Court found there would be a procedural violation of Article 3 ECHR 'if the applicant were to be returned to Russia without a prior *ex nunc* assessment by the French authorities of the alleged risk that he would face in that country'.[109] But in distinguishing his case from, for example, that of the applicant in *M.S.S.*, the Court noted the following:

> '[T]he applicant's situation is not that of an asylum-seeker who has just fled his or her country and who *could* therefore be considered vulnerable because of everything he or she might have been through during the migration . . . '.[110]

Once again, paragraph 232 of the *M.S.S.* Grand Chamber judgment is referenced here by the Court, as it was in *Ilias and Ahmed*. Once again, *M.S.S.* is misrepresented. However, this time it is with the introduction of the remote conditional 'could' rather than the simple conditional 'may'. Additionally, as in the Grand Chamber *Ilias and Ahmed* judgment, there is no mention of *particular* vulnerability.

While it might be argued that these two linguistic departures from *M.S.S.* are but outliers and should not be cause for any great consternation, there is evidence that these are at risk of becoming entrenched within the ECtHR's asylum jurisprudence. In late 2021, the Chamber delivered its judgment in the case of *M.H. and Others v. Croatia*.[111] The case concerned an Afghan family of fourteen, the majority of whom were children.[112] The applicants were held at the Tovarnik transit immigration centre for two months and fourteen days.[113] Central to the case was the death of one of the children on the railway tracks near to the Croatian-Serbian border.[114] It was disputed between the parties whether or not the applicants had sought asylum. The applicants claimed that, shortly before the death of the child, they had informed Croatian police officers that they wished to seek asylum, but that this request had been ignored, with the police officers then taking them back to the Croatian-Serbian border and telling them to return to Serbia by following the train tracks.[115] The respondent state denied this version of events, asserting that none of the applicants had expressed a wish to seek asylum.[116] Ultimately, the Court found itself 'unable to establish whether at the material time the respondent State provided the applicants with genuine and effective access to procedures for legal entry into Croatia'.[117] This was because of a lack of information supplied by the respondent Government pertaining to the asylum procedures at the border.[118] The applicants complained, *inter alia*, that the conditions of their placement in the Tovarnik transit immigration centre for in excess of two months had been in breach of Article 3 ECHR.[119]

Vulnerability features on several occasions in the judgment. In respect to the child applicants, the Court found a violation of Article 3 ECHR 'in view of the numerous children involved, some of whom were of a very young age, the particular vulnerability on account of painful past events [specifically, witnessing the death of their sister], and the length of their detention in conditions set out above, which went beyond the shortest permissible duration due to the failure of the domestic authorities to act with the required expedition'.[120] In respect to the adult applicants, the Court

[109] *Ibid.*, para. 162.
[110] *Ibid.*, para. 140 (emphasis added).
[111] *M.H. and Others v. Croatia*, Applications Nos 15670/18 and 43115/18, 18 November 2021.
[112] *Ibid.*, para. 5. Three of the applicants were adults, namely the father of the family and his two wives. The other eleven applicants were their children.
[113] *Ibid.*, paras 191–192.
[114] *Ibid.*, paras 1, 7–8.
[115] *Ibid.*, para. 7.
[116] *Ibid.*, para. 8.
[117] *Ibid.*, para. 303.
[118] *Ibid.*, paras 300–301.
[119] *Ibid.*, paras 167, 191.
[120] *Ibid.*, paras 201, 203.

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entered into a more thorough examination of whether they were 'particularly vulnerable'.[121] In doing so, the Court took into consideration the following four factors. First, the conditions at the Tovarnik Centre were 'acceptable'.[122] Second, the applicants were mourning the death of one of their children, but they had been visited by a psychologist on numerous occasions.[123] Third, while 'the detention of the adult applicants with their children could have created a feeling of powerlessness, anxiety and frustration', 'the fact that they were not separated from their children during the detention must have provided some degree of relief from those feelings'.[124] Fourth, they 'must have been affected by the uncertainty as to whether they were in detention and whether legal safeguards against arbitrary detention applied', although 'the fact that they were aware of the procedural developments in the asylum procedure through their legal aid lawyer ... and that in March and April 2018 they were visited by the Croatian Ombudswoman and the Croatian Children's Ombudswoman ... must have limited the negative effect of that uncertainty'.[125] When, at this point, it came to the question of asylum vulnerability, the Court explained that:

> '[I]t is true that asylum-seekers *may* be considered vulnerable because of everything they might have been though during their migration and the traumatic experiences they are likely to have endured previously (ibid., paragraph 192)'.[126]

Here, once more, the simple conditional 'may' appears, and 'particular' is absent. Yet, in contrast to *K.I.*, the '*ibid.*' reference here is not to *M.S.S.*, but to *Ilias and Ahmed* only. In fact, there is not a single mention of *M.S.S.* in the entire *M.H. and Others* judgment. *M.S.S.* is totally absent, as is the Grand Chamber's finding that asylum seekers *are particularly* vulnerable for the purpose of the Convention. This appears to indicate that the *M.S.S.* vulnerability principle is being left behind, having been transformed into the less protective approach since adopted by the Court.

