

Do the Challenges of LGBTQ Asylum Applicants Under Dublin Register With the European Court of Human Rights?

Social & Legal Studies

1–21

© The Author(s) 2020

Article reuse guidelines:

sagepub.com/journals-permissions

DOI: 10.1177/0964663920946360

journals.sagepub.com/home/sls**Raoul Wieland** *McGill University School of Social Work, Canada***Edward J Alessi***Rutgers School of Social Work, USA*

Abstract

Evidence suggests that Europe's Dublin Regulation is increasing the precarity of lesbian, gay, bisexual, transgender, and queer (LGBTQ) asylum applicants. Dublin allocates responsibility for examining asylum claims between EU Member States. The European Court of Human Rights (ECtHR) guides the obligations of States under Dublin. Increasingly, the ECtHR draws on the concept of vulnerability to frame the experiences of asylum seekers. Vulnerability purportedly functions for the ECtHR as a lens through which the harm experienced by asylum applicants is magnified, enabling it to better recognize human rights violations. Nevertheless, the ECtHR's vulnerability lens may be distorted by hetero- and cisgender normativity. We explore some implications of the ECtHR's assumptions for how the vulnerabilities of LGBTQ asylum seekers in Europe under Dublin register with the ECtHR. We suggest that the combined frameworks of intersectional invisibility and layers of vulnerability can improve the ECtHR's capacity to understand how LGBTQ asylum applicants may be particularly vulnerable under Dublin.

Keywords

Asylum seekers and refugees, Dublin Regulation, LGBTQ, queer migration

Corresponding author:

Raoul Wieland, McGill University School of Social Work, 3506 Rue University #300, Montréal, QC H3A 2A7, Canada.

Email: raoul.wieland@mail.mcgill.ca

In 2015, an unprecedented 1.3 million refugees fled to Europe, resulting in one of the biggest humanitarian crises of the early 21st century (Connor, 2016). Although official numbers do not exist, reports suggest that a significant number of people fleeing persecution and seeking asylum in Europe identify as lesbian, gay, bisexual, transgender, and queer (hereafter LGBTQ) (FRA, 2017). Similar to other refugee groups, LGBTQ refugees may seek protection and safety from war and political strife (Alessi et al., 2018). Additionally, LGBTQ people are increasingly migrating to Europe to seek protection from persecution based on their sexual orientation and gender identity. Nearly 70 countries continue to criminalize same-sex sexual behaviours, and in many others, where same-sex activity is not criminalized, LGBTQ individuals are routinely subjected to hostile living conditions (Mendos and ILGA, 2019). The stigma and discrimination that LGBTQ individuals experience before, during, and after migration therefore makes them particularly vulnerable to traumatizing events (e.g. abuse by family members, physical and sexual assault), marginalization, and invisibility (Alessi et al., 2017; Spijkerboer, 2013).

In this paper, we explore how the emerging vulnerability framework (Peroni and Timmer, 2013) of the European Court of Human Rights (hereafter the Court) may fail to substantively uphold the human rights of LGBTQ asylum seekers. More specifically, insufficient understanding of the particular vulnerabilities of LGBTQ asylum seekers may wittingly or unwittingly increase their exposure to stigmatization and violence under fundamental EU asylum laws such as the Dublin Regulation (Alessi et al., 2020). Commonly referred to as Dublin, this regulation (Council Regulation [EC] No 604/2013) attempts to hold EU Member States (hereafter State/s) accountable for their human rights and international refugee law commitments when deciding whether asylum claimants can safely be sent back to the State of first entry (Maiani, 2016). However, evidence suggests that Dublin is increasing the precarity of LGBTQ asylum seekers (Alessi et al., 2020), reflecting overlap with often problematic State practices in the interpretation and application of asylum law with respect to LGBTQ applicants (Akin, 2017; ECRE, 2017a; Giannetta, 2018; Hertoghs and Schinkel, 2018; Wessels, 2017).

We begin this paper by discussing the benefits and challenges of using the vulnerability framework in human rights law. As part of this discussion, we examine a selection of leading cases, *M.S.S. v. Belgium and Greece* (2011) and *Tarakhel v. Switzerland* (2014), to outline the Court's vulnerability approach with respect to asylum seekers. While these two cases did not involve LGBTQ asylum seekers, we nevertheless consider them first, as they are central to the Court's emerging vulnerability discourse and will undoubtedly impact how the vulnerabilities of LGBTQ applicants are framed in the future. Next, in an attempt to queer the migration discourse (Luibhéid, 2008), we highlight the ways in which the Court failed to properly account for LGBTQ asylum seekers' layered vulnerability by drawing on non-Dublin cases and then explore some of the implications for LGBTQ asylum seekers under Dublin specifically. We conclude by arguing that an intersectional and layered vulnerability framework offers a nuanced approach that the Court can rely on to better account for LGBTQ asylum seekers' complex experiences of vulnerability under Dublin. We briefly consider the case of *O.M. v. Hungary* (2016) from an intersectional lens since it was the first LGBTQ asylum case, albeit without Dublin involvement, in which the Court recognized some of the

specific protection needs of LGBTQ asylum seekers when compared with asylum seekers in general. While a step in the right direction, *O.M.* was still insufficient for recognizing the protection needs of LGBTQ asylum seekers. We suggest that in future cases the Court must more explicitly draw on an intersectional lens when applying its vulnerability framework to ensure LGBTQ asylum applicants are protected during the asylum process, and under Dublin.

The Benefits and Challenges of Using the Vulnerability Framework

The concept of vulnerability has been doing a lot of ‘heavy lifting’ lately (Cole, 2016: 262), showing up in a variety of academic disciplines, including policy and law, to conceptualize and help remedy a variety of social concerns (Brown, 2011). Some scholars argue that vulnerability is a universal quality derived from our dependence on others for survival and the hurt that this may sometimes bring with it (Fineman and Gear, 2013). Vulnerability theory seeks to both destigmatize the label of vulnerability and encourage critical reflection of the role of economic, social, legal, and political systems in rendering some individuals and groups more vulnerable than others (Cole, 2016; Peroni, 2016).

The use of a vulnerability approach can therefore have positive implications for how harms are recognized and addressed and how individual rights are protected (Beduschi, 2018; Flegar, 2016). More broadly, a human rights approach that adopts a vulnerability framework suggests a relationship of care between the state and vulnerable individuals and groups (Fineman, 2010). For instance, the Court has used the concept of vulnerability to describe the situation of individuals deemed to be in vulnerable situations, such as prisoners and children, and applies it also to (vulnerable) groups, including the Roma people, individuals with impaired health or abilities, people living with HIV, and asylum seekers (Peroni and Timmer, 2013). The Court considers such groups as being particularly vulnerable; the use of ‘particularly’ emphasizing that people belonging to these groups are more vulnerable than others. The vulnerable group shares specific characteristics that the Court loosely ties to experiences of stigma, discrimination, social exclusion, and dependency on the state due to their disadvantaged status (Peroni and Timmer, 2013). As a heuristic used by the Court, vulnerability thus functions as a lens through which the ill-treatment and harm experienced by human rights claimants is magnified, enabling the Court to (i) better consider complex socio-political and institutional contexts, (ii) elaborate on some positive State obligations in the face of human rights abuses, and (iii) effectively lower the threshold for finding a human rights violation (ECRE, 2017a; Peroni and Timmer, 2013). In the asylum process specifically, the category of vulnerable thus theoretically translates into procedural safeguards and reception guarantees, involving timely mechanisms to identify vulnerabilities, assess individual needs, and adapt reception modalities accordingly (ECRE, 2017a).

