

# 10 - Rights of children in vulnerable situations

Author : Simona Florescu - Last update : 25.07.2022

The notion of vulnerability has been addressed extensively in academic literature and it has also permeated the case law of international courts as well as various other international soft law instruments. Scholarship has divided vulnerability in two broad categories: 'inherent' vulnerability and 'situational' vulnerability, with the former referring to sources of vulnerability intimately linked to the human condition and the latter being connected to sources of vulnerability aggravated by personal, social, political economic or environmental situations. At times, it has been considered that vulnerability is better conceptualized by analysing particular situations rather than innate characteristics as it is difficult to create exhaustive groups of vulnerable individuals and moreover, these categories may vary depending on context, culture and time. In this characterization the favoured approach is that of looking at the context and at the groups in vulnerable contexts rather than finding that particular groups are vulnerable per se. This is also the approach adopted here.

The concept of vulnerability is closely linked to the notion of non-discrimination. In the framework of the **CRC**, Article 2 –which according to the CRC Committee is also one of the four core principles of the Convention - prohibits discrimination of children on any ground. Article 2 of the CRC, reads:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

In [General Comment No 24](#), the CRC Committee uses both concepts of 'vulnerability' and 'discrimination'. For example, in paragraph 9 the CRC Committee recommends that prevention and early intervention programmes should be focused on support for families, in for those in vulnerable situations. The CRC Committee touches indirectly upon the issue of bias -which is a form of discrimination- and in paragraph 112 it recommends that professionals in child justice systems receive training to better understand disparities which may amount to discrimination against certain marginalized groups including children belonging to minorities or to indigenous groups.

Under **EU law**, the prohibition of discrimination is one of the fundamental values listed as such under Article 2 of the Treaty on the European Union (the "TEU"). The EU is specifically required to take actions to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability age and sexual orientation when defining and implementing its policies and activities (Article 10 TFEU). Article 21 of the EU Charter includes the prohibition of discrimination which should be respected by all Member States whenever they are implementing EU law. The EU directives covering various criminal law matters also include non-discrimination provisions, either directly referring to children (for example Recital 65 of the Procedural Safeguards Directive) or more in general -for all individuals- but which are equally applicable to children (among others Article 3 § 2 of the Directive 2012/13 on the right to information; Article 13 of Directive 2013/48). As will be shown below, one of the core features of EU legislation in criminal matters in so far as discrimination and equal treatment are concerned is the requirement for an individualized

assessment which is particularly aimed to ensure that the authorities take account of potential vulnerabilities of the person in the criminal justice system.

Under the **ECHR**, the prohibition of discrimination is included under Article 14 of the ECHR and under Article 1 of Protocol 12 to the Convention. Article 14 of the ECHR does not have an independent existence in that Article 14 should always be brought in conjunction with other Articles of the Convention. In turn, Article 1 of Protocol no 12, which has entered into force on 1 April 2005, has had so far limited relevance in the Court's case law. As of 25 July 2022, only 20 Council of Europe Member States had ratified Protocol no. 12. The ECtHR's approach to cases brought under Article 14 has been to first examine whether a particular situation falls under the *ambit* of one of the provisions of the Convention. The ambit of a particular Article is broader than that the scope of an Article which means that a violation of one of the substantive Articles of the Convention is not necessary in order to find that Article 14 is applicable. It is however necessary that there is an arguable allegation of differential treatment in relation to a right which falls under the ECHR. The Court will then assess if there has been a differential treatment and if it has, whether the state has provided objective and reasonable justification for the treatment (see also the ECtHR [Guide](#) on Article 14 and Article 1 of Protocol no. 12). The Court has introduced criteria for assessing whether the differential treatment is proportionate and whether alternative means had been provided for achieving the same end.

The ECtHR has also introduced the notion of vulnerable groups as of the 2001 case of *Chapman v The United Kingdom*. The Court has not defined the notion of 'vulnerable groups' but has explicitly addressed vulnerability in its case law, finding that certain individuals should be given special protection.