The Court did not definitively state whether the adult applicants in *M.H. and Others* were, in its view, vulnerable or not. On the basis of its judgment, it can be presumed they were not. Ultimately, the Court found there had been no violation of Article 3 ECHR in respect to the adult applicants,[127] as it was 'unable to conclude that the otherwise acceptable conditions at the Tovarnik Centre for adult applicants were particularly ill-suited to their individual circumstances to such an extent as to amount to ill-treatment contrary to Article 3 [ECHR]'.[128] Neither *M.H. and Others* nor *K.I.* have been appealed to the Grand Chamber.

5. Marginalisation renewed

The above examination of the ECtHR's jurisprudence has identified three categories of cases that together demonstrate a sustained retreat, or backsliding, in the Court's recognition and use of vulnerability in its asylum-related jurisprudence since *M.S.S.*

The trajectory of the ECtHR's position can be summarised as follows. In 2011, asylum seekers constituted 'a particularly underprivileged and vulnerable population group in need of special protection',[129] with that vulnerability being inherent in their situation as asylum seekers.[130] Ten years later, an asylum seeker *may* or *could* be *simply* vulnerable (per the 'linguistic alteration cases'). Being

[121] *Ibid.*, paras 206–212.
[122] *Ibid.*, para. 211.
[123] *Ibid.*, para. 208.
[124] *Ibid.*, para. 210.
[125] *Ibid.*, para. 212.
[126] *Ibid.*, para. 207 (emphasis added).
[127] *Ibid.*, para. 213.
[128] *Ibid.* para. 211.
[129] *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011 [GC], para. 251.
[130] *Ibid.* para. 233.

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an asylum seeker is no longer by itself determinative of particular vulnerability. On the Court's discretion, an indeterminate range of other factors may also be considered. For example, if the applicant is also a minor, is pregnant, or is in fragile health, then there is a greater likelihood of them being considered vulnerable. Yet, even then, it is likely that the applicant will be compared with other asylum seekers in the same situation to identify their *relative* level of vulnerability, with the ultimate purpose to ascertain whether their vulnerability demands 'special protection' under the Convention (the 'comparative caveat' cases). Finally, all this is, of course, dependent upon whether the Court factors applicant vulnerability into its deliberations at all (the 'absence cases').

Reflecting now further upon the three categories, while the comparative caveat, taken alone, does not deny the particular vulnerability of asylum seekers, it introduces stratification, and thus exceptionalism, into the Court's treatment of asylum applicants (Yahyaoui Krivenko, 2022, p. 192). It downplays the particular vulnerability of *some* asylum seekers, typically those for whom the ECtHR does not identify some *additional* simultaneous form of vulnerability (what has elsewhere been termed 'compounded vulnerability') (Timmer, 2013, p. 161). The cases reveal this is often (young) adult males. This finding echoes the literature on judicial decision-making in respect to human trafficking, where 'trafficked adult males are routinely being treated ... as *non-vulnerable* subjects, based on reflections centred on gender assumptions' (Magugliani, 2022, p. 732; see also Benslama-Dabdoub, in this issue).[131] It also has parallels with Åberg's observations on the EU's operationalisation of vulnerability within its asylum procedures at Europe's external borders – '[f]or single, healthy men ... vulnerability becomes essentially unimaginable. The procedure obscures that their bodies are also weak and breakable in the face of violence, war, or lack of food and water' (2022, p. 76). Yet, as demonstrated by the cases of *M.A. and Others* and *M.K. and Others*, and as also recently observed by Yahyaoui Krivenko, 'even the presence of additional vulnerability factors, such as children, cannot secure success for applicants in all situations' (2022, p. 208). It is therefore uncertain what exactly is needed for any particular asylum applicant to be *sufficiently* vulnerable to count as such in the reasoning of the Court. What is clear, however, is that the use of the comparative caveat has very real consequences in respect to Convention standards. It excludes certain asylum applicants from the granting of 'special protection' by the Court – a 'special protection' that, per *M.S.S.*, is inherent to all asylum seekers by the very nature of their asylum situation.

