



Vulnerability in the Real Risk Assessment under Article 3 ECHR / Qualification Criteria of Subsidiary Protection:

A contribution to more fairness and equality in decisions
on international protection?

An Austrian case study

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The concept of vulnerability in the context of human rights (P 32130-G31)

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Introduction

Who is framed vulnerable?

Sources

Consequences

Conclusion

The concept of vulnerability in the context of human rights

Project structure

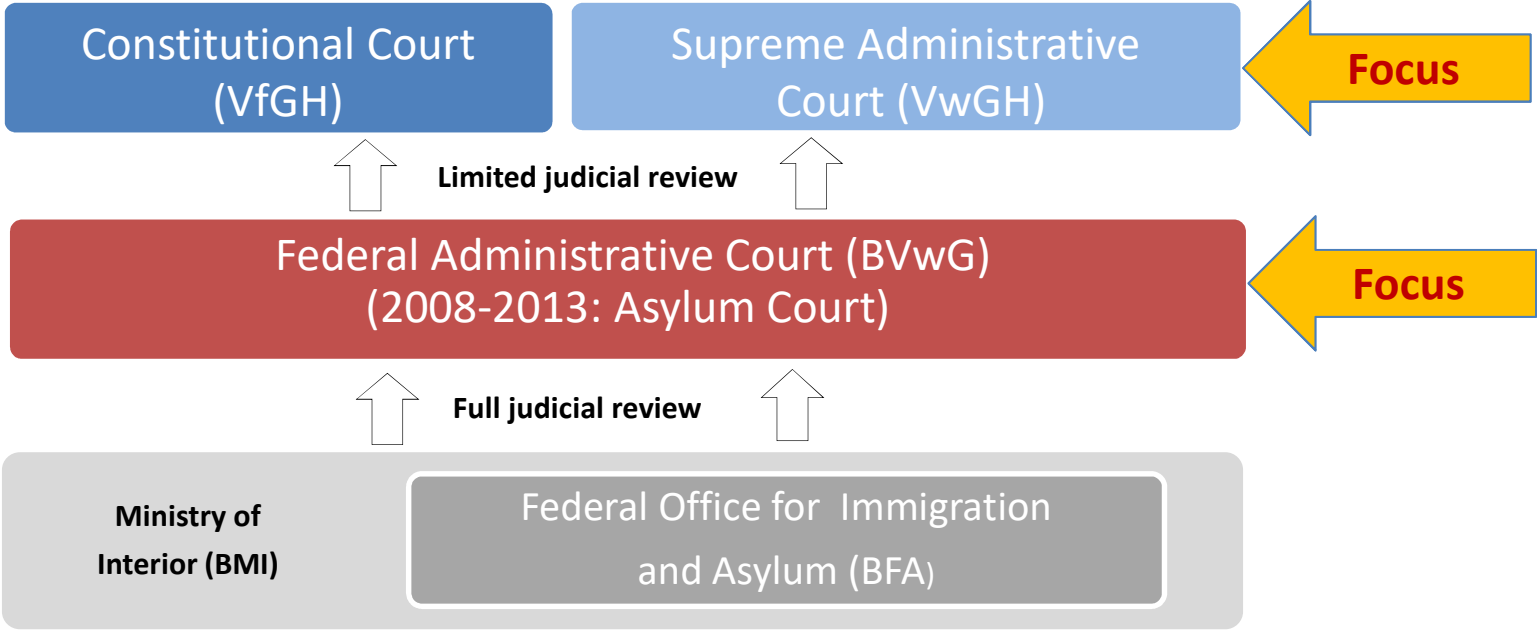
- WP 1 Explorative phase and conceptual work
- **WP 2 Case Study in the field asylum law/policy**
- WP 3 Case Study in the field of climate change/environmental-related mobility
- WP 4 Case Study in the field of Equality and Non-Discrimination
- WP 5 Dissemination
- WP 6 Project management

