

SPECIAL ISSUE ARTICLE

‘Route Causes’ and Consequences of Irregular (Re-)Migration: Vulnerability as an Indicator of Future Risk in Refugee Law

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Abstract

States’ bordering practices force individuals to undertake dangerous migratory journeys and put them at risk of severe human rights violations. Yet, irregular arrivals who are found not to be at risk of serious harm in their countries of origin are perceived as voluntary migrants and are therefore assumed not to be in need of protection. This article employs the concept of vulnerability to challenge the idea that both the initial and subsequent dangerous migratory journeys are undertaken voluntarily. Based on an analysis of trafficking-based asylum claims from the UK and Germany, the article shows that both re-trafficking and irregular re-migration result from vulnerabilities which converge to preclude reintegration in the country of origin and access to livelihood options. While some of these vulnerabilities are likely to be present at the time of the initial dangerous journey already, the article pays particular attention to ‘consequential vulnerabilities’ brought about by previous migration experiences. It then introduces the concept of ‘route causes’ of irregular re-migration to describe factors which heighten the risk of re-migrating irregularly and therefore establish a risk on return related to harm experienced during irregular migration, rather than in the country of origin. Thus, the article shows that the vulnerability concept informs the future risk analysis in refugee law and argues that, just like a risk of re-trafficking, a risk of irregular re-migration could form the basis of an asylum claim.

Keywords: refugee law; future risk; human trafficking; irregular migration; vulnerability

1 Introduction

Irregular migration is the result of states’ attempts to deter certain individuals from entering and staying in their territory (Squire *et al.*, 2021, p. 98). By utilising extraterritorial border control mechanisms (Moreno-Lax, 2017), such as visa regimes, carrier sanctions and a range of ‘contactless’ control measures (Moreno-Lax and Giuffré, 2019), states seek to impede and restrain migration, forcing migrants onto ever more dangerous routes. However, rather than being understood as a reaction to states’ border control policies, in international law, irregular migration facilitated by a third party is conceived of as a crime, either as ‘smuggling of migrants’ (UN Smuggling Protocol) or as ‘trafficking in persons’ (UN Trafficking Protocol). Even though they are separated conceptually, from the point of view of the individuals affected, trafficking and smuggling are extremely similar, for example in terms of the underlying reasons for migrating (Buckland, 2009) and the migration routes taken (Dimitriadi, 2016). Harm experienced during trafficking and smuggling is also similar and can entail, for example, physical and sexual violence, forced labour and deprivation of liberty (UNHCR, 2006; UNHCR, 2017).

Nevertheless, state responses to ‘trafficked persons’, on the one hand, and ‘smuggled persons’, on the other, differ substantially. Under European and EU law, the former are entitled to a range of protection and assistance measures (see e.g. Council of Europe Convention on Action against

Trafficking in Human Beings (hereinafter ECAT), Arts 12–14), are perceived as a ‘vulnerable’ group (Directive 2013/33/EU, Art. 21), and can claim refugee status based on their trafficking experience and a future risk of harm related thereto (Atak and Simeon, 2014). Smuggled persons, on the other hand, do not normally benefit from assistance measures as a result of being designated as ‘smuggled migrants’.¹ They are not considered to be ‘vulnerable’ *per se* and cannot claim refugee status based on their smuggling experience, although they may be able to claim protection where the smuggling experience leads to harm traditionally associated with a trafficking experience, such as exploitation or debt bondage.

While it has been suggested that smuggled persons are also victims in need of protection for the purpose of criminal law (Spena, 2021), this article focuses on the question whether smuggled persons may be entitled to refugee status based on their smuggling experience and future fear related thereto. Many refugees are, of course, also smuggled persons, but their entitlement to refugee protection is based on a future fear of harm in their country of origin, unrelated to the smuggling experience. This article, however, focuses on the question whether, just like trafficked persons may be at risk of re-trafficking and therefore entitled to refugee status, smuggled persons may be at risk of (experiencing harm during) irregular re-migration and therefore also entitled to refugee protection. Thus, this article analyses trafficking-based asylum claims from the UK and Germany in order to challenge the distinction between trafficked and smuggled persons. It focuses, in particular, on courts’ analysis of the risk of re-trafficking and the vulnerability concept employed in this context, to argue that the same factors which put trafficked persons at risk of re-trafficking may put smuggled persons at risk of irregular re-migration. The article explores the relationship between vulnerability, risk of harm and protection needs. In relying on the vulnerability analysis derived from trafficked persons’ asylum claims, it challenges the idea that dangerous migratory journeys are undertaken voluntarily. While the purpose of the article is to examine whether smuggled persons can meet the future risk element of the refugee definition in a manner similar to trafficked persons, it is not within the scope of this article to consider whether smuggled persons can meet the remaining elements of the refugee definition.²

This article analyses trafficking-based asylum claims in order to draw analogies between the experiences of trafficked and smuggled persons, but it does not intend to question the distinction between the two in criminal law and also recognises that experiences during irregular migration are not relevant to all smuggled persons’ asylum claims (seeing as many recognised refugees have been smuggled but their claims are separate from this experience). Thus, in order to focus the analysis on the context of refugee law and only on those smuggled persons who are not entitled to refugee protection based on a future fear of harm in their country of origin, I use the term ‘irregularised migrants’ to describe the smuggled persons in question. I conceive of irregularised migrants as people who undertake dangerous migratory journeys due to a lack of legal migration

¹It should be noted that, in the EU context, protection foreseen for trafficked persons under Council Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities, [2004] OJ L 261 may be extended to smuggled person on a discretionary basis.

²I have shown elsewhere that harm experienced during irregular migration and outside the country of origin can amount to persecution, see Grundler M (forthcoming) *The Locus of Persecution Reconsidered: Risk of Re-Trafficking, Cumulative Harm and Failure of State Protection, International Journal of Refugee Law*. Regarding the nexus element of the refugee definition, briefly, I propose that there is a nexus between the harm experienced during irregular migration and the particular social group ‘persons in vulnerable situations’. As discussed further below in this article, trafficked persons and irregularised migrants have certain vulnerabilities, some of which may lead to differential social perception, including having ‘illegitimate’ children, being stigmatised, lacking family support, or having mental health issues. In addition, these vulnerabilities can be understood as immutable characteristics in so far as an individual cannot disassociate themselves from them at the time of refugee status determination. Further, vulnerability is related to a migration experience, which itself is an experience that cannot be changed. Thus, I would argue that ‘persons in vulnerable situations’ can meet both the social perception and the immutable characteristics test. As outlined below, vulnerability indicators explain why an individual is at risk of re-migrating irregularly, thus establishing the necessary link between vulnerability and the persecution feared.

pathways, who cannot obtain international protection based on harm feared in their country of origin, or another form of leave to remain, and who, if returned, may re-migrate irregularly. While most ‘irregularised migrants’ will be smuggled persons whose travel was facilitated by a third party, irregularised migrants may also migrate by own means rather than with the help of smugglers. What defines irregularised migrants is the fact that they have undertaken a dangerous migratory journey, but are not granted any form of protection, so that they are at risk of return to their countries of origin and, as this article will show, potentially at risk of re-migrating irregularly. This is not intended to detract from the fact that trafficked persons, too, face obstacles in obtaining protection, in particular trafficked men (Magugliani, 2022b). Indeed, trafficked persons who are unable to claim protection and who have undertaken a dangerous migratory journey are also irregularised migrants and may benefit from the arguments advanced in this article. According to the way the law is currently interpreted, irregularised migrants are not refugees. This article, however, contends that conceiving of irregular re-migration as a risk could lead to irregularised migrants being reconceptualised as refugees, provided that, in addition to the future risk element, they can meet all other elements of the refugee definition.