Notwithstanding the above, the ECtHR has rarely assessed discriminatory aspects concerning children under any of these Articles. The ECtHR has sometimes referred to the specific vulnerabilities of children in conflict with the law in the context of its assessment under other Articles of the Convention (in particular under Article 3, 5 and 6 ECHR).

Overall, the ECtHR approach to non-discrimination has been subject to academic criticism on grounds of inconsistencies or paternalistic attitudes. Moreover, in various areas of law, including in relation to children in suspected or accused of having infringed criminal law, the ECtHR's case law has dealt with discriminatory aspects in the contexts of other Articles of the Convention, without finding a violation of either Article 14 or of Article 1 of Protocol no 12.

Last but not least, it should be pointed out that despite the wealth of international instruments covering discrimination and / or vulnerabilities and calling for an individualized approach of the justice system, many reports have highlighted that criminal justice systems are plagued by various forms of discrimination (including but not limited to biases or stereotyping), which affect individuals from their first interaction with the police until the sentencing and execution of the sentences. Regretably, the many instances of discrimination are not reflected in international case law -in that there is little case-law covering discrimination in the justice system, let alone of children in the justice systems.

Consequently, the focus of the sections below is to highlight how discrimination affects individuals in the justice system from the very first contact with the police until the execution of the sentences, along the topics discussed in Factsheets nos. 2 to 9. The practical examples will be supplemented by international case-law covering instances of discrimination of both children and adults. Even if not all case-law relates to children, these situations are relevant and applicable to children. It can be argued that the lack of child specific case law represents an additional evidence of the multiple vulnerabilities children face which in turn impede on their very access to the justice systems.

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# 1. Discriminatory attitudes during the first contact with the police

The rights of children during the first contact with the police have been described in Factsheet no 2. Section 1.1. presents examples of discrimination in the contact with police in general whereas Section 1.2. includes international case law and legal instruments tackling this issue.

## 1.1. Examples of discrimination during the first contact with the police

In March 2022 Fair Trials has published a [report](#) documenting instances of racism in Europe's law enforcement and criminal justice systems. In this [report](#), it has been documented that in Spain black people run the risk of being singled out in ports and public transport 42 more times because of the colour of their skin. Ethnic profiling in Spain has been condemned by the UN Human Rights Committee in the case of [Williams v Spain](#) (Views of 30 June 2009). The case of *Muhammad v Spain* (no. 34085/17) concerning ethnic profiling by police is currently pending before the ECtHR. In this case the applicant is complaining that the police officers had stopped him solely because of the colour of his skin and had imposed an administrative fine on the ground that he refused to identify himself.

Other cases of discriminations include police killing of racialised people on the ground of them being profiled as suspicious for sitting in the car or of persons with disabilities undergoing a mental health crisis (Fair Trials [report](#)).

It has also been highlighted that the use of algorithmic data could lead to severe human rights violations particularly on the rights of racialized and other marginalized groups. Discrimination appears as Big Data relies on the prioritization of certain characteristics informed by racialized and other discriminatory assumptions (Addressing the possible gaps in the Racial Equality Directive – Fair Trials Consultations [Input](#)).

In the United Kingdom, it has been shown that youth from racialized and black minorities face a higher risk of being strip searched when in police custody.

A [report](#) published in 2015 by Mental Disability Advocacy Centre has highlighted that children with disabilities are not provided with accessible information on their rights. The same [report](#) indicated that the biggest barriers children with disabilities have to overcome in order to ensure access to justice at national level are the exclusionary attitudes of those involved in the administration of justice (lawyers, judges, social workers and psychologists). It also appeared that the right to access to a lawyer is not always secured from the first interrogation and examples exist where children with disabilities suspected of having committed criminal offences are interrogated and forced to testify despite their wishes to stop, in absence of a lawyer or of qualified personnel.