Vulnerability in Austrian asylum procedures

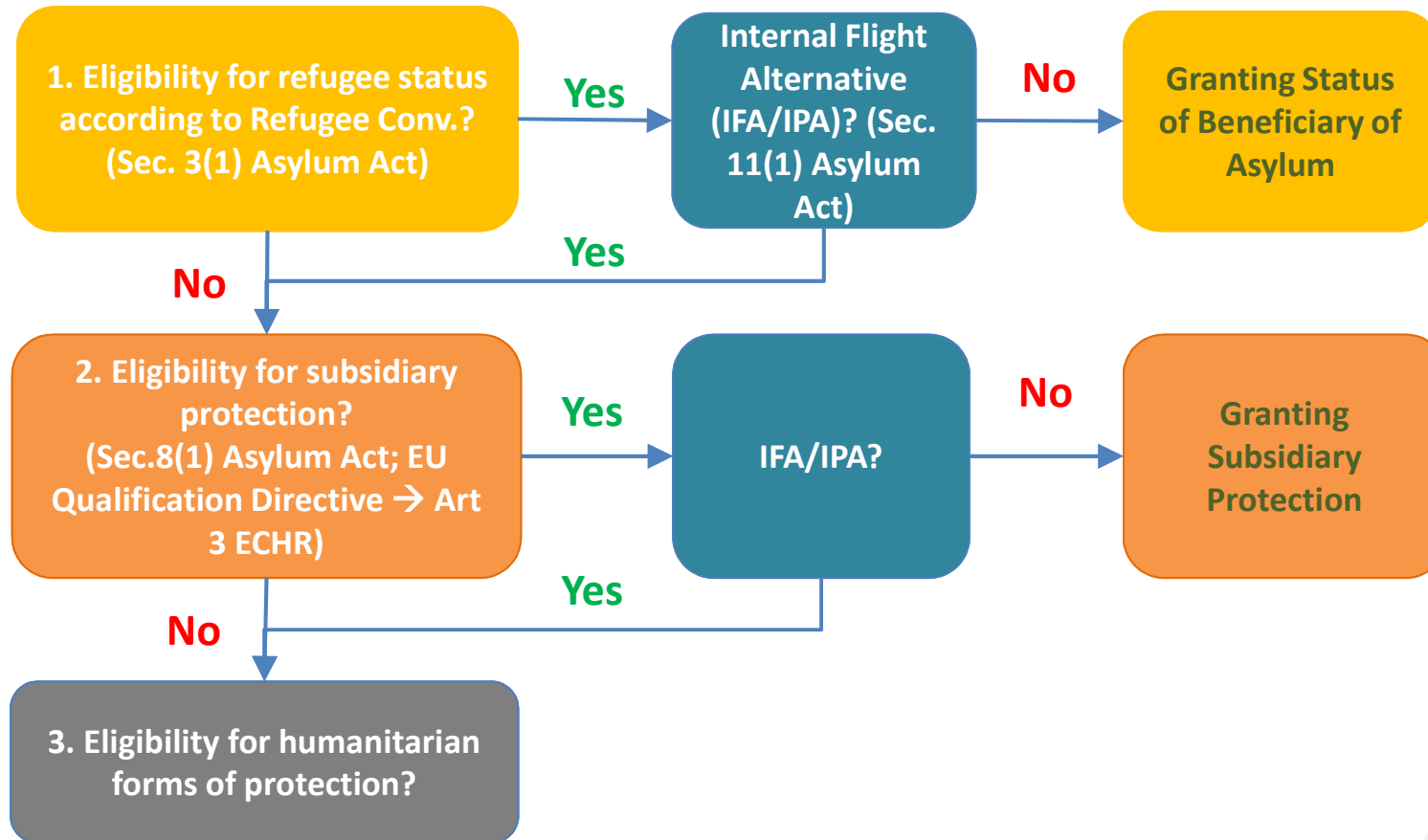
Starting point:

Vulnerability is **increasingly used by Austrian courts** in asylum procedures when **assessing eligibility for international protection** (refugee status, subsidiary protection) although **qualification criteria neither in Austrian asylum law nor in EU Qualification Directive refer to the concept.**