However, there may also be challenges when using the vulnerability approach to understand the experiences of asylum claimants. One concern is that uncritically designating certain groups as particularly vulnerable carries the risk of essentializing them as

powerless victims and blaming them for their shortcomings or perceived inability to help themselves. Such narratives may be stigmatizing because they erase agency, downplay resilience, and obscure the structural nature of vulnerability (i.e., how institutional and societal factors *render* them vulnerable). Critics therefore worry that vulnerability may justify paternalistic governance mechanisms that widen the scope of social control and undermine the human rights of individuals (Baillot et al., 2009; Dunn et al., 2008; Munro and Scoular, 2012; Urquiza-Haas, 2017).

The other concern, which remains the focus of this paper, is the way the vulnerability framework may fail to account for the unique situation of subgroups, such as LGBTQ asylum applicants, whose vulnerability may not be adequately captured by how vulnerability is currently conceptualized among asylum seekers in general (Ducoulombier, 2015; Spijkerboer, 2013). This is because the specific intersectional identities of LGBTQ asylum applicants are unique (e.g. being an asylum seeker and belonging to a sexual or gender minority and religious minority). In addition, there are salient differences between LGBTQ asylum seekers, who may experience persecution and exclusion differently and thus have varying protection needs (e.g. gay asylum seekers compared to lesbian asylum seekers; gay and lesbian asylum seekers compared to transgender asylum seekers) (Bach, 2013; Berg and Millbank, 2013). Recognizing such differences in the experiences of vulnerability among LGBTQ asylum seekers, and compared to asylum seekers generally, is of critical importance since the Court increasingly uses the vulnerable group category to determine appropriate legal and policy solutions to the human rights claims brought by individuals.

The Court's Vulnerability Lens Under the Dublin Regulation

Given that the vulnerability framework is likely applied subjectively by legal actors (Moncrieffe, 2007), it is important to consider whether the Court's vulnerability lens excludes particular subgroups of asylum applicants as not being vulnerable enough, and how it frames their security concerns, specifically under the Dublin Regulation. Although there have been several iterations of Dublin – the Dublin Convention (European Union, 1990), Dublin II (Council Regulation [EC] No 343/2003), and Dublin III (Council Regulation [EC] No 604/2013) – its core feature is a mechanism by which States are held accountable for examining how asylum applications are determined. By default, the State of first entry becomes the competent and responsible State for processing the asylum claim (Morgades-Gil, 2015). That is, if asylum seekers enter another State, they may, upon interception, be returned to the State they first entered after fleeing their country of origin (Menéndez, 2016). Asylum seekers can appeal decisions made by States under Dublin to the Court (applicants are required to exhaust all domestic remedies before appealing to the Court), which is then called upon to interpret Dublin and the accompanying rules, procedures, and conditions outlined in various Directives (Ippolito, 2013)¹ in line with EU human rights law and international refugee law (Viljanen and Heiskanen, 2016). As Dublin makes explicit, States are bound by appropriate case-law of the Court (see Recital 32 of Dublin III Regulation).

The case of *M.S.S.* (2011) is central to understanding and assessing the Court's emerging vulnerability framework. In *M.S.S.*, the Court first explicitly formulated its

particularly vulnerable group approach with respect to asylum seekers and offered an impactful critique of Dublin. This case concerned the Dublin transfer of an Afghan asylum seeker from Belgium to Greece (the State of his first entry after fleeing Kabul in 2008 following a murder attempt by the Taliban in reprisal for having worked as an interpreter for the international air force troops stationed in Kabul). Specifically, the Court was asked to consider whether Mr. M.S.S.'s alternating experiences of detention and homelessness in Greece amounted to a violation of his rights under the European Convention on Human Rights (hereafter ECHR), and whether Belgium's decision to send him back to Greece and thereby expose him to the deficiencies of Greece's asylum system likewise violated his human rights. In its analysis, the Court adopted a vulnerability framework and weighed numerous intersecting factors, including the claimant's daily realities of material and psychological deprivation, his dependency on the State, ongoing trauma, and the systemic deficiencies in the asylum system of Greece. Specifically, the Court stated that Mr. M.S.S., *as an asylum seeker*, was part of a particularly vulnerable and underprivileged population group in need of special protection (§ 251). This is because asylum seekers depend on States for most of their everyday needs as a direct result of the precarious legal status in which States place them (Costello and Hancox, 2016) and are likely to have experienced traumatic events in their country of origin or during their migration journey (§ 232).

In the Court's framing, Mr. M.S.S. belonged to a group of asylum seekers who had been subjected to 'material and psychological deprivation' (§ 238) while living in Athens and waiting for their asylum claims to process. Since Mr. M.S.S. belonged to this group, the claim that his human rights had been violated in Greece seemed credible. Having thus situated him, the Court argued that the vulnerability inherent in his situation as an asylum seeker triggered positive State obligations to ensure that, at the very least, his living conditions were not inhumane. The Court also identified the under-protective application of Dublin's safeguards as an additional layer of structural vulnerability that asylum applicants face as a group, arguing that even though Dublin permits States to return asylum seekers to the State of first entry, they are not thereby absolved of all responsibility under the ECHR (§ 342). Specifically, the Court ruled that Belgium knew or ought to have known that he would have been exposed to degrading treatment in detention in Greece and that being sent back there would further expose Mr. M.S.S. to a real risk of *refoulement* (i.e., being sent back to his country of origin, contrary to refugee law) by Greece. Belgium, by transferring him to Greece, thereby violated his human rights. The Court's application of the vulnerability framework to asylum seekers, and to Mr. M.S.S. specifically, seems to have played an important role in helping the Court determine why both Belgium and Greece violated Mr. M.S.S.'s Article 3 rights under the ECHR. Thus, Mr. M.S.S. subsequently obtained refugee status in Belgium.

In a subsequent case, that of *Tarakhel* (2014), the Court's sensibility was again put to the test. Drawing on the particularly vulnerable group framework to capture the experiences of asylum applicants, the Court further usefully nuanced its approach by recognizing that its analysis had to be flexible enough to also capture the specificities of subgroup differences; not only were the applicants asylum seekers, they were also parents with children who had specific needs tied to their age (§ 119). Reception conditions accordingly would have to be adapted to not 'create . . . for them a situation of stress and

anxiety, with *particularly* traumatic consequences' (§ 119) [emphasis ours]. With this ruling the Court thus established a procedural obligation for States under Dublin to ensure that transfer decisions account for the specific vulnerabilities of asylum seekers (Morgades-Gil, 2015).