The presence of a future risk of harm is essential for qualification as a refugee. According to the 1951 Convention relating to the Status of Refugees, a refugee is any person who:

‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ... (Article 1A(2))’.

The well-founded fear of being persecuted requires a ‘forward-looking apprehension of risk’ (Hathaway and Foster, 2014, p. 105) and the existence of such a risk is assessed based on the applicant’s own testimony and experiences, as well as country of origin information, expert reports, medical records, and other pieces of evidence (*ibid.*, pp. 121–128).

Irregular (re-)migration should be conceptualised as a risk to the enjoyment of basic human rights because it entails harm as serious as, or even more serious than, the harm feared by recognised refugees in their countries of origin. Nevertheless, it is generally assumed that, in the absence of a risk of serious harm or persecution in an individual’s country of origin, that individual would (re-)migrate for economic reasons and would do so ‘voluntarily’ (Hamlin, 2021, pp. 9–18). In this article, I will challenge the idea that irregular (re-)migration for mainly economic reasons is ‘voluntary’, exploring the complex and multiple factors leading to socio-economic deprivation, to argue that a risk of irregular re-migration can be established based on an individual’s vulnerabilities. In keeping with the theme of this Special Issue, I focus on vulnerability as a concept which currently operates at the margins of refugee law, but which deserves to take centre stage in the future risk analysis. Like all contributions to this Special Issue, I acknowledge the role of the law in creating vulnerabilities and the problematic nature of the vulnerability concept (Moreno-Lax and Vavoula, in this issue). At the same time, this article shows that the ambivalent nature of vulnerability reasoning also presents an opportunity to make refugee law more inclusive.

To do so, the article proceeds in three sections. In Section 2, I examine how the risk of re-trafficking is established by analysing trafficking-based asylum claims from the UK and Germany – two jurisdictions chosen as case studies because they operate under the same overarching legal frameworks on the protection of refugees and trafficked persons.³ The section shows that courts in

³Both countries are parties to the Refugee Convention, the UN Trafficking Protocol and the ECAT. Prior to the UK’s exit from the EU, when the majority of the cases discussed in this article were decided, both also applied the EU Trafficking Directive and the EU Qualification Directive, though the UK applied the 2004 version of the latter, while Germany applied the recast 2011 version.

both countries rely on vulnerability as a concept to establish future risk of re-trafficking. Section 3 then turns to vulnerability theory in order to form a better understanding of the different sources of vulnerability identified in the trafficking context. In introducing the concept of ‘consequential vulnerabilities’, the section develops existing theory to show why the vulnerability analysis is useful in the context of refugee law. Section 4 examines whether the vulnerability indicators identified in the trafficking context are also present for irregularised migrants. It argues that the relevant vulnerabilities do not only function as indicators of a future risk of re-trafficking, but more broadly, as indicators of a future risk of irregular re-migration. The section introduces the concept of ‘route causes’ of irregular re-migration – factors which cause irregularised migrants to ‘choose’ a dangerous migratory route while, at the same time, this dangerous route *causes* migrants to develop additional vulnerabilities, which, in turn, exacerbate the risk of irregular re-migration. As such, this article contributes a new perspective to existing theories on migration dynamics and migrant agency in the migration process (for example: De Genova *et al.*, 2015; Van Hear *et al.*, 2018; Atak and Crépeau, 2021; Scheel and Tazzioli, 2022). The article concludes by considering the implications of the findings for the protection needs of irregularised migrants. It argues that since irregularised migrants can satisfy the well-founded fear element of the refugee definition in the same way as trafficked persons, this may mean that, just like the latter, irregularised migrants qualify for refugee protection. This, in turn, has implications for states’ migration policy, particularly their attempts to deter irregular migrants.

2 Vulnerability to re-trafficking

In the context of irregular migration, it is the law itself which creates vulnerability (Moreno-Lax and Vavoula, in this issue). This has also been recognised in the Global Compact for Safe, Orderly and Regular Migration, which calls on states to address and reduce vulnerabilities in migration (Objective 7). At the same time, the vulnerability concept is often used to distinguish and prioritise between different groups of (irregular) migrants and refugees. This is the case, for example, in humanitarian settings (Turner, 2021), or with regard to reception conditions under EU law, which require special arrangements for ‘vulnerable’ groups (Directive 2013/33/EU, Art. 21). Such group-based determination of vulnerability assumes that a need for (additional) protection and assistance follows from being, for example, a woman, a minor, a person with disabilities, or a trafficked person (*ibid.*). Indeed, trafficked persons are seen as a vulnerable group also in the context of refugee law, though understanding of their vulnerability is largely limited to the particular social group ‘trafficked women’, which, in turn, excludes trafficked men from protection (Magugliani, 2022b). While protection needs may indeed exist for individuals belonging to the above-mentioned groups, the assumption that an entire group is ‘vulnerable’ can be disempowering and essentialising (Peroni and Timmer, 2013) and even utilised as an exclusion tool (Hudson, in this issue). Based on these observations, the vulnerability concept appears ill-suited for determining protection needs. However, by tracing how vulnerability is conceptualised in anti-trafficking legislation and trafficking-based asylum claims, I will show that when conducting an *individual* (and situational) rather than a group-based assessment of vulnerability, the concept can contribute to an understanding of why someone is at future risk of harm for the purpose of refugee law. At the same time, the relevant legislation and case law’s understanding of vulnerability is limited by assumptions introduced through the trafficking concept (such as an assumed relationship between vulnerability and female gender, *cf.* Benslama-Dabdoub, in this issue). Thus, as discussed in Section 4.2 below, the vulnerability-based future risk assessment must be broader than what the legislation and case law below offers. As such, the present section only serves as a starting point for understanding the relationship between vulnerability and future risk.

2.1 Vulnerability in anti-trafficking legislation

Before exploring the use of the vulnerability concept in the context of the future risk analysis in refugee law, it is pertinent to examine how vulnerability is conceptualised in anti-trafficking legislation. Indeed, vulnerability is part of the definition of ‘trafficking in persons’, which, according to Article 3(a) of the UN Trafficking Protocol entails:

‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a *position of vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’ (emphasis added).

According to this definition, abuse of a position of vulnerability is one of the ‘means’ employed by traffickers in recruiting, transporting, etc., trafficked persons (Gallagher, 2010, p. 29). The international law definition of human trafficking is reproduced in both the ECAT, a European regional anti-trafficking instrument, and in EU anti-trafficking legislation, the EU Trafficking Directive (2011/36/EU). The UN Trafficking Protocol does not define the concept of vulnerability and, as the United Nations Office on Drugs and Crime (UNODC) notes, it is important to distinguish between ‘vulnerability as a form of susceptibility to trafficking’ and ‘the *abuse of vulnerability as a means by which trafficking is perpetrated*’, while also acknowledging the overlap between the two (UNODC 2013, p. 15, emphasis in original). The focus here is on vulnerability as susceptibility to trafficking. The EU Trafficking Directive defines ‘position of vulnerability’ as ‘a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved’ (Directive 2011/36/EU, Art 2(2)). The same phrase is used in the Explanatory Report to the ECAT (Council of Europe, 2005, para 83). Thus, vulnerability is heavily associated with a lack of choice, brought about by a range of factors, which culminate in socio-economic deprivation. As Gallagher and McAdam (2013, p. 13) note, in the trafficking context,

“vulnerability” is typically used to refer to those inherent, environmental or contextual factors that increase the susceptibility of an individual or group to being trafficked. These factors are generally agreed to include human rights violations such as poverty, inequality, discrimination and gender-based violence — all of which contribute to creating economic deprivation and social conditions that limit individual choice and make it easier for traffickers and exploiters to operate’.