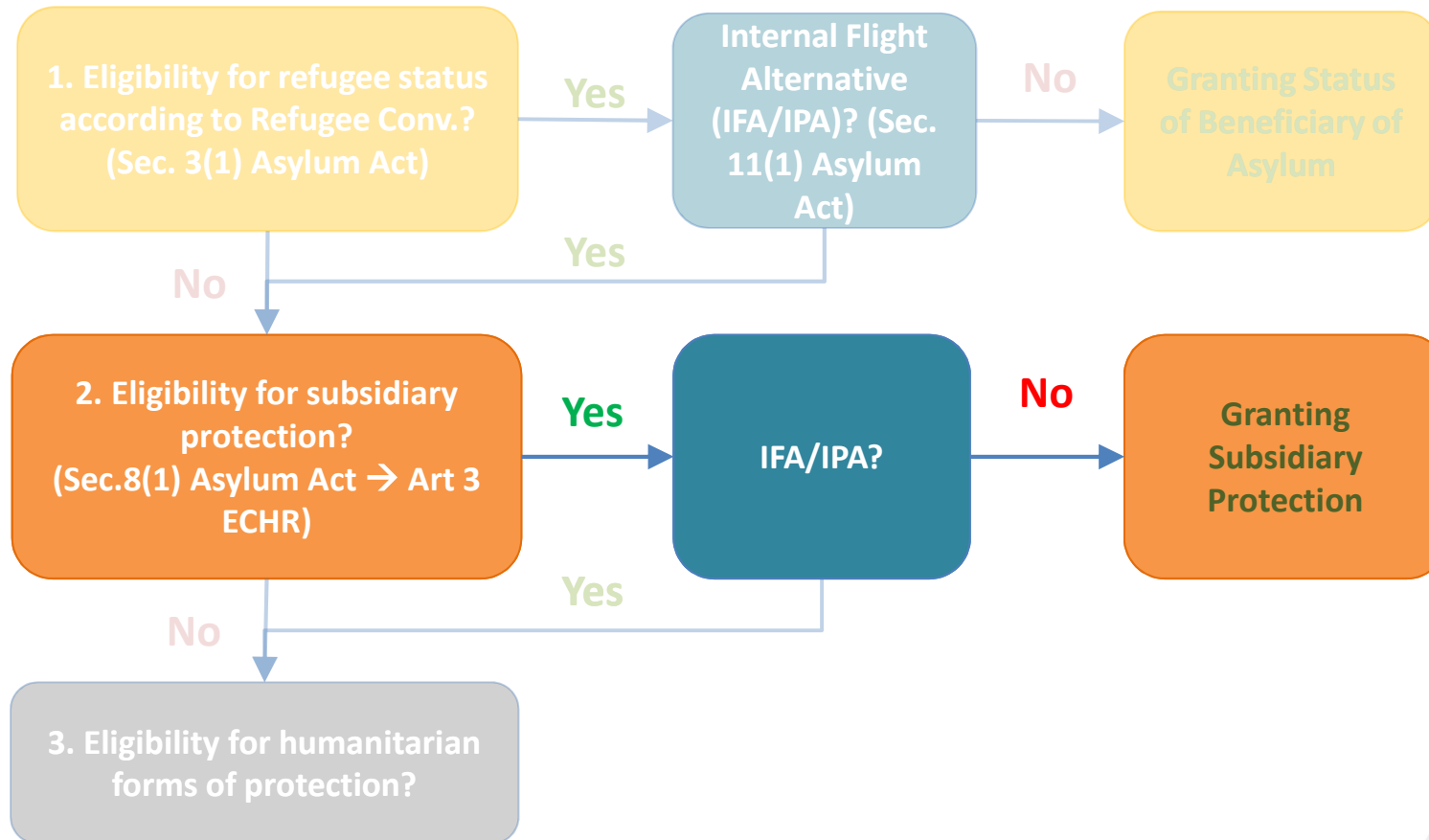
INSTITUTIONAL FRAMEWORK



Austrian asylum procedure



Austrian asylum procedure



2. Eligibility for subsidiary protection?
(Sec.8(1) Asylum Act → Art 3 ECHR)

Definition

*Subsidiary protection status shall be granted to an alien,
... if the alien's rejection at the border, forcible return or deportation to his country of origin would constitute a **real risk of a violation of Art. 2 ECHR, Art. 3 ECHR** or ... or would represent for the alien as a civilian a serious threat to his life or person as a result of indiscriminate violence in connection with an international or internal conflict.*