As well as generating exceptionalism and uncertainty, the comparative caveat is also highly impractical. It is improbable that the Court will ever have equivalent information pertaining to the situation of *every* asylum seeker within a particular detention centre or confinement zone at any given time for comparisons to be meaningful or warranted. Moreover, there is seemingly nothing to stop the Court from introducing more and more points of contrast to distinguish between otherwise similarly located asylum seekers. It therefore introduces inevitable selectivity and subjectivity on the part of the Court. Moreover, the comparative caveat pits asylum seekers against each other in a negative sense – to compete in a 'vulnerability contest' (Moreno-Lax and Vavoula, in this issue), by assessing whether any particular applicant is *worse off* than the asylum population at large, trivialising the precarity of their situation.

It is at this point worthwhile returning once more to the two abovementioned cases concerning the Röszke transit zone, namely *R.R. and Others* and *Ilias and Ahmed*. Article 3 ECHR violations were found in respect to all applicants (adults and children) in the former case, but none in the latter case (both adult males). Comparing the factual circumstances of the adult males in both cases, the key distinguishing factors in *R.R. and Others* were: (a) the duration of the applicant's stay in the transit zone (almost four months versus 23 days) and (b) no food having been provided to him by the respondent state during his entire stay. Yet, it is surely not improbable that a factual situation may occur where a group of exclusively adult males seeking asylum are held for several weeks in a setting similar to Röszke in which the relevant authorities fail to provide them with food

[131]Emphasis in original.

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during their stay. In such circumstances, it might be that, as with the adult male in *R.R. and Others*, Article 3 ECHR violations would be found for all. Yet, the comparative caveat dictates otherwise. As none of them is more vulnerable than any of the others, no Article 3 ECHR violations would be found at all. Taken to its logical conclusion, the circumstances could deteriorate indefinitely, but so long as everyone is similarly exposed, none would be sufficiently vulnerable and thus deserving of 'special protection' under the Convention. In other words, even if conditions are generally awful for *all* asylum seekers, applicants will have a hard time establishing their *relative* vulnerability in comparative terms (for the problems associated with the 'comparator test', see Baumgärtel and Ganty, in this issue). This, in turn, appears to legitimise states' exposing asylum seekers as a population group to *de facto* inadequate treatment in general. Indeed, the implication of choosing an asylum comparator over a member of the general population must surely be that, in the view of the Court, the standards applicable to asylum seekers *as a group* differ from those applicable to the general population. As a result, it becomes fair to deduce that such standards, including in respect to the *absolute* prohibition under Article 3 ECHR, are lower. In the end, not only is vulnerability misrecognised, it is drastically exacerbated by the Court's interpretation (see further, Moreno-Lax and Vavoula, in this issue).

The judgments in which the (particular) vulnerability of asylum seekers is absent display outright disregard for both the judicially recognised vulnerability inherent in the asylum situation and the actual lived experience of asylum seekers upon which this is based. Yet, there is inconsistency within the Court's jurisprudence as vulnerability *is* still used in some asylum cases, for example in the late-2021 *M.H. and Others* judgment. The Court fails to explain why vulnerability features in *M.H. and Others* but not in the dozen 'absence cases', and no clear pattern or rationale can be discerned. This therefore introduces another layer of selectivity on top of that which is more explicitly created through use of the comparative caveat. Moreover, this inconsistent invocation of vulnerability means the Court is failing to meet the need, introduced by its own categorical approach to vulnerability, for vulnerability to play a considerable role in *all* cases that involve individual applicants who are members of an inherently vulnerable group (Al Tamimi, 2016, p. 568; Kim, 2021, p. 627).

Of all three groups, the group of 'linguistic alteration cases' is perhaps the most concerning and the most pernicious in its effects. Worse than downplaying or disregarding asylum seekers' particular vulnerability, this group of cases serves to surreptitiously eradicate the very legal principle established in *M.S.S.* Moreover, it needlessly re-opens the question of whether or not asylum seekers are vulnerable for the purposes of ECHR protection. For example, in *M.H. and Others*, the Court unnecessarily entered into an examination of whether the adult applicants were 'particularly vulnerable'.[132] The answer is clear – the adult applicants, as well as the child applicants, were all particularly vulnerable simply by virtue of their asylum situation. Over the past ten years, since *M.S.S.*, the situations, circumstances, and experiences of asylum seekers in general have not changed, let alone improved, in a way that either undermines the validity of asylum seekers' particular vulnerability or renders unnecessary the need for 'special protection' that was accepted in *M.S.S.*

These categories of post-*M.S.S.* cases, both individually and collectively, result in the renewed marginalisation of asylum seekers by the ECtHR. In respect to the comparative caveat, this is, at least on the face of it, a *selective* marginalisation. It reaffirms the vulnerability of *some* asylum seekers through the undermining, if not outright negation, of the vulnerability of others (Yahyaoui Krivenko, 2022, p. 211), with the latter being excluded from the 'special protection' established by *M.S.S.* Yet, even though the vulnerability of some is ostensibly reaffirmed, the comparative caveat nonetheless weakens the perceived veracity of the vulnerability experienced by asylum seekers as a group, as is evident through the factual comparison of *Ilias and Ahmed* with *R.R. and Others*. It is argued elsewhere that one consequence of the introduction of asylum vulnerability into the

[132] *M.H. and Others v. Croatia*, Applications Nos 15670/18 and 43115/18, 18 November 2021, paras 206–213.