This view aligns with Baumgärtel and Ganty’s conceptualisation of vulnerability as ‘situational and socially induced’ (this issue). As the following two subsections show, a similar understanding of vulnerability to *re*-trafficking is employed in UK and German case law on trafficking-based asylum claims.

2.2 UK Case Law: Vulnerability as an indicator for future risk

In UK case law, a shift in the assessment of future risk of *re*-trafficking has taken place in stages over the last couple of years, beginning in 2008 with an assessment of the vulnerabilities of women trafficked for sexual exploitation and moving on to an engagement with the vulnerabilities of individuals trafficked for forced labour from 2016 onwards. It must be acknowledged here that the majority of the available case law deals with the experiences of women trafficked for sexual exploitation, which may limit the assessment of vulnerability to this particular situation and group of persons. Nevertheless, as explained below, the vulnerability analysis has more recently also been applied to male claimants.

Whereas UK courts used to take the stance that an individual with a previous trafficking experience would be wiser the next time around and would not be deceived into being trafficked again, for example in the case of *MP*,⁴ or in *HC & RC*⁵ – two cases in which the applicants were denied protection – the courts now accept that a previous trafficking experience contributes to trafficked persons' vulnerability to re-trafficking. The above-mentioned shift began with the case of *SB*,⁶ which concerned a Moldovan woman who was trafficked to the UK for sexual exploitation, feared being re-trafficked and was granted refugee status. With regard to the risk of re-trafficking, the Tribunal hearing her case first considered the structural issues underlying human trafficking, noting, in particular, that:

'the fact that Moldova is Europe's poorest nation taken in conjunction with other factors (such as family relations, lack of employment, lack of awareness of the dangers of being trafficked as well as corruption which enables traffickers to operate) go some way towards explaining the reasons why individuals are pressurised to, or feel compelled to, enter into arrangements which result in their being trafficked' (para. 105).

The Tribunal then considered how a previous trafficking experience affects a trafficked person's ability to re-integrate in her country of origin and how this relates to risk of re-trafficking, highlighting the impact of:

'social stigmatisation of victims of trafficking for sexual exploitation and the fact that victims of trafficking for sexual exploitation rarely avail . . . themselves of follow-up assistance because of concerns about members of their home communities learning about their experience. Social stigmatisation is mentioned as one of the difficulties faced in any reintegration process, as well as one of the reasons for the phenomena of re-trafficking . . .' (*ibid.*).

Thus, the Tribunal took into account both structural factors and the appellant's personal circumstances in assessing the risk of re-trafficking, while pointing to the difficulties these factors would pose to the appellant's reintegration in the country of origin. This approach was strengthened further in the 2010 case of *AZ*,⁷ which concerned a Thai woman who was forced into sexual exploitation in the UK and was also granted refugee status. The Tribunal acknowledged that mere knowledge of the trafficking process does not protect trafficked persons from being re-trafficked, finding that:

'[i]t could be said that having been trafficked once, [the appellant] would be wiser the next time round. However, the evidence indicates the opposite is the case and that former victims of trafficking are even more *vulnerable* to re-trafficking because they have already been through the business and know how to be compliant' (para. 150, emphasis added).

Thus, in this judgement, the Tribunal introduced the concept of vulnerability to explain risk of re-trafficking. It held that this risk depends on the applicant's 'age . . . marital status, domestic background, familial support network, educational level, qualifications, past work experience and availability of employment' (para. 144). With regard to the appellant herself, the Tribunal found that she had 'no family support, no home and limited education' (para. 146) so that it 'would be difficult [for her] to reintegrate into her home community', also because of her 'fragile state of mind' (para. 148).

⁴*MP (Trafficking – Sufficiency of Protection) Romania* [2005] UKIAT 86.

⁵*HC & RC (Trafficked Women) China* CG [2009] UKAIT 27.

⁶*SB (PSG – Protection Regulations – Reg 6) Moldova* CG [2008] UKAIT 2.

⁷*AZ (Trafficked women) Thailand* CG [2010] UKUT 118 (IAC).

Similar underlying reasons for an inability to reintegrate and thus for re-trafficking are listed in *AM and BM*⁸ and *TD and AD*,⁹ both of which concerned women trafficked for sexual exploitation and granted refugee status. In *AM and BM*, the Tribunal stated that in order to assess the risk of re-trafficking, the applicant's individual characteristics have to be taken into account, 'includ[ing] her age, her social, economic and educational background, the network of support which she might have, whether or not she has an illegitimate child and the way in which she has been trafficked in the past' (para. 182). Meanwhile, in *TD and AD*, the Tribunal considered that returned trafficked persons may face 'stigma, isolation, financial hardship and uncertainty, a sense of physical insecurity and the subjective fear of being found either by their families or former traffickers,' which makes reintegration into the home society difficult, especially for persons with 'mental illness or psychological scarring' (para. 119).

Similar factors precluding reintegration and underlying the risk of re-trafficking also apply where the applicant was trafficked for domestic servitude rather than sexual exploitation (although the two may overlap), as discussed in the case of *HD*, another case resulting in refugee status.¹⁰ In this case, the Tribunal refers to 'indicators of vulnerability' to re-trafficking (para. 169), such as '[r]ejection by her family', 'being psychologically damaged', which 'may render [the applicant] less able to find work or access employment and result in her being at enhanced risk of destitution', '[b]eing stigmatised and ostracised', '[h]aving been subjected to sexual abuse/exploitation during domestic servitude', experiencing destitution or poverty, as well as 'pressure from her family . . . to provide an income from sexual exploitation' (para. 168).

Further, the case law suggests that men, too, can be vulnerable to (re-)trafficking. An example of this is the case of *BT*,¹¹ which concerned a Vietnamese man trafficked for forced labour. The Tribunal found that '[t]he trafficking came about because of his *extreme vulnerability* which was brought about by poverty, loss of land, mental health problems and family responsibilities to name but a few of the circumstances' (para. 38, emphasis added). The Tribunal found that he was at risk of re-trafficking and entitled to refugee status. Another example is the case of *JFK*,¹² in which a Chinese man trafficked for labour exploitation was found to be 'vulnerable to re-trafficking' and granted refugee status (para. 40). In *TAN*, a male minor trafficked for sexual exploitation was found to be vulnerable to re-trafficking,¹³ while in *TVD*,¹⁴ the appeal of a gay man trafficked for sexual exploitation was allowed on asylum grounds, with the First-Tier Tribunal having found him to have a range of vulnerability indicators. Further, the case of *TDL* suggests that a risk of trafficking can be established based on the applicant's vulnerabilities, even if that applicant has no prior experience of having been trafficked.¹⁵ This case concerned an autistic Vietnamese man whose mother sent him to school in the UK because he was being discriminated against in Vietnam due to his autism. The UT found that due to his mental health issues, lack of a support network in Vietnam, poverty, and lack of education and vocational skills, the applicant was at risk of being trafficked if returned to Vietnam (paras 52–53).