Research questions:

- What are the sources of vulnerability?
- Who is labelled/framed as vulnerable?
- Which legal consequences are attached to the concept of vulnerability?
- How is vulnerability embedded in real risk assessment/IPA assessment?
- Does it lead to more fairness/equality? (as the concept has been associated with more substantive equality)

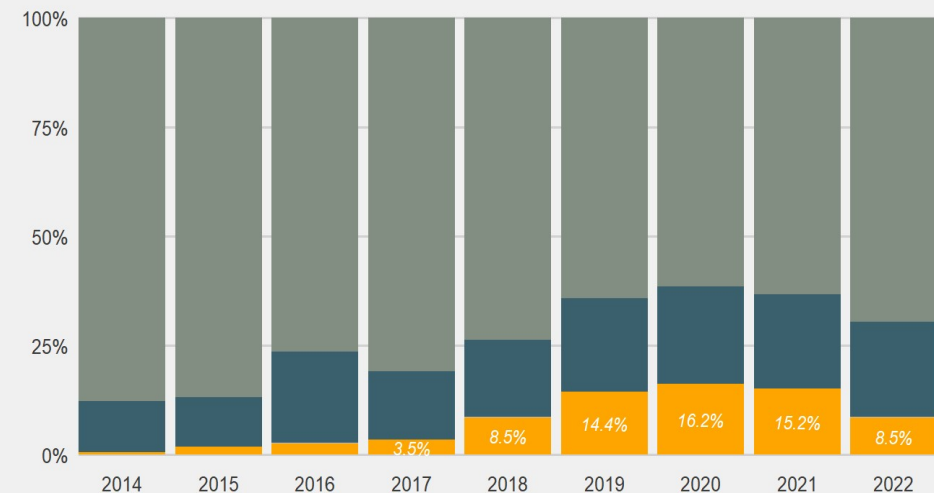
Overview of sample selection and methods

- **More than 24,400 decisions of Austrian appellate court** contain vulnerability (out of 87,064).
- **Quantitative text** analysis of court decisions available in Austrian legal database (RIS) 01.01.2014-01.11.2022 (search date: 8.11.2022): **8,176 decisions** contain **vulnerability** in chapter on legal reasoning
- **Qualitative Analysis** of 387 BVwG decisions with MAXQDA + all decisions of supreme courts (VfGH, VwGH)
- **Interviews with stakeholders**

