



# EUROPEAN POLICYBRIEF

## VULNER

### VULNER POLICY BRIEF: CANADA

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#### KEY MESSAGES

- In Canada, there is an increased recognition of 'migrant vulnerability' in government policy making. This includes, but is not limited to, refugees and asylum seekers. Several pathways to temporary or permanent protection (and status) are already available for migrants considered 'vulnerable'. However, 'vulnerability' is not always defined and lacks clarity in Canadian law and policy.
- This raises critical questions regarding how "vulnerability" is understood and assessed by decision makers involved in immigration and asylum proceedings.
- Lack of conceptual clarity also leads to policy and accountability discrepancies that create a range of administrative 'vulnerabilities'.
- This first Canadian report draws solely on desk research findings. Some of the policy recommendations are subject to revision, following interviews with civil servants and practitioners. Others reflect long-standing issues in the Canadian context.
- Our recommendations are as follows: expand the mandate of a 'designated representative' to all immigration proceedings; develop more consistent and fair oversight and appeal mechanisms to ensure that decision makers effectively and consistently rely on existing guidelines; ensure that training of decision-makers is closely followed by regular, transparent and publicly accessible monitoring and evaluation of the decisions being made; expand access to legal aid in the migration context to all Canadian provinces and territories; compile and provide consistent and publicly accessible data regarding specific groups of migrants, such as migrants ineligible to health care or migrants on a moratorium.

#### INTRODUCTION

The UN Global Compacts for Migration and on Refugees require states to develop their migration and asylum policies in ways that consider the vulnerabilities that migrants and refugees may be facing. In Canada, there are a variety of pathways for vulnerable migrants to gain legal status and protection, be they

temporary permanent. Each pathway has its own specific criteria as to who can apply and under which conditions protection is granted. In addition to these protection mechanisms, legal and policy documents recognize that certain categories of migrants are likely to experience heightened vulnerability, such as immigration detainees, unaccompanied minors, stateless persons, or individuals from countries to which there is a moratorium on removals, and that their specific situation should be considered in proceedings affecting them. Criteria and procedural consequences thus vary widely across immigration and asylum proceedings.

The Canadian team of the VULNER project studied how vulnerable asylum seekers (and other vulnerable migrants) are identified, and how their special reception and procedural needs are assessed and addressed in Canada. They examined legislation, case-law, policy documents and administrative guidelines. This Policy Brief explores the findings, highlighting the challenges and the shortcomings observed in Canada as well as proposing concrete policy recommendations. Given that the study draws solely on desk research, most of these findings are subject to clarification and/or confirmation following our interviews with civil servants and practitioners.

## EVIDENCE AND ANALYSIS

The Canadian team examined over 377 legal and policy documents in their first report, including legislation and regulations, guidelines, manuals, and ministerial instructions produced by government departments. Our study was complemented by an analysis of over 884 cases of the Supreme Court, Federal Court (Trial Division and the Appeal Division), Provincial Courts, and the Immigration and Refugee Board of Canada (IRB). Over 100 secondary sources from documents issued by UN agencies, NGOs and lawyers as well as academic scholarship were also analysed.

Given the massive amount of documentation that the Canadian team had to review in the first phase of the project, our first research report is only based on desk research data. At the time of writing of the first report (December 2020), interviews with civil servants had not begun, but were expected to begin in the following months.

The Canadian protection regime has made many positive and unique steps towards the increasing recognition of migrant vulnerability. A number of government documents and procedural guides were developed to assist decision-makers to better address and respond to vulnerability in their decision making. For example, in 2006, the IRB created a 'vulnerability' guideline (Guideline 8) to assist board members in "providing procedural accommodation(s) for individuals who are identified as vulnerable persons" as they go through Canada's inland refugee determination process. In 2017, the IRB also developed a Guideline (Guideline 9) aimed at "promoting greater understanding of cases involving sexual orientation and gender identity and expression (SOGIE) and the harm individuals may face due to their non-conformity with socially accepted SOGIE norms." With regard to refugees resettled directly from overseas, Canada also regularly admits private sponsorship applicants, in addition to those regularly referred by the UNHCR.

Despite the growing recognition of the existence of 'vulnerability' among migrants in need of protection in Canadian government documents and processes, 'vulnerability' is rarely defined and lacks clarity in Canadian law and policy. More particularly, it is not easy to understand *who* a vulnerable migrant is, and *how* exactly that vulnerability must be addressed. This raises critical questions about how immigration officials use their broad discretionary powers to address such vulnerabilities in practice.