Finally, the relevant vulnerability indicators may preclude reintegration in a region other than the applicant's region of origin, i.e. they may preclude an internal protection alternative (IPA). Although the IPA concept is not explicitly part of the refugee definition, in state practice, and indeed in EU law, where an applicant can safely move to, and remain in, a region in their home country where they are either not at risk of persecution or where state protection is available, that applicant will not be entitled to refugee status (Directive 2011/95/EU, Art. 8). As evident from

⁸*AM and BM (Trafficked women) Albania* CG [2010] UKUT 80 (IAC).

⁹*TD and AD (trafficked women) CG* [2016] UKUT 92 (IAC).

¹⁰*HD (Trafficked women) Nigeria* CG [2016] UKUT 00454 (IAC).

¹¹*BT v. SSHD* [2019] UKUT (IAC) PA/07306/2017.

¹²*JFK v. SSHD* [2018] UKUT (IAC) PA/06854/2016.

¹³*TAN v. SSHD* [2016] UKUT (IAC) AA/05644/2014.

¹⁴*TVD v. SSHD* [2022] UKUT (IAC) PA/00252/2020.

¹⁵*TDL v. SSHD* [2021] UKUT (IAC) PA/00358/2020.

cases such as *AM and BM* (paras 183 and 187) and *ES* (paras 67–75),¹⁶ however, trafficked persons' vulnerabilities may preclude them from reintegrating in the entirety of the country of origin, so that a risk of persecution can be assumed to exist country-wide. Further, the cases of *HC*¹⁷ and *LVC*,¹⁸ both resulting in refugee status for the applicants, show that this reasoning, again, also applies to male claimants. *HC* concerned a man trafficked from Vietnam to Serbia, where he performed forced labour in a factory. The Tribunal found that he had 'no family support, few educational or vocational skills', and had experienced trauma, all of which would not only put him at risk of re-trafficking, but also preclude internal relocation (paras 42, 43 and 48). *LVC* concerned another Vietnamese man who was trafficked for cannabis cultivation. The Tribunal found that he 'faced a real risk of trafficking *wherever* he lived in Vietnam ... because the cumulative impact of his personal characteristics rendered him especially vulnerable', mentioning, in particular, lack of family support, education and employment prospects, as well as his poor mental health (para. 8, emphasis in original).

Based on the above cases, it can be concluded that in UK case law, future risk of re-trafficking is seen as being connected to the presence of 'vulnerability indicators'. These exacerbate one another and converge to impact a person's livelihood options, resulting in socio-economic deprivation and, ultimately, re-trafficking. As such, the case law acknowledges that, under certain circumstances, a person may have no choice but to 'consent' to being (re-)trafficked in order to ensure their economic survival. The vulnerability indicators for risk of re-trafficking can be summed up as: young age, poverty, lack of employment opportunities and experience, having little education, having no family or other support networks in the country of origin, including being unmarried, or experiencing pressure from the family to earn money, having mental health issues, experiencing stigmatisation and having 'illegitimate' children.

In addition, although not explicitly stated, since the majority of the available case law discusses the trafficking experience of female claimants, female gender may be seen as a vulnerability indicator (on the problematic nature of equating female gender with vulnerability, see Benslama-Dabdoub, in this issue). At the same time, male gender has been cited as a factor countering vulnerability. This was the case in *TT*,¹⁹ which concerned a Vietnamese man who was trafficked to Thailand, France and finally to the UK, where he performed forced labour on a cannabis farm for a year. Counsel for the appellant argued that he "ticked all the boxes" for being at risk of re-trafficking if returned to Vietnam, since 'he owed money to the traffickers; he had no family in Vietnam and had no support network; he had barely any education; and he had no vocational skills or other resources available to him' (para. 26). The Court of Appeal, however, found that the applicant was not at risk of re-trafficking, but was 'an able-bodied young man with work experience' who could relocate internally (*ibid.*). Indeed, despite a number of cases (cited above), which show a growing understanding of men's vulnerability, as Magugliani (2022a; 2022b) has shown, UK decision-makers systematically denied men's vulnerabilities and protection needs in decisions issued only a few years before the cases mentioned. As such, while the presence of vulnerability indicators suggests that there is a risk of re-trafficking, their presence does not result in an automatic finding of risk for every appellant. Rather, an individual assessment of each applicant's vulnerabilities in the context of their overall circumstances must be made to establish whether or not the person in question is at risk of re-trafficking. Vulnerability reasoning is at the heart of this assessment in UK case law and, as the next subsection will show, in German case law as well.

¹⁶*ES* (s82 NIA 2002, *Negative NRM*) [2018] UKUT 335 (IAC).

¹⁷*HC v. SSHD* [2021] UKUT (IAC) PA/05060/2019.

¹⁸*SSHD v. LVC* [2021] UKUT (IAC) PA/06804/2019.

¹⁹*TT (Vietnam)* [2019] EWCA Civ 248.

2.3 Future risk and vulnerability in German case law

As in the UK, in German case law, some judgements explicitly link vulnerabilities and a future risk of re-trafficking. The relevant case law does not use the term ‘vulnerability indicators’, nor indeed ‘vulnerability’. Instead, in several cases, the courts mention the term *Zwangslage*, which can be translated as ‘predicament’, and which stems from the codification of part of the trafficking definition’s means element in the German Criminal Code. Despite these differences in language, parallels to the indicators identified in UK case law can be observed. Indeed, as the analysis below shows, courts in both countries rely on the same vulnerability criteria, so that I will continue to refer to ‘vulnerability (indicators)’ throughout this section to highlight similarities between UK and German case law. There are, however, limitations to this body of German case law, which focuses on the experiences of female claimants and the risk of sexual exploitation. This, in turn, may colour courts’ perceptions of who is and is not ‘vulnerable’.

In 2014, the Administrative Court (AC) Stuttgart, in deciding the case of a Nigerian applicant brought to Italy for sexual exploitation, found that she would be at risk of having to return to this arrangement due to a lack of education and the general economic situation in Nigeria, which, coupled with stigmatisation and rejection by her family, would leave her no other choice.²⁰ Similarly, in a 2020 judgment, the AC Magdeburg found that the applicant was at increased risk of re-trafficking due to her poverty, lack of education and family support and mental health issues.²¹ The applicant in question, who was granted refugee status, was a Nigerian woman who was brought to Germany for sexual exploitation. In another 2020 judgment, the AC Stuttgart granted refugee status to a Nigerian woman trafficked for sexual exploitation based on a risk of re-trafficking due to being a single mother with outstanding debts to the traffickers, who had no family support, little education and employment experience and who would be ostracised.²²

As in UK case law, in German case law vulnerability indicators may also preclude an IPA. Thus, the AC Wiesbaden found that a Nigerian woman had no IPA due to a lack of family support and lack of livelihood options.²³ The appellant had been taken to Germany to work as a sex worker, feared both reprisals from her traffickers and re-trafficking, and was granted refugee status. Similarly, the AC Würzburg found that a Nigerian woman trafficked to Italy for sexual exploitation had no feasible IPA due to a lack of education and family support ensuing from stigmatisation.²⁴ This woman, too, feared reprisals and re-trafficking and was granted refugee status. Further, the AC Cologne, in considering whether a Nigerian woman, who feared reprisals from the woman who had trafficked her, had an IPA, took into account that the applicant was a single mother of two small children with no family support, who had not finished her education and who would be at risk of destitution. The AC held that there was no IPA and that she was entitled to refugee status.