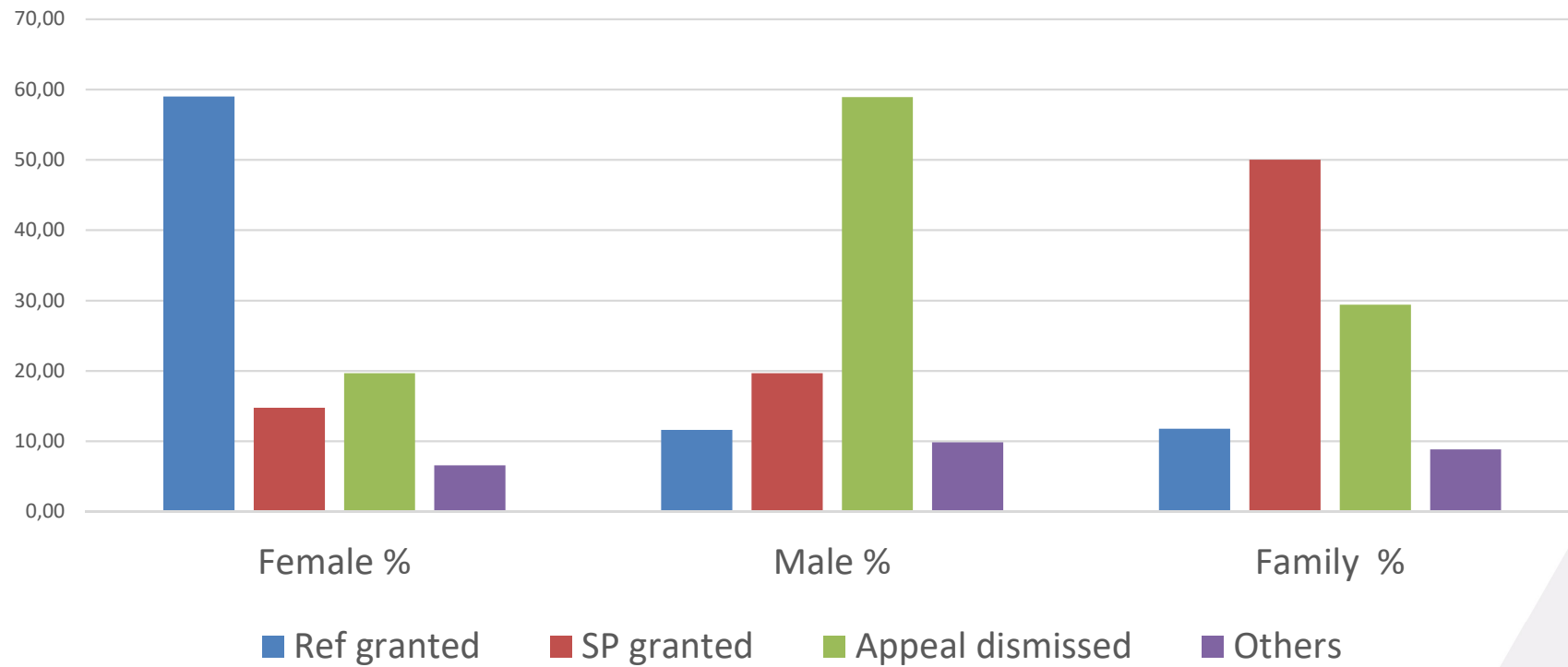
AsyIG §§3,8: BVwG judgments with/out 'vulnerab*' in %

Court: BVwG; Period: 01.01.2014 - 01.11.2022; Norms: 'AsyIG §8' oder 'AsyIG §3';
Search term: 'vulnerab*'; Search Date: 08.11.2022

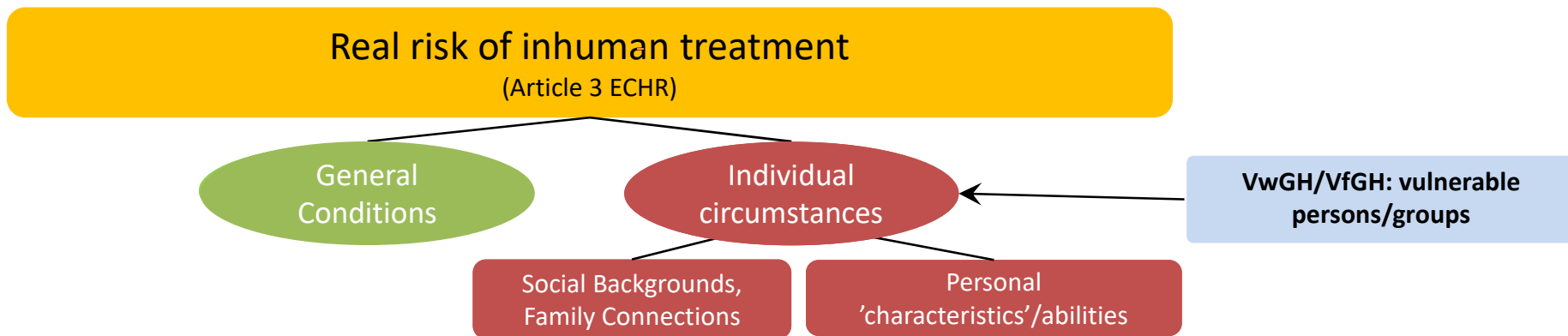
■ no 'vulnerab*' in jdgmt ■ 'vulnerab*' in jdgmt, but not in chapter 'Rechtliche Beurteilung'
■ 'vulnerab*' in jdgmt, but inconclusive delineation of chapters ■ 'vulnerab*' in chapter 'Rechtliche Beurteilung'



Analysis of case law (BVwG): Gender/family and outcome %



Subsidiary protection status: Eligibility Criteria, Sec. 8(1) Asylum Act



ECtHR caselaw

Article 4(3) Qualification Directive: Assessment 'on an individual basis'