Challenges to the Vulnerability Lens for LGBTQ Asylum Seekers

Despite promising judgments such as *M.S.S.*, in which the Court purposefully applied a vulnerability lens to the experiences of asylum applicants under Dublin, and *Tarakhel*, where it attempted to account for the specificities of a subgroup of asylum seekers (i.e., parents with children), the Court has generally struggled to formulate a consistent framework for considering LGBTQ individuals as a particularly vulnerable subgroup of asylum seekers (Annicchino, 2015; Ducoulombier, 2015; Peroni and Timmer, 2013). This is surprising since LGBTQ asylum seekers are not only vulnerable as asylum seekers but also have specific protection needs tied to their sexual and gender identities. The absence of such a framework may have negative implications for how well judges pick up on the range of challenges that LGBTQ asylum seekers face throughout the migration process, and specifically under Dublin. Unlike other asylum seekers, LGBTQ asylum seekers have frequently experienced violence and abuse based on their sexual orientation and/or gender identity from early ages, and this tends to persist until they flee (Alessi et al., 2016). Studies have shown that they experience victimization by those closest to them (family and friends) as well as community members and state actors (Alessi et al., 2016, 2017). Turning to others for help or support is usually not an option, and when they do, they may be subjected to further abuse (Alessi et al., 2016). Even those who manage to hide their sexual or gender identities in their countries of origin deal with extreme hypervigilance and apprehension about being discovered (Alessi et al., 2017).

Following migration, LGBTQ asylum seekers typically do not have the same level of support as other refugees. They may anticipate or experience homophobia and transphobia by other refugees and members of their diaspora community as well as racism and xenophobia by the mainstream and the LGBTQ host community (Alessi, 2016; Kahn et al., 2018). Moreover, they face the heavy burden of having to prove their sexual or gender identity to State officials during asylum hearings by providing evidence of victimization in their country of origins through police reports and letters from people they know, which is typically not feasible; by conforming to stereotypical presentations of how immigration adjudicators and judges may expect LGBTQ people to behave; by documenting their engagement in the LGBTQ community in the host country through photos, even if they are uncomfortable with participating in such activity; and by disclosing private details of their sex lives (Berg and Millbank, 2009; Kahn and Alessi, 2018; Lewis, 2014).

The Court's vulnerability framework therefore has implications for LGBTQ individuals, including whether or not they are recognized as being vulnerable. For instance, in his dissent in *M.S.S.*, Judge Sajó categorically rejected the majority's vulnerability framing, and argued that while *some* asylum seekers are vulnerable, they should not *all*

be considered as comprising a particularly vulnerable group (p. 101). This leaves open to interpretation whether or not LGBTQ asylum seekers would be considered particularly vulnerable, despite the growing body of evidence demonstrating that this is, indeed, the case. Further, Judge Sajó claimed that in the context of Dublin, the vulnerable group label is reserved for a specific category of asylum seekers: victims of torture and unaccompanied children. More broadly, the label applies to groups, such as persons with mental disabilities who, 'due to their adverse social categorisation, deserve special protection' (p. 101); LGBTQ asylum seekers were not mentioned. Finally, Judge Sajó indicated that M.S.S. was 'in possession of considerable means' (p. 106), was unreasonably uncooperative with Greek authorities, and hence, could not 'claim to be a victim of the system' (p. 106). Seen through Judge Sajó's vulnerability lens, Mr. M.S.S.'s treatment by Greek authorities failed to reach the threshold necessary to register as an Article 3 claim under the ECHR. Mr. M.S.S. was not found to be inherently or particularly vulnerable, and the State conduct thus did not reach the necessary threshold of severity to warrant legal sanction. The significant disagreement over how broad the vulnerable group should be, which criteria matter when considering a group as being vulnerable, as well as how the experiences of asylum applicants are framed, underscores some of the disparities in the Court's interpretation of what constitutes vulnerability. It is therefore important to ask how sensitive the Court is, or will be, to the specific harms experienced by LGBTQ asylum applicants and to the dynamics that render them disproportionately vulnerable, given the likely ongoing disagreement over who should qualify as vulnerable, and the absence of a clear framework identifying LGBTQ asylum seekers as a vulnerable subgroup of asylum seekers.

Queer Migration and Dublin

Since asylum adjudicators and other relevant decision-makers may not align the specific harms experienced by LGBTQ asylum applicants with vulnerability, the call to queer the migration and asylum discourse is as relevant as ever (Bruce-Jones, 2015; Luibhéid, 2008; Murray, 2014). Adopting a queer perspective in migration addresses how the vulnerability of migrants is exacerbated as a result of rigid state-sanctioned identity categories, and how the presence and actions of LGBTQ migrants also trouble and partially transform those same categories and underlying norms (Luibhéid, 2014). In analysing how asylum adjudicators and Court judges struggle with LGBTQ asylum cases, queer can thus be understood as a 'critical term that refers to practices, pleasures, emotions and identities that "disorient" decision-makers' (Raj, 2017: 456).

This disorientation is reflective of deeply rooted beliefs and perceptions that permit one version of reality to appear accurate, objective, and right (Johnson, 2014). The way in which decision makers tend to enforce hetero- and cisgender normativity when examining queer migration (Luibhéid, 2014) sets the experiences of LGBTQ asylum seekers apart from those of other vulnerable groups (e.g. children, women, the elderly, or religious minorities). In this case, hetero- and cisgender normativity refers to 'the institutions, structures of understanding, and practical orientations that make heterosexuality [and cisgenderism] seem not only coherent . . . but also privileged' (Berlant and Warner, 1998: 548). Adopting a critical queer migration perspective helps to illuminate the many

ways in which the vulnerabilities of LGBTQ individuals may be rendered invisible in LGBTQ asylum cases, and even more vulnerable when these cases involve Dublin.

Impact of Hetero- and Cisgender Normativity on LGBTQ Asylum Seekers

LGBTQ individuals face specific challenges when applying for asylum in Europe and when being transferred between States under Dublin (Alessi et al., 2020), which are often the result of, or are exacerbated by, hetero- and cisgender normative assumptions made by legal actors (Ducoulombier, 2015; Johnson, 2013). For the purpose of considering the impact of hetero- and cisgender normativity on LGBTQ individuals, it is helpful to examine two types of cases: (i) LGBTQ asylum cases without Dublin involvement (i.e., the possible return of asylum applicants to their countries of origin), and (ii) LGBTQ asylum cases with Dublin involvement (i.e., ‘Dublin transfers’ between States). In both types of cases the Court seeks to hold States accountable to their human rights and international refugee law commitments. However, given the absence of Court decisions on LGBTQ Dublin cases, we first examine how the Court deals with non-Dublin cases to demonstrate how it might also struggle to contend with Dublin cases. We also include some of the potential negative consequences for asylum applicants that are specific to Dublin.

LGBTQ Asylum Cases Without Dublin Involvement

The Court’s hetero- and cisgender normativity may be reflected in its narrow reading of sexual orientation, in maintaining a public/private binary when considering the experiences of LGBTQ individuals, and in conflating sexual orientation and gender identity (Gonzalez-Salzburg, 2014; Grigolo, 2003; Johnson, 2013, 2016). The narrow reading of sexual orientation is illustrated by the Court’s unhelpful implicit reliance on the dichotomy of heterosexual/homosexual in its LGBTQ non-asylum case law. This binary has specific implications in the asylum context. By adopting a view of sexual orientation as a desire towards one sex *or* the other (Waites, 2009), the Court may fail to see the asylum claims of LGBTQ applicants as credible. For instance, sexual orientation asylum claims may often involve applicants with a history of heterosexual relationships or who had to present a gender identity that was aligned with their biological sex, common features of forming a sexual or gender identity under conditions of erasure and violence (Berg and Millbank, 2013). The asylum case of *MKN v. Sweden* (2013) suggests that this nuance is missed by the Court. In *MKN*, the Court held that the applicant’s claim of having had a same-sex relationship in Iraq was lacking credibility, particularly given his stated intention to continue living with his wife and his inability to provide reasonable explanation for why he had waited until late in the Swedish Migration Court proceedings to disclose his sexual orientation (§ 43). Notably, the Court failed to account for how sociocultural conditions in the country of origin as well as subsequent shame and humiliation may force some LGBTQ applicants, as opposed to asylum applicants in general, into silence (Johnson, 2011; Shuman and Bohmer, 2014).