Based on the above judgments, it is clear that German case law takes a similar approach to establishing risk of re-trafficking, at least for women trafficked for sexual exploitation, basing this on vulnerability indicators and a resulting inability to reintegrate and make a livelihood in the country of origin. However, as in UK case law, there is no automatic finding of a risk of re-trafficking as soon as (some) vulnerability indicators are present. Indeed, it is assumed that such a risk can be countered in certain situations. Thus, the AC Augsburg found that a woman who had been trafficked from Nigeria to Italy for sexual exploitation was not at risk of re-trafficking, since she and her minor children could receive economic support from the appellant’s 27-year-old daughter on return to Nigeria.²⁵ The same year, the AC Düsseldorf found that, despite a lack of family support in Nigeria,

²⁰AC Stuttgart, A 7 K 1405/12, 16.05.2014.

²¹AC Magdeburg, 6A 40/19 MD, 11.02.2020.

²²AC Stuttgart, A 1 K 8819/18, 5770443, 16.11.2020.

²³AC Wiesbaden, 3 K 1465/09.WI.A, 14.03.2011.

²⁴AC Würzburg, W 2 K 14.30213, 17.11.2015.

²⁵AC Augsburg, Au 7 K 16.31586, 21.07.2017.

the appellant, who was a suspected victim of trafficking, was not in need of protection because she had been able to make a living before leaving Nigeria.²⁶

Nevertheless, overall, it can be concluded that vulnerability indicators are considered in connection with risk of re-trafficking in both UK and German case law. In this context, it is important to highlight, once again, that the vast majority of applicants who are found to be vulnerable and thus at risk of re-trafficking, are female, while male applicants are not normally seen as equally vulnerable. Thus, the case law reflects stereotypical approaches to vulnerability and gender (Magugliani, 2022a and 2022b; Benslama-Dabdoub, in this issue). Even where a male applicant has a prior experience of trafficking or sexual exploitation, courts appear to be less inclined to take vulnerabilities into account. For example, in 2012, the AC Augsburg found that a 36-year-old Nigerian man, who was forced to have sex with clients but was not paid and was also denied medical treatment, was not entitled to protection.²⁷ Despite the facts of the judgment showing that the applicant faced socio-economic deprivation and possibly stigmatisation on return to Nigeria, and that he had little education, as well as health issues, he was not deemed vulnerable, with the Court suggesting that he could avoid destitution by working in the construction sector. As such, although the vulnerability-based future risk assessment mainly considers applicants' individual circumstances, it must be pointed out that there is nevertheless a group-based dimension to this assessment in its focus on female applicants.

Despite the shortcomings in courts' use of the vulnerability concept, it is evident from both UK and German case law that the risk of re-trafficking is established based on the presence of a range of vulnerability indicators, which converge and result in individuals being unable to meet their socio-economic needs in the country of origin, so that they have no choice but to submit to re-trafficking. To situate these findings within existing debates and to develop a better understanding of the vulnerability indicators discussed above, the next section considers existing theories on vulnerability.

3 Vulnerability theory and refugee law

3.1 Vulnerability theory

Although, as explained above, vulnerability is in practice often determined on a group basis (Peroni and Timmer, 2013; Baumgärtel and Ganty, in this issue; Hudson, in this issue), legal theory on vulnerability conceives of vulnerability as individual and situational. Since it is not within the scope of this article to outline all existing vulnerability theories in detail, I will focus on two contributions which are particularly helpful for contextualising the above findings from the trafficking context. Firstly, Fineman, who first developed a theory of vulnerability in law, understands vulnerability as an alternative to the group-based non-discrimination framework in the context of achieving equal treatment (Fineman, 2008). For Fineman (*ibid.*, p. 9), vulnerability arises from human embodiment, 'which carries with it the ever-present possibility of harm'. As such, she conceives of vulnerability as universal, though at the same time, 'human vulnerability is also particular: it is experienced uniquely' by each person due to differences between individuals, for example with respect to health and economic or social capital (*ibid.*, p. 10). Thus, while personal characteristics and a lack of resources can exacerbate a person's vulnerability, they can also 'provide individuals with "resilience" in the face of vulnerability' (*ibid.*, p. 13). In this context, Fineman (*ibid.*, pp. 14–23) mentions health, wealth and education, but also family and other relationships, as well as structural factors, such as the environment in which an individual lives (on this point, see Ippolito, in this issue).

Based on Fineman's vulnerability theory, Mackenzie, Rogers and Dodds (2014, p. 7) have developed a 'taxonomy of three different sources of vulnerability (i.e., *inherent*, *situational*, and

²⁶AC Düsseldorf, 7 K 6086/17, 12.06.2017.

²⁷AC Augsburg, Au 7 K 12.30184, 18.09.2012.

pathogenic) and two different states of vulnerability (i.e., *dispositional* and *occurrent*) (italics in original). Inherent vulnerability broadly corresponds to Fineman's conceptualisation of vulnerability as universal, described by Mackenzie, Rogers and Dodds as 'intrinsic to the human condition' and related to the state of the physical body, including its age and health condition (*ibid.*). Situational vulnerability, on the other hand, is 'context specific' and 'caused or exacerbated by the personal, social, political, economic, or environmental situations of individuals or social groups' (*ibid.*). Pathogenic vulnerability is 'a subset of situational vulnerability' and arises through 'morally dysfunctional or abusive interpersonal and social relationships and sociopolitical oppression or injustice' (*ibid.*, p. 9). Both forms of vulnerability – inherent and situational – Mackenzie, Rogers and Dodds argue, can be either dispositional – where there is the potential to experience vulnerability – or occurrent – where, as the term suggests, vulnerability actually occurs (*ibid.*, p. 8). What both Fineman's and Mackenzie, Rogers and Dodd's approach to conceptualising vulnerability have in common is an interest in understanding the reason(s) for exposure to harm. This, in turn, is helpful when seeking to apply vulnerability reasoning in the context of the future risk analysis in refugee law.

3.2 Towards an understanding of 'consequential' vulnerabilities

Indeed, Mackenzie, Rogers and Dodd's taxonomy is useful to categorise the vulnerability indicators from the trafficking context. Whereas a trafficked person's age, health and gender are inherent sources of vulnerability to (re-)trafficking, most sources of vulnerability are situational, such as poverty, lack of employment opportunities and experience, being unmarried, having no family or other support networks in the country of origin, or experiencing pressure from the family to earn money, having little education, being stigmatised and having 'illegitimate' children. The taxonomy's differentiation between occurrent and dispositional vulnerabilities is also relevant to better understanding future risk in the trafficking context. While some of these indicators are likely to have existed at the time of the initial trafficking, others – in particular stigmatisation, mental health issues and 'illegitimate' children – are brought about by the trafficking experience itself. Thus, while vulnerability is undoubtedly occurrent, both at the time of the initial trafficking and at the time of re-trafficking, those vulnerabilities brought about by the trafficking experience are still dispositional at the time of initial trafficking.