A Fair Trials [report](#) published in January 2021 has found that people of racialised and ethnic groups are denied access to a lawyer or receive inadequate legal representation whereas people of colour are not always provided with interpretation so as to participate meaningfully in their criminal case.

The [UN Global study on children deprived of liberty](#) emphasizes that girls face a higher risk of being arrested for status offences or for behaviour rather than actual criminal activity (§ 38). At the same time, girls are more likely to be arrested for sexual behaviour and girls from poor families run a higher risk of institutionalization. The same study touches on aspects related to LGBTI children who are more likely to be arrested on suspicion of status offences (§ 39).

## 1.2. International case law and instruments

### Racially motivated police violence

The **European Court of Human Rights** has dealt on several occasions with racially motivated police brutality. In the case of *Lingurar v Romania* (no. 48474/14), the applicants were member of the Roma community and they alleged that police had organised a brutal intervention against them on the ground of their ethnicity. In that particular case, the applicants had received a visit from 85 armed law enforcement officers and in the aftermath of the intervention they had been left with injuries which necessitated medical intervention. The ECtHR found that in that case the use of force had been disproportionate and contrary to Article 3 ECHR. The Court also found that the police raid had been racially motivated on the basis of the language used by the authorities which clearly showed that the applicants' were expected to be criminal because of their ethnic origin. In this case the Court has also relied on reports from third party intervenors showing racial stereotyping of the Roma in Romania.

Violations of the Convention on account of police brutality and racially motivated excessive interventions against members of the Roma community have also been found, among others, in the cases of *Ciorcan and Others v Romania* (nos. 29414/09 and 44841/09), and most recently on 14 June 2022 in *Balkasi and Others v Albania* (no. 14800/18). In all these cases the ethnicity of the applicants resulted in the authorities treating them as suspects rather than victims of crimes and in the inefficiency of the protection which would otherwise be available to victims of crime.

### Discrimination on the basis of disability during police interviews

As mentioned above, the case law of the ECtHR is not always consistent when it comes to the guarantees afforded to individuals in situations of vulnerability who come in contact with the criminal justice system. An example is the recent case of *Hasáliková v Slovakia* (no. 39654/15)

which was lodged by an applicant with a slight intellectual disability who had been convicted to 15 years imprisonment for murder. The applicant complained that the authorities failed to make reasonable adjustments for her disability of which they knew or should have known from the first contact with the police. The ECtHR did not find a violation of Article 6 considering that the applicant -despite her slight intellectual disability- had not been particularly vulnerable in the circumstances of the case. Two judges wrote a dissenting opinion, highlighting that the Court had failed to counterbalance the applicant's vulnerability with appropriate safeguards or with the exclusion of evidence at trial.

## **2. Discrimination during regarding pre-trial detention**

Factsheet no 3 outlined children's rights concerning pre-trial detention, including the principle that detention should be imposed as a measure of last resort. Section 2.1. will describe how discrimination affects the imposition of pretrial detention and Section 2.2. presents instances of international case law in this area.

### **2.1. Examples of discrimination concerning the imposition of pre-trial detention**

A Fair Trials [report](#) published in January 2021 found that pre-trial detention is rather the default measure, than the measure of last resort and that it is imposed more frequently on non-nationals and on people of colour. Poverty also plays a significant role in imposing pre-trial detention as judges often assess poverty as a flight risk justifying detention even for minor offences.

These concerns have been equally raised by the UN Committee on the Elimination of Racial Discrimination (CERD) (General Comment no. 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System Preamble and § 1.III.2).

There have been examples of cases where detention of children with severe disabilities was considered lawful, even if they were not assisted by a lawyer, whereas this would not have been deemed lawful for children without disabilities (The 2015 [report](#) published by Mental Disability Advocacy Centre).