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ECtHR's case law has been to exclude migrants who have not sought asylum (Hudson, 2018). What this analysis shows is that marginalisation and exclusion is now also being inflicted upon those who the ECtHR, through *M.S.S.*, had previously included within the Convention's 'special protection' vulnerability regime. The 'absence' and 'linguistic alteration' cases take this marginalisation to another level, as these cases have the potential to exclude *all* asylum seeker applicants from 'special protection' (and even 'protection' *tout court*) under the Convention. Tangible evidence of such exclusion already exists – in *M.H. and Others*, the application of *Ilias and Ahmed*, rather than *M.S.S.*, resulted in the needless re-opening of the vulnerability question. Thus, it brought the opportunity to not recognise the adult applicants as vulnerable and, at least partly as a consequence of this, avoid finding Convention violations. Finally, it is not only asylum applicants facing marginalisation. The precedent set in *M.S.S.* is being crowded out, and, most worryingly, is at risk of disappearing altogether from the ECtHR's latest judgments. The more restrictive positions from cases such as *Ilias and Ahmed*, which themselves present a warped view of *M.S.S.*, are becoming the Court's primary point of self-reference on asylum vulnerability.

As Bermeo has identified in respect to political institutions, backsliding is occurring with increasing subtlety (2016, p. 6). The same is true of the ECtHR's vulnerability backsliding post-*M.S.S.* As this article has shown, that does not, however, make it any less pronounced or insidious in its effects. If it is the ECtHR's wish to retreat from its vulnerability position in *M.S.S.*, which this article has demonstrated is happening, it is only right it does so openly and explicitly. Moreover, it must provide its rationale, not only for reversing *M.S.S.*, but also for its introduction of the comparative caveat and its decidedly inconsistent use of vulnerability reasoning in its asylum-related jurisprudence. As Baumgärtel has observed, 'there already is *empirical* evidence of a link between the consistency of judgments and the legitimacy of courts, with potentially important consequences for the degree of impact of decisions' (2019, p. 109).[133] Doing this might very well be difficult for the ECtHR. As Helfer and Voeten have observed, 'the ECtHR has never *expressly* overturned a prior ruling in a rights-restrictive direction' (2020, p. 804). Moreover, there is no doubt that the ECtHR, as a supra-national human rights judicial body, faces a real challenge to justify such a reversal when the conditions asylum seekers face, during their migration and upon their arrival at the borders of European states, continue to worsen (Campàs Velasco, 2022, p. 87).

6. Conclusion

This article has argued that the ECtHR is backsliding in its asylum-related jurisprudence when this is viewed through the lens of vulnerability. In the years since the Grand Chamber first affirmed asylum vulnerability in its *M.S.S.* judgment, the Court has subtly, but markedly, reversed its position to the point at which *M.S.S.* and its pronouncement on asylum vulnerability is now at risk of disappearing altogether. This can be seen in many subsequent cases, especially in the most recent years, which this article has categorised as the 'comparative caveat cases', the 'absence cases' and the 'linguistic alteration cases'. Both individually and in combination, these groups of cases have renewed the marginalisation and, to some extent, the exclusion of asylum seekers, undoing the advances made by *M.S.S.* This article has thus provided concrete findings in support of commentary that has observed the risk of backsliding by the Court in its role in protecting migrant rights (Helfer and Voeten, 2020), problematising an instance of judicially-made compounded vulnerability (in line with Moreno-Lax and Vavoula, in this issue).

As stated towards the beginning of this article, the intention here has been to provide concrete evidence of judicial backsliding. Further research is now needed to ascertain the cause(s) of, and intention(s) behind, this backsliding – in particular, whether this is a form of migration management initiated to placate state parties in response to the well-documented pushback/backlash faced by the ECtHR over recent decades. What is, however, abundantly clear is that

[133]Emphasis in original.

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without a pronounced turn of direction by the ECtHR, the hope that many had, this author included, for vulnerability reasoning to provide a more inclusive, more human(e), response to the threats to Convention rights of persons seeking refuge in Europe, will be dashed forever.

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