Nevertheless, neither Fineman's nor Mackenzie, Rogers and Dodd's vulnerability framework adequately reflects one particularly important aspect of vulnerability in the trafficking context, which emerges from the above analysis of the case law. The different sources and states of vulnerability proposed in Mackenzie, Rogers and Dodd's taxonomy do not account for the effect of formerly dispositional vulnerabilities becoming occurrent and interacting with other (occurrent) vulnerabilities. In other words, while the taxonomy foresees vulnerabilities which may come about in the future ('dispositional') and acknowledges that vulnerabilities may result from the individual's personal situation ('situational'), including abusive relationships ('pathogenic'), it lacks a term for vulnerabilities which are created by a particular experience and which increase the risk of being exposed to this same situation again. In the present context, the relevant risk is re-trafficking and this risk is increased for individuals with a prior experience of trafficking because this experience leads to additional vulnerabilities. Vulnerabilities acquired through trafficking can be inherent or situational; mental health issues, as a health condition, are an example of the former, while stigmatisation, which is created by a social situation, is an example of the latter. While it should be noted that not all trafficked persons will necessarily experience these vulnerabilities and may not see themselves as vulnerable at all (Andrijasevic, 2010), acquiring additional vulnerabilities is a common consequence of trafficking. As Serughetti explains:

‘[t]he notion of vulnerability in the international definition of human trafficking is ambiguous and generally interpreted in two main ways: first, *as a condition produced by the experience of trafficking itself*, from which special protection obligations derive for states; and second, *as a characteristic of individuals and their environments* that makes them more exposed than others to the risks of human trafficking’ (Serughetti, 2018, p. 25, emphasis added).

Thus, Serughetti effectively sums up the three layers of vulnerability which emerge from the trafficking context and are relevant for the future risk enquiry: individual characteristics (universal/inherent vulnerabilities), surrounding circumstances (particular/situational vulnerabilities) and what I will call ‘consequential vulnerability’ – inherent or situational vulnerabilities brought about by the initial trafficking experience, which make re-trafficking more likely. This corresponds to what Timmer, in researching the use of the vulnerability concept by the European Court of Human Rights (ECtHR), calls ‘*ex-post* vulnerability’, describing instances where a person is ‘particularly vulnerable after (and because of) suffering [a certain] kind of human rights abuse’ (Timmer, 2016, p. 155). In this context, it is important to note that these different layers of vulnerability are likely to exacerbate one another, so that different vulnerabilities must be considered holistically as reasons of exposure to harm. Timmer, noticing a similar convergence of different vulnerabilities in ECtHR case law, calls this ‘compounded vulnerability’ (*ibid.*, p. 161).

Understood in this way, the vulnerability concept can make a meaningful contribution to the future risk analysis in refugee law (see also Ippolito, in this issue). Indeed, both the individualised and situational nature of the vulnerability enquiry and its interest in the reasons for exposure to harm fit well with refugee law, more specifically, with the well-founded fear, or future risk, enquiry. Even if prospective refugees have experienced persecution in the past, in order to be eligible for refugee status, they must have a forward-looking fear of experiencing persecution. Refugee status determination normally involves an individual assessment of the prospective refugee’s circumstances and experiences in the context of information on her country of origin (Hathaway and Foster, 2014, pp. 121–128). In this context, decision-makers often rely on past harm experienced by an applicant and it is generally accepted that ‘evidence of past persecution is ... an especially effective means of informing future risk’ (*ibid.*, p. 165).

Vulnerability reasoning, then, explains why past persecution is relevant. Rather than focusing only on the persecutors and their (presumed) intentions to re-victimise the applicant, vulnerability reasoning puts the focus on the effects past persecution has had on the individual and her ability to evade harm in the future. As explained above, under the vulnerability analysis, an applicant’s individual characteristics and their surrounding circumstances are examined, as well as vulnerabilities resulting from prior experiences of harm. Thus, such consequential vulnerabilities explain what effect past persecution has had on the applicant and how these additional vulnerabilities further constrain their choices, putting them at future risk. In summary, the analysis of trafficking-based asylum claims demonstrates how the vulnerability concept can be employed in refugee law to inform the future risk analysis.

4 A risk of irregular re-migration

4.1 Vulnerability indicators beyond the trafficking context

Since the vulnerability-based future risk assessment described above is of an individualised nature, this assessment cannot be limited to either the group of ‘trafficked persons’ who have experienced trafficking in the past, nor to the trafficking context generally. Indeed, the vulnerability indicators identified in trafficking-based asylum claims may apply beyond the trafficking context and to persons who are similarly vulnerable, but who have not experienced trafficking, such as the applicant in the case of *TDL*, or indeed irregularised migrants.

Although the role of law in generating or entrenching vulnerability in the context of forced displacement is paramount (Moreno-Lax and Vavoula, in this issue), as Baumgärtel and Ganty (this issue) note, ‘migratory vulnerability’ transcends legal status and is created by structural factors. Indeed, it is easily conceivable that irregularised migrants are poor, lack education, employment opportunities and experience, are young and unmarried, and generally have no family or other support networks in the country of origin. If they do have a family network, they may experience pressure from the family to earn money. They, too, may have ‘illegitimate’ children (although this is most likely to be the case mainly for women, for example those who are raped during the migratory journey), mental health issues, or experience stigmatisation if returned to their country of origin. While it is not within the scope of this section to provide evidence for the fact that each of these vulnerability indicators applies beyond the trafficking context, I will briefly look at such evidence with a focus on stigma and mental health issues. Since in trafficking case law vulnerabilities are discussed mainly in relation to female applicants, in this section, I highlight experiences of men to broaden the perspective.

With regard to stigma, Schuster and Majidi’s research on (male) irregular migrants deported back to Afghanistan has found that ‘socio-cultural shame of failure and the suspicions of the community’ are reasons for re-migration (2013, p. 225). This stigma results from a ‘failed’ migration experience, i.e. a failure to return with capital to invest in the home community and to repay debts, and a failure to enable other family members to migrate, as well as the suspicion that, having been deported, an individual must have committed criminal acts (Schuster and Majidi, 2015, pp. 640–641). Likewise, Tyldum (2010, p. 9) notes that ‘[i]n many communities, failed migration experiences with exploitation and abuse are in and of themselves stigmatized’. Stigma may also result from the decision to migrate being seen as abandoning the home community, or from ‘return [being] seen as a failure or a failure to return with adequate wealth/earnings’ (IOM, 2017, p. 2). This is also reflected in the case law to a certain extent. In a 2020 judgment by the AC Stuttgart, for example, the Court found that the appellant was likely to be ostracised upon return for not having returned ‘successfully’.²⁸ Turnbull (2018, p. 49), meanwhile, looks at the stigmatising effects of deportation, explaining that ‘detention and deportation are not typically well understood but still associated with wrongdoing and illegality’ and that ‘those subject to them are guilty by association’ so that the stigma attached to having been deported may ‘impact [their] future career prospects’. Thus, it is clear that not only do irregular migrants who fall outside the trafficking definition experience stigma, but these experiences have similar effects in that they decisively contribute to the decision to re-migrate.