### **2.2. International case law and instruments**

#### Detention and sexual orientation

The ECtHR has found a violation of Article 5 of the Convention in the case of O.M. v Hungary (no. 9912/15) which concerned the detention of an LGBTI asylum seeker as the Hungarian authorities did not exercise particular care in view of his situation of vulnerability (§ 53).

## **3. Discrimination concerning rights in detention**

Factsheet no 4 addresses children's rights in detention. Section 3.1. below covers concerns related to discrimination in relation to detention whereas Section. 3.2. highlights relevant international case-law in the field.

### **3.1. Examples of discrimination concerning conditions of detention**

It has been highlighted that members of the LGBTI community face specific risks while in detention and States should take special measures aimed at protecting the LGBTI prisoners from the increased risk of violence (see for example [FRA Report](#) published on 12 December 2019: *Criminal detention conditions in the European Union: rules and reality*, page 40).

Also, studies have demonstrated that children with intellectual and psychosocial disabilities are overrepresented in the prison population. A 2018 [Report](#) of the Parliamentary Assembly has highlighted that "Detainees with disabilities are faced with unsuitable cells, resulting in shameful living conditions and with inaccessibility of the common areas in prisons which prevents them from moving around outside their cells without assistance. Communication difficulties may also have serious consequences in terms of access by detainees with disabilities to information in accessible formats and activities suited to their disabilities." The same report mentions the lack of access to adequate treatment for detainees with psychosocial disabilities which heavily impacts on their potential for reintegration into the community. Women detainees face higher risks of mental health problems and suicide compared to their male counterparts (PACE Report, § 46)

### **3.2. International case law and instruments**

#### Detention and sexual orientation

The case of *Stasi v France* (no. 25001/07) concerned the detention of a LGBTI person who complained under Article 3 in conjunction with Article 14 that he had been ill treated by another inmate. The European Court declined to find an infringement of the aforementioned articles on the ground that the authorities could not have known of the alleged ill treatment. Two judges dissented on the ground that the ECtHR's approach had been too standardized in that the Court had failed to consider the individual circumstances of the applicant in that case.

#### Detention and disability

The case of *Price v The United Kingdom* (no. 33394/96), concerned the detention of a person with physical disabilities for seven days in conditions which had not been adapted for her disability. As a result she was forced to sleep in her wheelchair, without access to a toilet or emergency buttons. By the time of her release, she had developed serious health problems. The ECtHR found a violation of Article 3 of the Convention on the ground of lack of reasonable accommodations of the prison facilities, even if the authorities did not have the intention to humiliate or degrade her.

The case of *Jasinskis v. Latvia* (no 45744/88) concerns the death of a person who was deaf and mute in a police cell. The ECtHR found a violation of the substantive limb of Article 2 (right to life) on the ground that despite the police's knowledge of the victim's sensory disability, they failed to react to his knocking on the doors and to call an ambulance after he could not be woken in the morning.

## Intersectional discrimination gender and disability

The case of *Raffray Taddei v. France* (no. 36435/07) concerned the failure of the authorities to provide a woman in detention who was suffering from asthma, chronic respiratory insufficiency, anorexia and Munchausen's syndrome with appropriate treatment. The ECtHR found a violation of Article 3 on the ground that the domestic authorities did not take all the necessary measures to provide the applicant an individual treatment given that she was in a particular state of vulnerability.

## Intersectional discrimination on the ground of illness and disability

Using a similar reasoning as in the cases mentioned above, the ECtHR found a violation of Articles 3, 14 and 13 in *Martzaklis and Others v Greece* (no. 20378/13) on the ground of the conditions of detention of HIV positive persons in a psychiatric hospital attached to a prison. They had been held in conditions which were not compatible with their illness, such as overcrowded cells, in contact with other contagious patients and without the possibility to wash their clothes so as to minimize the risk of infection. The ECtHR has found a violation of Article 3 in conjunction with Article 14 on account of the prison conditions, the lack of medical treatment as well as their segregation which had not been objectively justified. The Court also found a violation of Article 13 in conjunction with Article 3 on account of their lack of access to an effective national remedy to complain about the conditions of detention and medical treatment.