A related critique of the Court's case law is that the Court tends to consider the supposed violations of the human rights of LGBTQ individuals under the right to private life (see Article 8 of the ECHR), which reinforces the notion that in the asylum context LGBTQ asylum applicants should be comfortable with concealment (Johnson, 2013). The result of this framing is that it can weaken applicants' claims under Article 3 (i.e., having been subject to torture and inhuman or degrading treatment or punishment). This issue was illustrated in *F. v. the United Kingdom* (2004) and *M.E. v. Sweden* (2014). In *F.*, the Court's first LGBTQ asylum case, it dismissed the claim of an Iranian asylum applicant on the basis that same-sex partners, if discreet about their activities, would not be persecuted by the Iranian state. Therefore, while acknowledging that gay men may be vulnerable to persecution in Iran, the Court held that the applicant, given his option of being discreet about his sexuality, failed to establish that being sent back to Iran would place him at sufficient risk of persecution (§ 1). In *M.E.*, the Court was faced with the situation of a gay man from Libya in a same-sex marriage in Sweden who had been ordered to return to Libya to apply for a family reunion visa from there. The Court upheld the Swedish Migration Court's ruling and deemed that it was acceptable for the applicant to be discreet about his sexuality in Libya while awaiting his visa. Dissenting Judge Power-Forde held that this rationale was in stark contrast to developments in international and European law, including rulings by the Court of Justice of the European Union (CJEU; see the 2013 joined cases C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v. X, Y and Z*), since it furthered the false notion that sexual identity was primarily a matter of sexual conduct bound by the laws of privacy and discretion. The intervening human rights organizations in this case also stressed that forcing a gay man to conceal his identity to evade harm was contrary to Article 3 of the ECHR, and that the temporary nature of the expulsion was immaterial given that the Article 3 right to be protected against persecution and ill-treatment was absolute (§ 70). As Judge Power-Forde stated, a test for the duration of concealment does not exist in comparative European law and is not acceptable under the ECHR. It should also be noted, as argued by human rights organizations, that under human rights law the fear of being persecuted because of one's sexual orientation (or gender identity) should hold the same weight as experiencing actual persecution (Millbank, 2012; UNHCR, 2012). Thus, by suggesting that individuals can protect against persecution by being discreet, the Court once more insufficiently explored the implications of living in countries such as Libya that may nevertheless make the lives of LGBTQ asylum seekers unbearable (Millbank, 2012; UNHCR, 2012). Such conditions are especially unbearable when considering that an asylum seeker's sexual identity is expressed not only by their sexual behaviours but also by the way in which they live in society (i.e., the way they present themselves and interact with others; UNHCR, 2012).

The Court's hetero- and cisgender normative lens may also impact transgender asylum applicants. For instance, transgender identities can be incorrectly viewed by State adjudicators as being a manifestation of gay or lesbian identities, thereby conflating sexual identity with gender identity (Berg and Millbank, 2013). This conflation, in turn, can lead to misuse of country-of-origin information during risk-of-persecution assessments. For example, consider the hypothetical situation, proposed by Berg and Millbank (2013), of a transgender woman who states that she experienced persecution at work

because of her gender expression. Conflation of sexual orientation and gender identity would lead the Court to interpret this as the case of a gay man who *chooses* to cross-dress at work and as a result experiences homophobia from his co-workers. The expectation that she can behave discreetly would likely lead her to being sent back to her country of origin and thus effectively erase the persecution she experienced as a transgender woman.

LGBTQ Asylum Cases With Dublin Involvement

If the Court downplays or fails to clearly understand the risk that the public/private binary and the conflation of sexual orientation and gender identity poses for LGBTQ asylum seekers, as demonstrated above, how will the Court be able to effectively scrutinize Dublin transfers to States where adjudicators may routinely send applicants back to their countries of origin for lacking a credible claim? Would the Court be able to capture such a nuance if its lens remains invested in viewing the claims through a hetero- and cisgender normative lens? While we did not come across any cases in which the Court specifically examined the asylum claims of LGBTQ individuals with Dublin involvement, the study by Alessi et al. (2020) usefully demonstrates how Dublin can have a range of negative impacts with enduring consequences for LGBTQ asylum seekers. Because this study did not report on the final determination of such Dublin cases, including whether they were appealed to the Court, we do not know what happened. However, we attempt to discuss some of the potential consequences of Dublin for such individuals, especially if the Court were to examine such cases through a hetero- and cisgender normative perspective.

For instance, one applicant, who was forced to flee his country of origin due to his sexual orientation, made his way to Austria on the migration path that many asylum seekers were following at that time (i.e., walking from Greece) and ended up being fingerprinted in Hungary. If he had known this would affect his case, he may have figured out a way to avoid doing so, as others had done. Once he was in Austria seeking asylum, he feared that his case under Dublin would lead Austria to force him to return to Hungary, a State that has been shown not to be as accepting and affirming of LGBTQ individuals as Austria (Mendos and ILGA, 2019). Understandably, he worried that Hungary would send him back to his country of origin, where he believed that he would face death. If he were to be sent back to Hungary, would his rights be protected? Two issues could arise: (i) if he were to be held in a detention camp in Hungary until the conclusion of his asylum claim, would he be exposed to the risk of violence, ill-treatment, or physical, mental, or sexual abuse contrary to Article 3 of the ECHR by camp staff or fellow detainees? (ii) would Hungary perform a thorough individualized vulnerability assessment to determine his specific protection needs while in detention? Failing to do so might make the deprivation of his liberty arbitrary and therefore a violation of the ECHR.

In another example, the asylum claim of a transgender woman seeking to stay in Austria was halted when it was discovered that she had been fingerprinted in Croatia. One of her biggest concerns related to the possibility of not being able to access gender-affirming medical services in a country generally hostile to transgender people

(European Commission, 2018; Mendos and ILGA, 2019). In this case, a central issue for the Court would be to understand the psychological impact that the denial of such services might have on her, and how transphobia in Croatia might expose her to violence. Furthermore, if placed in detention in Croatia, would the Court be able to distinguish the salient differences between homophobic and transphobic violence (Berg and Millbank, 2013), and would it expect the vulnerability assessment by Croatian officials to account for this? Even the Netherlands, which has been considered one of the most progressive States when it comes to LGBTQ rights (Mendos and ILGA, 2019), may have underestimated the harm that transgender asylum applicants can encounter in migratory settings. For example, transgender women asylum seekers who were placed in housing with gay male asylum seekers with 'gay friendly' staff experienced stigmatization and isolation and had difficulty getting their specific protection needs met (Van Der Pijl et al., 2018).