Canadian law and policy provide measures to mitigate the difficulties that 'vulnerable' migrants may face in immigration proceedings, and hence, offer certain procedural accommodations to these migrants (such as priority processing of some claims, allowing a support person to be present, varying the order of questioning, or creating a more informal atmosphere in refugee hearings). However, being identified as a 'vulnerable' or potentially 'vulnerable' migrant on its own does not typically lead to the granting of a protection status. Equally, recognition of vulnerability is rarely paired with the promise to address the underlying issues that contribute to vulnerability in the first place. An exception to this can be found in the administration of Canada's overseas resettlement program. There, the recognition of vulnerability can lead to government officials seeking to match the needs of a vulnerable refugee person with available reception services after resettlement, thus resulting in a durable solution being offered to some of the most vulnerable people.

Overall, the lack of clarity of the concept of 'vulnerability' leads to policy and accountability gaps that create a range of additional, administrative 'vulnerabilities.' For instance, there is a recognition in Canadian law that individuals from certain countries cannot be removed to their country of origin because of a "generalized risk to the entire civilian population" in that country. These are individuals whose claim for protection has been denied and who stay in Canada for years, or decades, in legal limbo, with the 'sword of Damocles' hanging over their head as removals can be reinstated at any time during their stay. Another issue is the restriction or lack of access to legal aid in some Canadian provinces for refugee claimants, including the most vulnerable ones. As well, the lack of legal representation for overseas applicants and detained migrants in Canada who must navigate complex immigration proceedings by themselves, and the lack of a 'designative representative' in non-asylum proceedings, which has detrimental consequences for vulnerable migrants who are unable to appreciate the nature of the proceeding can either create or exacerbate vulnerability.

## POLICY IMPLICATIONS AND RECOMMENDATIONS

While the IRB mandates the appointment of a 'designated representative' to assist unaccompanied minors or adults who are unable to appreciate the nature of the proceedings, there are no provisions for similar appointments in other non-IRB proceedings, such as Humanitarian and Compassionate claims, Pre-Removal Risk assessments or overseas processing. We recommend expanding the mandate of a 'designated representative' within the immigration legislation to *all* immigration proceedings.

Given the broad discretionary power that decision makers enjoy in most immigration and asylum proceedings, we recommend developing more consistent and fair oversight and appeal mechanisms to ensure that decision makers effectively, and consistently rely on existing guidelines.

Our findings show that there are substantial variations in decisions regarding the assessment of the 'vulnerability' of migrants and their specific needs. Additional steps should be taken to prevent stereotyped understandings of their "lived experience" and to develop more consistent assessment tools.

Decision makers can also benefit from regular and standardized training, allowing them to assess the various facets of vulnerability and to weigh them appropriately. It is recommended that training of this nature be closely followed by regular, transparent, and publicly accessible monitoring and evaluation of the decisions being made.

Immigration and asylum processes are very complex, and research shows it is crucial that migrants not be left unrepresented. Access to legal aid for the most vulnerable migrants should therefore be expanded to *all* Canadian provinces and territories.

In Canada, official, consistent, and publicly available data regarding specific groups of migrants, such as migrants ineligible for health care or migrants on a moratorium, is missing or inaccessible. Such data is required to better understand the scope and magnitude of these phenomena.

## THE VULNER RESEARCH PROJECT

This policy brief has been issued by Delphine Nakache, Dagmar Soennecken, Christiana Sagay, Mélissa Mary Anderson, François Crépeau, Edit Frenyo, Zainab Mahmood, Anna Purkey and Rikita Tanotra. It reflects the result of their own scientific data and analyses, which they developed within the framework of the VULNER research project.

The VULNER research project is an international research initiative, whose objective it is to reach a more profound understanding of the experiences of vulnerabilities of migrants applying for asylum and other humanitarian protection statuses, and how they could best be addressed. It therefore makes use of a twofold analysis, which confronts the study of existing protection mechanisms towards vulnerable migrants (such as minors and victims of human trafficking), with the one of their own experiences on the ground.

This policy brief reflects only the authors' views. The European Union and the project coordinator are not liable for any use that may be made of the information contained therein.

## PROJECT IDENTITY

<b>PROJECT NAME</b>	VULNERABILITIES UNDER THE GLOBAL PROTECTION REGIME - How Does the Law Assess, Address, Shape and Produce the Vulnerabilities of the Protection Seekers? (VULNER)
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#### BUDGET

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#### WEBSITE & TWITTER

[www.vulner.eu](http://www.vulner.eu) | @VULNERproject

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#### FURTHER READING

Kaga, M., Nakache, D., et al., *Vulnerability in the Canadian Protection Regime: Research Report on the Policy Framework*. 2021. VULNER **Research Report 1**. [doi: 10.5281/zenodo.5525795](https://doi.org/10.5281/zenodo.5525795)

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