## **4. Discrimination concerning fair trials guarantees**

The fair trials guarantees for children have been detailed in Factsheets no 5, 6 and 7. Section 4.1. below covers examples of discrimination from various available reports whereas Section 4.2. deals with issues of discrimination addressed in international case law and other instruments.

### **4.1. Examples of discrimination**

Fair Trials has published a [Report](#) (*Disparities and Discrimination in the European Union Criminal Justice Systems*) which identified that people of colour are denied many fair trial guarantees, including early access to a lawyer, the right to translation and interpretation, the right to legal aid or the presumption of innocence. Examples included studies in Hungary and Bulgaria identifying the people of Roma origin are not able to contact a lawyer and are more often appointed a defence counsel by the authorities; reports in Greece showing that non-nationals did not have any support in translating their files or where the interpretation was of poor quality. Further, the same [Report](#) cited the European Commission, the European network of legal experts in gender equality and non-discrimination 2019 Country report on Slovakia. According to the Slovakia Country Report judges in this country were influenced by racial bias in their decision making.

Furthermore, anecdotal evidence suggests that the individual assessment provided under Article 7 of the Procedural Safeguard Directive is used to further discriminate and stereotype children accused or suspected of criminal offences, rather than offering them an individual approach which is better tailored to their individual needs.

### **4.2. International case law and instruments**

The ECtHR has dealt with the issue of adapted fair trials guarantees in the case of *Blockhin v Russia* where the applicant was a 12-year-old child suffering from ADHD, a mental and neurobehavioural disorder, which according to the Court had made him 'particularly vulnerable' and in need of special protection (§ 12). In paragraph 219 of the judgment, the ECtHR explains as follows the distinction between children and adults on the one hand and between children in general and children with disabilities in particular, on the other hand:

"In the Court's view, minors, whose cognitive and emotional development in any event requires special consideration, and in particular young children under the age of criminal responsibility, deserve support and assistance to protect their rights when coercive measures, [...] are applied in their regard. [...] the Court is convinced that adequate procedural safeguards must be in place to protect the best interests and well-being of the child, certainly when his or her liberty is at stake. To find otherwise would be to put children at a clear disadvantage compared with adults in the same situation. In this connection, children with disabilities may require additional safeguards to ensure that they are sufficiently protected. The Court would point out that this does not mean, however, that children should be exposed to a fully fledged criminal trial; their rights should be secured in an adapted and age-appropriate setting in line with international standards, in particular the Convention on the Rights of the Child."

Under **EU law**, Article 7 of the Procedural Safeguards Directive is intended to benefit children who may find themselves in situations of particular vulnerability. Article 7 (2) specifically mentions that the "individual assessment, shall, in particular take into account the child's personality and maturity, the child's economic social and family background and any specific vulnerabilities that the child may have."

In the case of *Alekseiu Petruhhin v Latvijas Republikas Generalprokuratūra* [GC], C-182/15 the Court of Justice of the European Union (the CJEU) accepted that the applicant had not been discriminated against on the ground of nationality (Article 18 TFEU) when it came to the applicable extradition requirements. In so finding the CJEU ruled that the Framework Decision 2002/584 did not prohibit the exchange of information with the country of which the alleged offender was a national as such possibility allowed the state of nationality to prosecute that person for offences committed outside the national territory.

The **CRC Committee** addresses in particular fair trial guarantees offered to children with intellectual and psychosocial disabilities. The Committee recommends that these children should not be in the justice system at all, even if they have reached the age of criminal responsibility. If they are, they should be individually assessed (General Comment no 24, § 28).