Another example from Alessi et al. (2020) involves a lesbian woman who was facing the prospect of being transferred from Austria to the State which had initially granted her a visa. Her worry was that, while she had a family member who supported her regardless of her sexual orientation in Austria, in the other State, she had no one. Would the Court recognize the tremendous importance for an LGBTQ asylum seeker, rejected by her family in her country of origin for her sexual orientation, of having finally connected with someone who supports her and affirms her identity in the State she was currently living in? Or would she be forced to leave under Dublin and start over in a State where she knew no one, which is relatively common for LGBTQ refugees compared to their heterosexual counterparts? A gay asylum seeker in a similar situation to her, who had obtained a visa for another State prior to his arrival in the Netherlands, was required to return or risk deportation. He did not want to return to the State for which he initially obtained a visa for because he had developed a social support system in the Netherlands and thus did not want to start his life all over again in the other State without knowing anyone there. He decided to go into hiding for 18 months. As per Article 29, Reg 604/13, if an individual cannot be located and transferred within this timeframe, the State wherein the individual currently resides becomes responsible for processing the asylum claim. However, during these 18 months, individuals are unable to benefit from social assistance or work legally to support themselves. Reluctantly, he turned to sex work in the Netherlands in order to survive. Given the situations discussed in Alessi et al. (2020), what necessary steps would the Court need to take to ensure that LGBTQ asylum seekers are protected from the specific harms under Dublin? Developing an intersectional framework can assist the Court in clearly determining how State policies, laws, and norms can deepen historical prejudice, especially hetero- and cisgender normativity, and is therefore invaluable for an enriched vulnerability assessment (Yoshida, 2013).

Intersectional Invisibility

The framework of intersectionality attempts to capture the 'multi-dimensionality' (Crenshaw, 1989: 139) of the lived experiences of marginalized subjects located within interlocking systems of oppression and domination (Collins, 2000; Hulko, 2009). Feminist and anti-racism activists initially deployed this framework to dismantle the race/gender

binary to show how race and gender oppression interacted to shape the experiences of Black women, arguing that considering one form of oppression in the absence of the other could not properly account for the totality of their lived experiences (Collins and Bilge, 2016; Crenshaw, 1989). This is based on the notion that experiences of oppression are the result of different systems of stratification, and various forms of oppression (e.g. racism, classism, sexism, homophobia, ableism) that are shaped by one another to create an interlocking ‘matrix of domination’ (Collins, 2000: 42). An intersectional perspective lends itself well to illuminating intra-group differences and suggests that the ways in which identities intersect and oppressions overlap are varied, fluid, and contextual (Collins and Bilge, 2016; Hulko, 2009; Nash, 2008; Rahman, 2010).

The experiences of individual asylum seekers may therefore differ based on the type of oppression that they face as a result of their intersectional identities and the relative amount of privilege and resources that they possess to deal with such oppression (Hulko, 2009). This means that the privilege, autonomy, and freedom that individuals have is relative and shifting in time and space, and that important intra-group differences among LGBTQ asylum seekers exist that need to be explored. For instance, when considering the safety of an asylum seeker from the perspective of the healthcare options available in a State of first entry, it is necessary to consider the specific challenges that a transgender applicant might face, such as accessing transition-related healthcare without having their rights to privacy and bodily integrity violated and experiencing psychological harm as a result (Swetzer, 2016). Similarly, the notion of sending a LGBTQ asylum applicant back to the State of first entry, even though they have developed a support system in another State is quite problematic, given that it can be extremely difficult for LGBTQ asylum seekers to find social support. Returning to the State of first entry without having social support can also lead to deleterious consequences, such as a lack of work and housing opportunities, exacerbation of mental health problems, and an elimination of the social connections that are fundamental for helping asylum seekers integrate into host countries.

The concept of ‘intersectional invisibility’ helps to further articulate how important intra-group differences may fail to register due to excessive boundary/category policing, thereby rendering some persons with multiple subordinate identities invisible (Purdie-Vaughns and Eibach, 2008). Transgender asylum applicants of colour with multiple subordinate identities might face intersectional invisibility, for instance, when their experiences are filtered through ahistorical, decontextualized, and universalized expectations of how LGBTQ asylum seekers should act and appear. Furthermore, while many LGBTQ asylum seekers share similar concerns (i.e., wanting to live a life free of persecution), their narratives are likely to differ based on their race, ethnicity, religion, and socioeconomic status (Dhoest, 2019). This fluidity poses a challenge for refugee law, which prefers ‘static and concrete identity groupings’ (Berg and Millbank, 2013: 122). The rigid lens through which the narratives of LGBTQ applicants confound the human rights regime presents a significant barrier to the effectiveness of a vulnerability analysis. Thus, the framework of intersectionality can assist the Court in accounting for the distinct challenges of LGBTQ asylum claimants and is a prerequisite for ensuring that the Court can effectively oversee the legality of Dublin transfer decisions between States and thereby mitigate some of the risks that LGBTQ individuals face under Dublin.

Layers of Vulnerability

The layers-not-labels approach to framing vulnerability (Luna, 2009) resonates well with a queer and intersectional approach to migration studies (Dhoest, 2019). Rather than seeing vulnerability as a label fixed to a group, this framework adopts a layered, dynamic, and relational approach to illuminate the particular situation of individuals navigating overlapping identities within broader interlocking political, social, economic, cultural, and legal systems of power and oppression (Hulko, 2009). It enables the Court to recognize how identity is constituted and performed differently throughout the migration process (Alessi et al., 2018; Luibhéid, 2002), how vulnerability changes over time and space (Shakhsari, 2014), how different aspects of an individual's identity informs how and why they are vulnerable in a particular context (Alessi et al., 2017, 2020), and how 'new' vulnerabilities arise that the Court may not have expected. For example, De Vries (2015) identifies 12 categories of difference, including race, gender, sexuality, class, nationality, ability, language, religion, culture, ethnicity, body size, and age, and suggests that each interconnecting category should be analysed with respect to broader social institutions and structures to understand differential experiences of exclusion, discrimination, and violence. Such an analysis yields a multifaceted intersectional framework that can account for the multiple and layered vulnerabilities impacting asylum applicants differently, thereby helping the Court spot potential risks associated with transferring applicants under Dublin. For instance, LGBTQ asylum seekers may experience racism within mainstream queer communities and homophobia within racialized communities, making it difficult both to integrate in society and/or navigate spaces of detention shared with other asylum seekers (Lee and Brotman, 2011). This may explain why some applicants fear being sent back to certain States under Dublin, and why they would hide from authorities and turn to sex work for survival rather than being transferred (Alessi et al., 2020). The marginalization of racialized queer asylum seekers within their own and the host communities may also make them vulnerable to failing to credibly demonstrate their sexual orientation and gender identity to asylum adjudicators who may expect them to conform to culturally-specific narratives of being an 'out' non-heterosexual who, for example, volunteers for LGBTQ organizations and marches in gay pride parades (Akin, 2017). The inability to credibly demonstrate their identity in some States further adds to their vulnerability since it may increase the likelihood of being *refouled* (Millbank, 2012). It is important for the Court to recognize this cascading and layered experience of vulnerability in order to ensure that the human rights provisions under Dublin are given substantive meaning, and that Dublin transfers to States that disregard or exacerbate the asylum seekers layered vulnerability, such as described above, are not enforced and legitimated. An enriched vulnerability framework that considers how interactions at different levels within the system create layered experiences of vulnerability also bridges the problematic and categorical vulnerable/not vulnerable dichotomy illustrated in the *M.S.S* case. Rather than labelling some groups as essentially (not) vulnerable and then engaging in acts of boundary policing, the layers of vulnerability framework challenges the Court to explicitly spell out the reasons for holding on to a vulnerable group analysis – its boundary and category defining discourses – and forces it to attend to the individual lives of applicants that may inhabit

the group category differently (or not at all) (Peroni and Timmer, 2013). Absent such an individualized vulnerability analysis, the Court will not be in a position to mitigate the risks that LGBTQ asylum seekers face under Dublin, and to hold States accountable to their human rights obligations under the ECHR.