In addition, trafficked persons are not the only group of irregular migrants to experience mental health issues. Indeed, displaced persons ‘are at high risk for chronic mental health disorders because of the multiple stressors they experience before, during, and after their flight’, and ‘are at particularly high risk for post-traumatic stress disorder ... depression, and somatization (emotional trauma or stress experienced as physical symptoms)’ (Ringold, 2005, p. 646). Further, mental health problems are by no means limited to female irregular migrants, but ‘the majority of male migrants’ found their experiences of border crossing traumatic; these men experienced ‘[f]eelings of hopelessness, desperation, lack of self-value and self-esteem’ (Arsenijević *et al.*, 2018, pp. 90–91), as well as ‘psychosomatic symptoms’, such as ‘headaches, tremors and heart palpitations’ (*ibid.*, p. 92).

In sum, as these accounts of the experiences of (male) irregular migrants (who were not trafficked) show, consequential vulnerabilities are brought about not only by a past experience of trafficking, but also by a past experience of migrating irregularly. Coupled with other inherent and situational vulnerabilities, consequential vulnerabilities do not only indicate a risk of re-trafficking, but may put individuals at risk of irregular re-migration. As in the trafficking context, these vulnerabilities may affect an individual’s ability to reintegrate in the country of

²⁸See n 22 above.

origin and to make a living, so that irregular re-migration is ‘chosen’ to address the situation. Thus, re-trafficking and irregular re-migration effectively become ‘a source of resilience’ for individuals who have no other prospects (Fouladvand and Ward, 2019, p. 48). Conceiving of irregular re-migration as a risk, then, has implications for theories on migration dynamics, particularly the allegedly ‘voluntary’ nature of (re-)migration for mainly economic reasons, as discussed in the next subsection.

4.2 From ‘root causes’ to ‘route causes’ of irregular (re-)migration

States tend to react to the possibility of irregular re-migration with deterrence. The border control regime which applies to irregular migrants generally also affects those migrating a subsequent time; in the EU, re-entry bans target those re-migrating irregularly specifically and states attempt to keep returnees in their countries of origin through reintegration assistance (Kohls, 2014, p. 11). The latter approach betrays a simplistic conceptualisation of the reasons why people migrate, a problem generally prevalent in EU migration policy (Squire *et al.*, 2021, p. 105). Indeed, attempts to contain people in their countries of origin through reintegration assistance show that the relevant policy relies on ‘root causes’ theory. Root causes theory seeks to identify the underlying causes of migration, their ‘roots’, usually in order to then influence such migration. So-called root causes of (irregular) migration are thought to include factors ‘such as economic underdevelopment, poverty and unemployment’ and it is believed that by addressing these causes, migration can be reduced (De Haas, 2007, p. 828). This simplistic understanding of why people migrate, however, has been shown to be flawed. Indeed, it has been proven that development assistance increases, rather than decreases, people’s aspirations and ability to migrate (*ibid.*, p. 833).

Thus, there have been attempts to develop more sophisticated models which explain the phenomenon of irregular migration. These include ‘push-and-pull’ models, which take into account not only factors ‘pushing’ migrants out of one country, but also factors ‘pulling’ them towards another (Lee, 1966). Other migration theories focus on migrant agency and speak of ‘drivers’ of irregular migration – ‘factors that may make up the external structural elements shaping the decision space for those considering migration’ (Van Hear, Bakewell and Long 2018, p. 928). The ‘drivers’ model, as developed by Van Hear, Bakewell and Long, comes close to the vulnerability approach discussed above in acknowledging that migration decisions are constrained by structural factors (*ibid.*, p. 930). However, despite conceiving of migration as a process, rather than as a one-off event, this model does not engage with the phenomenon of (irregular) re-migration in particular, nor with the effects of a previous migratory journey on subsequent migration.

In this context, Lemberg-Pedersen’s (2012) concept of ‘border-induced displacement’ is particularly relevant. He conceptualises restrictive border controls as ‘a cause of displacement and forced migration in itself’, arguing that, while there will be an initial cause for the original migratory journey, ‘border-induced forced migration’ constitutes a ‘second-order displacement’ which leads to ‘people [being] constantly uprooted and transferred between control elements’ (*ibid.*, p. 47). Against this background, and building on Lemberg-Pedersen’s approach, I introduce the concept of ‘route causes’ of irregular re-migration.

The underlying premise of the ‘route causes’ approach is that there are factors which cause irregularised migrants to ‘choose’ a dangerous migratory route (this can include ‘root causes’, such as socio-economic deprivation, but also other structural factors, such as a lack of legal migration options), while, at the same time, this dangerous route, and the experiences associated with it, *causes* migrants to develop additional vulnerabilities, which exacerbate the risk of irregular re-migration if returned to the country of origin. The factors which cause irregularised migrants to ‘choose’ a dangerous migratory route are inherent or situational vulnerabilities already present at the time of migrating irregularly for the first time. Meanwhile, the additional vulnerabilities caused by the initial dangerous journey are the consequential vulnerabilities referred to in Section 3.2,

such as mental health issues and stigmatisation. While the effects of these vulnerabilities manifest upon return to the country of origin, they are caused by the initial dangerous journey in so far as they are the result of (experiences encountered during) such journeys. I conceive of the dangerous route in broad terms to include experiences of irregularity – a law-created vulnerability (Moreno-Lax and Vavoula, in this issue) – in countries of transit and destination (such as being undocumented while working), so that individuals who have migrated regularly and, for example, overstayed a visa and experienced the adverse effects of irregularity, can be included in the analysis. As explained above, the vulnerabilities identified in the trafficking context are likely to apply to irregularised migrants generally. However, in the context of the risk of irregular re-migration, other vulnerability indicators, not identified in the trafficking context, may be of relevance. Thus, to form an understanding of the route causes of irregular re-migration, it is necessary to look at the broader structural conditions under which irregular migration takes place.

In this context, Ingram (2018, p. 126) states that structural coercion in the migration context is present where people are ‘compel[led]’ to migrate irregularly due to ‘unreasonable quotas, legal conditions, costs, and lengthy processing that make regular migration impossible for many desperate persons’, as well as the ‘global State system that subjects people to arbitrary abuse (or neglect) by their own governments and by the inequities of international trade agreements and unregulated markets’. He adds that besides ‘political oppression’, circumstances such as ‘civil wars, economic insecurity, and environments devastated by pollution, coastal flooding, and catastrophic weather-related events’ compel people to move (*ibid.*, p. 127; see also Ippolito, in this issue). Thus, in terms of structural factors, or situational vulnerabilities, irregular migration may take place because of a wide array of circumstances in the country of origin, including oppression, conflict, environmental degradation, and poverty. However, it is important to note that not all people affected by factors such as poverty and conflict will be ‘pushed’ to migrate; rather, when faced with such circumstances, people still exercise agency and make decisions whether or not to move (De Haas, 2007, p. 13). Nevertheless, besides socio-economic deprivation, conflict, oppression and environmental degradation can be added to the list of possible vulnerability indicators for irregular re-migration. Importantly, Ingram also highlights the coercive impact of the absence of a right to migrate regularly, so that persons with few or no realistic opportunities to re-migrate regularly should be considered to be more vulnerable to irregular re-migration. To return to Mackenzie, Rogers and Dodd’s taxonomy of vulnerability, the global visa regime may be regarded as an example of pathogenic (legally-entrenched) vulnerability – a form of socio-political injustice (*cf.* Van Houtum, 2010) embedded in law (Moreno-Lax and Vavoula, in this issue).