In addition, the Committee recommends States to provide adequate and effective assistance by well trained professionals to children who experience communication barriers (General Comment no 24, § 65). Indeed, some States have developed the practice of intermediaries whereby professionals specialized in interacting with children from particularly vulnerable groups assist them in the justice process and act as 'conveyors' of the children's voices to the authorities (see for example here: Intermediaries for Child Defendants, available [here](#)). The courts in England and Wales have handed down several judgments where they have reasoned that children with disabilities have the right to an intermediary in order to ensure their effective participation in the criminal justice process (*R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin), *R v Walls* [2011] EWCA Crim 443, *R (OP) v the Secretary of State for Justice and others* [2014] EWHC 1944 (Admin)). The intermediaries are trained professionals appointed by courts depending on the



specific disability of the child. They are not a party to the proceeding, their role being exclusively that of transmitting the child's voice to the judge or other legal professionals involved in the case.

The practice of intermediaries is intended to fulfil requirements of reasonable and procedural accommodations which states are mandated to adopt under various international instruments such as Articles 5 and 13 of Convention on the Rights of Persons with Disabilities; General Comment no 6 CRPD/C/GC/6, § 51; UN High Commissioner for Human Rights or the OHCHR International Principles and Guidelines on Access to Justice for Persons with Disabilities.

A practice related to that of intermediaries is that of *cultural mediators* which has been adopted in Italy and made available for non-national children (Italy, Country Report (forthcoming)– [Child Friendly Justice Project](#) – Validity Foundation).

## 5. Discriminatory attitudes in diversion and sentencing

The topics of Diversion and Sentencing have been addressed in Factsheets nos 8 and 9. Section 5.1. outlines examples of discriminatory practices in these areas whereas Section 5.2. provides examples of international case law and instruments so as to exemplify how these issues have been tackled.

### 5.1. Discrimination in diversion and sentencing

First and foremost the criminalization of certain offences is itself discriminatory for some groups. For example, the criminalization of abortion, or prostitution has a gender element whereas the criminalization of begging affects disproportionately people from a disadvantaged social economic background. Similarly, criminalization of homosexuality affects the LGBTI group.

Research has also shown that individuals from marginalized groups face longer sentences and do not usually have access to alternatives to custodial sentences (Fair Trials [Report: Disparities and Discrimination in the European Union Criminal Justice Systems](#))

### 5.2. International case law and instruments

In the ECtHR case *Paraskeva Todorova v Bulgaria* (no. 37193/07), the applicant who was of Roma origin complained that the domestic courts' refusals to suspend her sentence were motivated by her Roma ethnicity. In the case at hand the domestic court had referred to the widespread sentiment of impunity in society, highlighting in particular this sentiment among minority groups for whom a suspended sentence was- according to the court- not a conviction (§ 10). The Court found an infringement of Article 14 in conjunction with Article 6 of the ECHR on the ground that the allegations of the domestic courts had not been based on any factual basis.

In the case of *E.B. and Others v Austria* (nos. 31913/07, 38357/07, 48098/07, 48777/07 and 48779/07) the ECtHR found a violation of Article 8 and 14 on the ground that the domestic authorities refused to delete the convictions from the criminal records of individuals after the provision which had criminalized sexual activity between men of certain ages had been declared unconstitutional. The Court found in particular that the domestic authorities had not put forth any justification for such refusal.

## Further reading

Van den Brink Y. Different but equal? Exploring potential catalysts of disparity in remand decision-making in the youth court. *Social & Legal Studies*. 2022;31(3):477-500.

van den Brink, Y., Forde, L., Burghout, P., & Beljaars, D. (2022). Disparities in Responses to Children Who Commit Serious Offences: What Does the Evidence Tell Us? In N. Lynch, Y. N. van den Brink, & L. Forde (Eds.), *Responses to Serious Offending by Children: Principles, Practice and Global Perspectives* (Routledge Frontiers of Criminal Justice). Routledge.  
<https://doi.org/10.4324/9781032107707>

Relevant materials regarding children from vulnerable groups:

Youth Justice Legal Centre: <https://yjlc.uk/resources/legal-guides-and-toolkits>