The Case of O.M.: A Step in the Right Direction

O.M. (2016), while not a Dublin case (i.e., involving the transfer of an asylum applicant from one State to another), was a necessary step in the right direction for considering the unique circumstances of LGBTQ asylum applicants generally, and under Dublin specifically. Importantly, this case accounted for LGBTQ asylum seekers' layered vulnerabilities, as opposed to overlooking their specific protection needs, or viewing them as they would asylum seekers in general. This is a welcome change, given that prior to *O.M.* the Court did not consider LGBTQ individuals as being a particularly vulnerable group of asylum seekers (Ducoulombier, 2015). In *O.M.*, a gay Iranian asylum seeker in Hungary claimed that his human rights were violated as a result of his detention. Indeed, LGBTQ people in detention are at high risk of encountering bias-related victimization (e.g. harassment, physical, and sexual abuse) by other detainees and staff members, leading to environments where they may live in fear, lose their freedom, and experience an exacerbation of pre-existing trauma (Tabak and Levitan, 2014; UNHCR, 2015). While detention centres may use segregation techniques to ensure the protection of LGBTQ detainees, these techniques may not be much different than the solitary confinement procedures used in prisons (Tabak and Levitan, 2014).

Ultimately, the Court found that the applicant's detention was not justified under Article 5(1)(b) of the ECHR, adding that State authorities had failed to adequately consider the applicant's particular situation. That is, that he should be considered vulnerable since he was a sexual minority in Iran, a country where rights for sexual minorities are virtually non-existent (§ 53). The Court considered that an *individualized analysis* was necessary to ensure that vulnerable individuals, such as the applicant, are safe when placed in detention with other detainees who may have cultural or religious prejudice against sexual minorities (§ 53). Additionally, the Court emphasized that detention should be ordered only if no other alternatives in the form of bail, periodic reporting requirements, or assignment to a residence are available, and held that the government's claim that Mr. O.M. posed a flight risk lacked evidence (§ 52).

These are promising pronouncements, but from an intersectional, layered vulnerability approach did not go far enough. While the Court limited its analysis to the criteria for arbitrary detention, it could have done more to contextualize detention by providing an overview of the wide-ranging deficiencies and structural flaws of Hungary's asylum procedure and reception system. For instance, asylum seekers might structurally be barred from alternatives to detention, such as bail, which can be difficult to obtain (Council of Europe Commissioner for Human Rights, 2014). While most asylum applicants may be unable to post bail, LGBTQ asylum applicants in particular often lack the resources or supports to be able to afford much upon their arrival in host countries. Further, since Hungarian officials lack clear guidelines about alternatives to detention and generally are insufficiently trained about the specific protection needs of vulnerable

asylum seekers, LGBTQ applicants are at risk of facing unsafe conditions and a lack of health and social services if they were to be placed outside of detention centres. It would also have been important for the Court to acknowledge the ineffectiveness of judicial review of detention in Hungary, and address the concern over the arbitrariness that characterizes Hungary's asylum regime in general; detention decisions have sometimes been based on criteria such as the nationality of the asylum seeker or the availability of spaces in centres (Council of Europe Commissioner for Human Rights, 2014). While it is not clear from this case whether Mr. O.M. was detained because of his nationality, it is important that the Court addresses such structural issues, particularly given legislative changes in Hungary since 2015 that have created an extremely hostile environment for asylum seekers, including the possibility of unlawfully denying Dublin returnees access to the asylum procedure (ECRE, 2017b). Such measures raise concerns that LGBTQ asylum applicants will be disproportionately impacted and should lead the Court to carefully consider the legality of Dublin transfer applications to States like Hungary. In particular, it would do well to build on its ruling in *O.M.*, requiring States to complete an individualized vulnerability analysis to ensure the safety of sexual and gender minorities in detention, by engaging in a structural assessment, as it did in *M.S.S.*, but with the experiences of LGBTQ individuals, as a particularly vulnerable subgroup of asylum applicants, in mind.

Conclusion

As Europe's top asylum court, the Court plays an important role in holding States accountable to human rights and international refugee law when making Dublin decisions and in harmonising practices throughout 47 States, impacting the lives of up to 800 million people (Helfer and Voeten, 2014). Therefore, it is critical to consider both the promising and concerning implications of the Court increasingly analysing the human rights claims of asylum applicants through a vulnerability framework (Ippolito and Sánchez, 2015). For instance, how does the Court's vulnerability lens hold up if the Court continues to view LGBTQ asylum seekers through structures that promote hetero- and cisgender normativity? Particularly, how does a hetero- and cisgender normative vulnerability lens impact the Court's sensitivity to how personal circumstances and structural forces render LGBTQ asylum applicants (differentially) vulnerable? The decision to send LGBTQ asylum seekers back to States of first entry under Dublin can have life and death consequences for applicants (Alessi et al., 2020). LGBTQ seekers may be vulnerable *qua* asylum seekers. However, the determination of whether and how they require special consideration in Dublin transfer decisions and how they may disproportionately struggle not only during the asylum process, but also during the pre- and post-asylum period and in detention or communities, requires an enriched vulnerability lens. Given the range of challenges that LGBTQ asylum applicants face under Dublin (Alessi et al., 2020), such a lens will require the Court to adopt flexible and creative approaches to the protection of LGBTQ asylum seekers, to recognize similarities despite differences, and to not homogenize vulnerability. It is only by adopting such an inter-sectional and layered vulnerability approach that the Court can ensure that vulnerability

as a heuristic, if continued to be used, will fulfil the promise of substantively protecting individuals and safeguarding their human rights.


Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

Raoul Wieland  <https://orcid.org/0000-0003-1159-8303>

Note

1. While we focus on the Court's use of 'vulnerability', the European Union has also, in its asylum instruments, started to use and define vulnerability (Jakuleviciene, 2016).

References

- Akin D (2017) Queer asylum seekers: Translating sexuality in Norway. *Journal of Ethnic and Migration Studies* 43(3): 458–474.
- Alessi EJ (2016) Resilience in sexual and gender minority forced migrants: A qualitative analysis. *Traumatology* 22: 203–213.
- Alessi EJ, Kahn S and Chatterji S (2016) 'The darkest times of my life': Recollections of child abuse among forced migrants persecuted because of their sexual orientation and gender identity. *Child Abuse & Neglect* 51(3): 93–105.
- Alessi EJ, Kahn S, Greenfield B, et al. (2020) A qualitative exploration of the integration experiences of LGBTQ refugees who fled from the Middle East, North Africa, and Central and South Asia to Austria and the Netherlands. *Sexuality Research and Social Policy* 17: 13–26.
- Alessi EJ, Kahn S and Van Der Horn R (2017) A qualitative exploration of the premigration victimization experiences of sexual and gender minority refugees and asylees in the United States and Canada. *Journal of Sex Research* 54(7): 936–948.
- Alessi EJ, Kahn S, Woolner L, et al. (2018) Traumatic stress among sexual and gender minority refugees from the Middle East, North Africa, and Asia who fled to the European Union. *Journal of Traumatic Stress* 31(6): 805–815.
- Annicchino P (2015) The persecution of religious and LGBTI minorities and asylum law: Recent trends in the adjudication of European supranational courts. *European Public Law* 21(3): 571–590.
- Bach J (2013) Assessing transgender asylum claims. *Forced Migration Review* 42: 34–36.
- Baillet H, Cowan S and Munro VE (2009) Seen but not heard? Parallels and dissonances in the treatment of rape narratives across the asylum and criminal justice contexts. *Journal of Law and Society* 36(2): 195–219.
- Beduschi A (2018) Vulnerability on trial: Protection of migrant children's rights in the jurisprudence of international human rights courts. *Boston University International Law Journal* 36(1): 55–85.