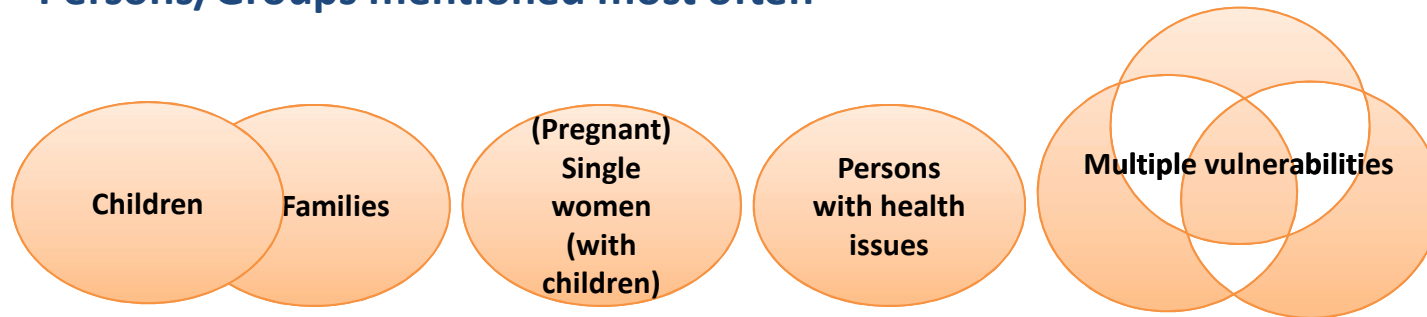
- '... includes taking into account' inter alia relevant facts relating to country of origin, '**individual position and personal circumstances of the applicant**, including **factors such as background, gender and age**'

VwGH: assessment on individual basis

- **holistic assessment of risks**
- must relate to personal situation in relation to general human rights situation; concrete and comprehensible findings

**NEW: Particular
vulnerability!**

Persons/Groups mentioned most often

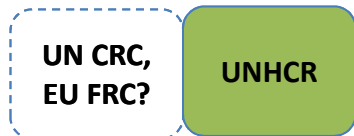


‘a particularly vulnerable person’

‘a particularly vulnerable group of persons in need of special protection’

Art 21 EU Reception Conditions Directive (RCD)

Obligation of MS to take into account in the national law implementing RCD ‘the **specific situation of vulnerable persons** such as **minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence**, such as victims of female genital mutilation’



Obligation to take particular vulnerability into account

- Holistic assessment of possible risks from point of view of particular vulnerability (e.g. of children, in view of special need for protection)
- Assessing in detail actual concrete return situation for concrete person, concrete findings, no blanket assumptions
- Use up-to date and relevant COI, e.g. reflecting experiences of children as particularly vulnerable applicants

→ Are these really new obligations? Added value?

- Placing a marker on certain characteristics/conditions, but does not relieve from requirement of individual assessment

Other consequences:

- Exceptional circumstances/living conditions: vulnerability – easier to fulfil high threshold?
- Suspensive effect of appeal

Does it lead to more fairness/equality?

- Issues that are now framed as vulnerabilities had to be taken into account before (e.g. pregnancy, age, gender...) → legally no added value
- From a discourse-analytical point of view it is a problematic concept → metaphor of “wound” means that it is a stigmatizing concept → stereotyping and stigmatisation of certain groups should be avoided (e.g. CEDAW, CERD, CRPD)
- Racialization of legal discourse → racist discourse often uses somatic terminology
- Stereotypical representation of masculinity and femininity

Conclusions and possible way forward

- Vulnerability is regarded by caseworkers as support (making reasoning easier; ‘marker’ for (not) granting protection) BUT individual assessment has to be conducted anyway
- Problematic as it contributes to stigmatizing and stereotyping representation of asylum seekers → gendered racialization of legal discourse
- Existing legal framework/case law already provides adequate basis for taking into account ‘individual position and personal circumstances of the applicant, including factors such as background, gender and age...’ (Art. 4(3) EU QD) → no need to rely on problematic terminology such as vulnerability