While the structural factors discussed above may also be considered as part of ‘root causes’, ‘push-pull’ and ‘drivers’ models of migration dynamics, what thinking on route causes adds to these debates is an understanding of how experiences during previous migratory journeys add vulnerabilities, which interact with pre-existing inherent and situational vulnerabilities, thereby further constraining an individual’s choices. As explained above, irregularised migrants are likely to experience consequential vulnerabilities, such as mental health issues and stigma. Such consequential vulnerabilities exacerbate vulnerabilities which existed prior to the initial departure from the country of origin. Further, consequential vulnerabilities may exacerbate and compound one another. In fact, mental health issues can lead to stigmatisation (Nguï *et al.*, 2010) and vice versa (Spittel *et al.*, 2019). This is important because, while it must be acknowledged that some situational vulnerabilities, such as mental health issues, may be temporary, they can result in new (and potentially more lasting) vulnerabilities, such as stigma.

Thus, just like persons with a prior experience of being trafficked are at an even higher risk of re-trafficking, irregularised migrants will be at an increased risk of re-migrating irregularly precisely because they have previously undertaken a dangerous migratory journey (or experienced the adverse effects of being undocumented in countries of transit and destination). The ‘route causes’ concept describes those factors which heighten the risk of irregular re-migration. As such, while it is often alleged that in the absence of a risk of persecutory harm in the country of origin,

(re-)migration is voluntary, vulnerability reasoning makes it clear that the decision to re-migrate irregularly is not taken voluntarily, but is likely to constitute a response to vulnerabilities, which prevent reintegration in the country of origin and thus access to livelihoods.

In summary, like the ‘border-induced displacement’ approach, ‘route causes’ theory focuses on what happens *after* the initial displacement. However, while Lemberg-Pedersen (2012; Moreno-Lax and Lemberg-Pedersen, 2019) focuses on the responsibility of states of destination for inducing displacement, my focus is on the experiences of irregularised migrants during such displacement and the effect these experiences have on inducing future migratory journeys. In this sense, the route causes approach is similar to what Squire *et al.* (2021, pp. 112–133) refer to as ‘intersecting drivers and conditions of flight’ – conditions encountered during and created by dangerous journeys, which result in onward migration. While it is not within the scope of this article to comprehensively discuss all conditions (or vulnerabilities) migrants face during irregular migration, I have given a range of examples of relevant factors in this section, which nevertheless by no means constitute an exhaustive list. In explaining that intersecting drivers and conditions of flight may mean that individuals on the move never reach safety, Squire *et al.* (*ibid.*, pp. 121–122) lament that these conditions are not being taken into account in the refugee status enquiry. Yet, as this article has shown, it is possible to do precisely that when approaching route causes of irregular re-migration as vulnerabilities which inform the future risk enquiry as part of the refugee status determination process.

5 Conclusion

This Special Issue approaches the vulnerability concept and its interplay with law and migration critically (Moreno-Lax and Vavoula, in this issue). As several of its contributions show, the concept is often used to exclude individuals from protection (Hudson, in this issue) or frame them as powerless (Benslama-Dabdoub, in this issue). This is clearly also a danger in trafficking-based asylum claims, which focus largely on the experiences of women trafficked for sexual exploitation, thus potentially limiting the investigation into the reasons for trafficked (and smuggled) persons’ vulnerability more generally and excluding claimants with diverse genders and experiences. At the same time, vulnerability can be a valuable tool to address protection gaps in the law (Ippolito, in this issue; Baumgärtel and Ganty, in this issue) and indeed, the above analysis has shown that vulnerability reasoning can be extended to both male trafficked persons and, more generally, to irregularised migrants. Thus, this article has approached vulnerability as a tool to make international refugee law more inclusive. Despite shortcomings in the case law, such as a focus on the vulnerability of female claimants, the article has shown that when conceptualising vulnerability as the reason(s) for exposure to harm, the concept aids the assessment of an existence of future risk in refugee law. More specifically, the vulnerability concept creates an understanding of how past experiences of harm impact the risk of being subjected to similar types of harm in the future. In this article, I focused the enquiry on risk of re-trafficking and the corresponding risk of irregular re-migration. Rather than constituting a voluntary choice, the decision to be re-trafficked or to re-migrate irregularly is made because vulnerabilities converge to prevent an individual’s reintegration and socio-economic survival in the country of origin. Thus, ‘vulnerable’ irregularised migrants are not powerless, but exercise agency to respond to their situation, even if this agency is heavily restricted.

As such, even if ‘vulnerable’ irregularised migrants are not at risk of serious harm in their country of origin, they may nevertheless be in need of protection based on the harm they will experience during the renewed dangerous migratory journey they are likely to undertake. Since (some) irregularised migrants can satisfy the well-founded fear element of the refugee definition in the same way as trafficked persons, i.e. based on having similar vulnerabilities, this may mean that, just like the latter, irregularised migrants should be recognised to be in need of and entitled to

refugee protection, provided they can meet the remaining elements of the refugee definition. As mentioned in the Introduction, it is not within the scope of this article to consider whether the remaining elements of the refugee definition can be met. That said, having drawn analogies between trafficked persons and irregularised migrants with regard to the well-founded fear element of the refugee definition, a similar exercise can be conducted with regard to the question of the presence of persecution and the nexus to Refugee Convention grounds.

Overall, when considering the ‘route causes’ and consequences of irregular migration, it becomes clear that states’ restrictive migration policies contribute to creating the vulnerabilities which lead to irregular re-migration. By extension, assuming that irregularised migrants can meet the remaining elements of the refugee definition, states may be creating a new category of claimant entitled to refugee protection. This, in turn, has implications for these states’ migration policy. Unless states cease to attempt to exclude irregular migrants through extraterritorial border controls (Moreno-Lax, 2017), they may have to include (certain) irregularised migrants as refugees in accordance with their obligations under the Refugee Convention.

Acknowledgment. This article belongs to the Special Issue: *Law, Migration and Vulnerability: From the Margins to the Centre*, edited by Violeta Moreno-Lax and Niovi Vavoula. A previous version was presented at the Conference: *Conflicting Responses to Refugees and Migrants in Covid-19 Europe*, Queen Mary Law School, 11 December 2020, <https://www.qmul.ac.uk/law/events/items/maps-conference-conflicting-responses-to-refugees-and-migrants-in-covid-19-europe.html>. Both the conference and the contributions to this Special Issue are deliverables of the Migration and Asylum Policy Systems (MAPS) Jean Monnet Network, <https://www.mapsnetwork.eu/>, funded by the Jean Monnet Programme (2018-2022) 599856-EPP-1-2018-1-IT-EPPJMO-NETWORK, Grant decision 2018-1606/001-001. The author would like to thank Violeta Moreno-Lax, Niovi Vavoula and the two anonymous reviewers for their comments on earlier drafts of this article.

Competing Interests. None.

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Cite this article: Grundler M (2024). ‘Route Causes’ and Consequences of Irregular (Re-)Migration: Vulnerability as an Indicator of Future Risk in Refugee Law. *International Journal of Law in Context* 20, 35–53. <https://doi.org/10.1017/S1744552323000344>