- Berg L and Millbank J (2009) Constructing the personal narratives of lesbian, gay and bisexual asylum claimants. *Journal of Refugee Studies* 22(2): 195–223.
- Berg L and Millbank J (2013) Developing a jurisprudence of transgender particular social group. In: Spijkerboer T (ed) *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*. Abingdon: Routledge, pp. 121–153.
- Berlant L and Warner M (1998) Sex in public. *Critical Inquiry* 24(2): 547–566.
- Brown K (2011) ‘Vulnerability’: Handle with care. *Ethics and Social Welfare* 5(3): 313–321.
- Bruce-Jones E (2015) Death zones, comfort zones: Queering the refugee question. *International Journal of Minority and Group Rights* 22(1): 101–127.
- Case no 17341/03, *F. v. the United Kingdom* [22 June 2004] ECtHR. Available at: <http://hudoc.echr.coe.int/eng?i=001-24020> (accessed 31 July 2020).
- Case no 29217/12, *Tarakhel v. Switzerland* [4 November 2014] ECtHR02. Available at: <http://hudoc.echr.coe.int/eng?i=001-148070> (accessed 31 July 2020).
- Case no 30696/09, *M.S.S. v. Belgium and Greece* [21 January 2011] ECtHR. Available at: <http://hudoc.echr.coe.int/eng?i=001-103050> (accessed 31 July 2020).
- Case no 71398/12, *M.E. v. Sweden* [26 June 2014] ECtHR. Available at: <http://hudoc.echr.coe.int/eng?i=001-145018> (accessed 31 July 2020).
- Case no 72413/10, *MKN v. Sweden* [27 June 2013] ECtHR. Available at: <http://hudoc.echr.coe.int/eng?i=001-121572> (accessed 31 July 2020).
- Case no 9912/15, *O.M. v. Hungary* [5 July 2016] ECtHR. Available at: <http://hudoc.echr.coe.int/eng?i=001-164466> (accessed 31 July 2020).
- Cole A (2016) All of us are vulnerable, but some are more vulnerable than others: The political ambiguity of vulnerability studies, an ambivalent critique. *Critical Horizons* 17(2): 260–277.
- Collins PH (2000) *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*. New York: Routledge.
- Collins PH and Bilge S (2016) *Intersectionality*. Cambridge: Polity.
- Connor P (2016) Number of refugees to Europe surges to record 1.3 million in 2015. *Pew Research Center*. Available at: <https://www.pewresearch.org/global/2016/08/02/number-of-refugees-to-europe-surges-to-record-1-3-million-in-2015/> (accessed 21 March 2020).
- Costello C and Hancox E (2016) The Recast Asylum Procedures Directive 2013/32/EU: Caught between the stereotypes of the abusive asylum-seeker and the vulnerable refugee. In: Chetail V, De Bruycker P and Maiani F (eds) *Reforming the Common European Asylum System: The New European Refugee Law*. Leiden: Brill Nijhoff, pp. 377–445.
- Council of Europe Commissioner for Human Rights (2014) Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014. Available at: <https://www.refworld.org/docid/54905c1d4.html> (accessed 18 March 2020).
- Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. Available at: <http://eur-lex.europa.eu/> (accessed 2 July 2020).
- Council Regulation (EC) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Available at: <http://eur-lex.europa.eu/> (accessed 2 July 2020).

- Crenshaw K (1989) Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *The University of Chicago Legal Forum* 1: 139–167.
- De Vries KM (2015) Transgender people of color at the center: Conceptualizing a new intersectional model. *Ethnicities* 15(1): 3–27.
- Dhoest A (2019) Intersectional identifications: Ethnicity and sexuality among diasporic queer women in Belgium. *Ethnicities* 0(0): 1–19.
- Ducoulombier P (2015) The protection of sexual minorities in European law. In: Ippolito F and Sánchez SI (eds) *Protecting Vulnerable Groups: The European Human Rights Framework*. Oxford: Hart Publishing, pp. 201–227.
- Dunn MC, Clare ICH and Holland AJ (2008) To empower or to protect? Constructing the ‘vulnerable adult’ in English law and public policy. *Legal Studies* 28(2): 234–253.
- European Commission (2018) Trans and intersex equality rights in Europe – A comparative analysis. Available at: https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf (accessed 14 March 2020).
- European Council on Refugees and Exiles (ECRE) (2017a) The concept of vulnerability in European asylum procedures. Available at: <https://www.ecre.org/vulnerability-in-european-asylum-procedures-new-aida-comparative-report/> (accessed 8 November 2019).
- European Council on Refugees and Exiles (ECRE) (2017b) Asylum in Hungary: Damaged beyond repair? Available at: <https://www.ecre.org/legal-note-asylum-in-hungary-damaged-beyond-repair/> (accessed 18 March 2020).
- European Union Agency for Fundamental Human Rights (FRA) (2017) Current migration situation in the EU: Lesbian, gay, bisexual, transgender, and intersex asylum seekers. Available at: <https://fra.europa.eu/en/publication/2017/march-monthly-migration-focus-lgbti> (accessed 8 November 2019).
- European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities. *Official Journal C* 254, 15 June 1990, pp. 0001–0012. Available at: <http://eur-lex.europa.eu/> (accessed 2 July 2020).
- Fineman MA (2010) The vulnerable subject and the responsive state. *Emory Law Journal* 60: 251–275.
- Fineman MA and Grear A (eds) (2013) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*. Farnham: Ashgate.
- Flegar V (2016) Vulnerability and the principle of non-refoulement in the European Court of Human Rights: Towards an increased scope of protection for persons fleeing from extreme poverty. *Contemporary Readings in Law and Social Justice* 8(2): 148–169.
- Giametta C (2018) New asylum protection categories and elusive filtering devices: The case of ‘Queer asylum’ in France and the UK. *Journal of Ethnic and Migration Studies* 46(1): 142–157.
- Gonzalez-Salzberg DA (2014) The accepted transsexual and the absent transgender: A queer reading of the regulation of sex/gender by the European Court of Human Rights. *American University International Law Review* 29(4): 797–829.
- Grigolo M (2003) Sexualities and the ECHR: Introducing the universal sexual legal subject. *European Journal of International Law* 14(5): 1023–1044.
- Helfer LR and Voeten E (2014) International courts as agents of legal change: Evidence from LGBT rights in Europe. *International Organization* 68(1): 77–110.

- Hertoghs M and Schinkel W (2018) The state's sexual desires: The performance of sexuality in the Dutch asylum procedure. *Theory and Society* 47: 691–716.
- Hulko W (2009) The time- and context-contingent nature of intersectionality and interlocking oppressions. *Affilia: Journal of Women and Social Work* 24(1): 44–55.
- Ippolito F (2013) The contribution of the European Courts to the Common European Asylum System and its ongoing recast process. *Maastricht Journal of European and Comparative Law* 20(2): 261–281.
- Ippolito F and Sánchez SI (eds) (2015) *Protecting Vulnerable Groups: The European Human Rights Framework*. Oxford: Hart Publishing.
- Jakuleviciene L (2016) Vulnerable persons as a new sub-group of asylum seekers? In: Chetail V, De Bruycker P and Maiani F (eds) *Reforming the Common European Asylum System: The New European Refugee Law*. Leiden: Brill Nijhoff, pp. 353–373.
- Johnson P (2013) *Homosexuality and the European Court of Human Rights*. New York: Routledge.
- Johnson P (2014) Sociology and the European Court of Human Rights. *Sociological Review* 62(3): 547–564.
- Johnson P (2016) *Going to Strasbourg: An Oral History of Sexual Orientation Discrimination and the European Convention on Human Rights*. New York: Oxford University Press.
- Johnson TAM (2011) On silence, sexuality and skeletons: Reconceptualizing narrative in asylum hearings. *Social & Legal Studies* 20(1): 57–78.
- Kahn S and Alessi EJ (2018) Coming out under the gun: Exploring the psychological dimensions of seeking refugee status for LGBT claimants in Canada. *Journal of Refugee Studies* 31(1): 22–41.
- Kahn S, Alessi EJ, Kim H, et al. (2018) Facilitating mental health support for LGBT forced migrants in Canada: A qualitative inquiry. *Journal of Counseling & Development* 96(3): 316–326.
- Lee EOJ and Brotman S (2011) Identity, refugeeness, belonging: Experiences of sexual minority refugees in Canada. *Canadian Review of Sociology/Revue Canadienne de Sociologie* 48(3): 241–274.
- Lewis RA (2014) “Gay? Prove it”: The politics of queer anti-deportation activism. *Sexualities* 17(8): 958–975.
- Luibhéid E (2002) *Entry Denied: Controlling Sexuality at the Border*. Minneapolis: University of Minnesota Press.
- Luibhéid E (2008) Queer/migration: An unruly body of scholarship. *GLQ: A Journal of Lesbian and Gay Studies* 14(2–3): 169–190.
- Luibhéid E (2014) Afterword: Troubling identities and identifications. *Sexualities* 17(8): 1035–1040.
- Luna F (2009) Elucidating the concept of vulnerability: Layers not labels. *International Journal of Feminist Approaches to Bioethics* 2(1): 121–139.
- Maiani F (2016) The Dublin III Regulation: A new legal framework for a more humane system? In: Chetail V, De Bruycker P and Maiani F (eds) *Reforming the Common European Asylum System: The New European Refugee Law*. Leiden: Brill Nijhoff, pp. 101–142.
- Mendos LR and ILGA (2019) *State-Sponsored Homophobia 2019: Global Legislation Overview Update*. Available at: <https://ilga.org/state-sponsored-homophobia-report> (accessed 8 November 2019).

- Menéndez AJ (2016) The refugee crisis: Between human tragedy and symptom of the structural crisis of European integration. *European Law Journal* 22(4): 388–416.
- Millbank J (2012) The right of lesbians and gay men to live freely, openly and on equal terms is not bad law: A reply to Hathaway and Pobjoy. *Journal of International Law and Politics* 44(2): 497–528.
- Moncrieffe J (2007) Labelling, power and accountability: How and why our categories matter. In: Moncrieffe J and Eyben R (eds) *Power of Labelling: How People Are Categorized and Why It Matters*. London: Earthscan, pp. 64–79.
- Morgades-Gil S (2015) The discretion of States in the Dublin III System for determining responsibility for examining applications for asylum: What remains of the sovereignty and humanitarian clauses after the interpretations of the ECtHR and the CJEU? *International Journal of Refugee Law* 27(3): 433–456.
- Munro VE and Scoular J (2012) Abusing vulnerability? Contemporary law and policy responses to sex work in the UK. *Feminist Legal Studies* 20(3): 189–206.
- Murray DAB (2014) The (not so) straight story: Queering migration narratives of sexual orientation and gendered identity refugee claimants. *Sexualities* 17(4): 451–471.
- Nash JC (2008) Re-thinking intersectionality. *Feminist Review* 89: 1–15.
- Peroni L (2016) Violence against migrant women: The Istanbul convention through a postcolonial feminist lens. *Feminist Legal Studies* 24: 49–67.
- Peroni L and Timmer A (2013) Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law. *International Journal of Constitutional Law* 11(4): 1056–1085.
- Purdie-Vaughns V and Eibach RP (2008) Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities. *Sex Roles* 59(5–6): 377–391.
- Rahman M (2010) Queer as intersectionality: Theorizing gay Muslim identities. *Sociology* 44(5): 944–961.
- Raj S (2017) A/effective adjudications: Queer refugees and the law. *Journal of Intercultural Studies* 38(4): 453–468.
- Shakhsari S (2014) The queer time of death: Temporality, geopolitics, and refugee rights. *Sexualities* 17(8): 998–1015.
- Shuman A and Bohmer C (2014) Gender and cultural silences in the political asylum process. *Sexualities* 17(8): 939–957.
- Spijkerboer T (ed) (2013) *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*. Abingdon: Routledge.
- Swetzer L (2016) *Trans-Harming Care: Comparing the Experiences of Latin American, Caribbean and Dutch Transwomen with the Dutch Healthcare System*. Oisterwijk: Wolf Legal Publishers.
- Tabak S and Levitan R (2014) LGBTI migrants in immigration detention: A global perspective. *Harvard Journal of Law and Gender* 37(1): 1–44.
- United Nations High Commissioner for Refugees (UNHCR) (2012) Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. Available at: <https://www.refworld.org/docid/50348afc2.html> (accessed 14 March 2020).

- United Nations High Commissioner for Refugees (UNHCR) (2015) Discrimination and violence against individuals based on their sexual orientation and gender identity. Available at: <https://www.refworld.org/docid/5571577c4.html> (accessed 14 March 2020).
- Urquiza-Haas N (2017) The semiotic fractures of vulnerable bodies: Resistance to the gendering of legal subjects. *International Journal for the Semiotics of Law* 30(4): 543–562.
- van der Pijl Y, Oude Breuil BC, Swetzer L, et al. (2018) “We do not matter”: Transgender migrants/refugees in the Dutch asylum system. *Violence and Gender* 5(1): 1–11.
- Viljanen J and Heiskanen HE (2016) The European Court of Human Rights: A guardian of minimum standards in the context of immigration. *Netherlands Quarterly of Human Rights* 34(2): 174–193.
- Waites M (2009) Critique of “sexual orientation” and “gender identity” in human rights discourse: global queer politics beyond the Yogyakarta Principles. *Contemporary Politics* 15(1): 137–156.
- Wessels J (2017) Publicly manifested – fatefully determined – invariably “discreet”: The assessment of sexuality-based asylum claims in Germany and France. *Canadian Journal of Women and the Law* 29(2): 343–374.
- Yoshida K (2013) Towards intersectionality in the European Court of Human Rights: The case of B.S. v Spain. *Feminist Legal Studies* 21: 195–204.