



**TURUN
YLIOPISTO**
UNIVERSITY
OF TURKU

WIGGLE ROOM

Discretionary Power and Vulnerability
in Asylum Procedure

Johanna Vanto



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ABSTRACT

This doctoral dissertation examines how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power, and what implications the use of discretionary power in the asylum procedure may have for applicants who are made vulnerable – in particular, for those applying for queer asylum.

Street-level implementers, or public employees (e.g., caseworkers and judges) and the organisations that employ them, make decisions regarding access to asylum. The scale, complexity, and invisibility of street-level implementers' discretionary power render it difficult to scrutinise. Yet, as this dissertation shows, this scrutiny is crucial, as the authorities' interpretive shifts may risk protection for entire asylum applicant populations.

Previous empirical research on discretion focuses largely on the output of the individual street-level bureaucrat. This dissertation contributes to knowledge on discretion by highlighting how street-level discretionary power in asylum decision-making may be collectivised, or used on a large scale to control migration, and some of it delegated to third parties, such as non-governmental organisations (NGOs). The dissertation finds that the asylum procedure is rendered difficult for asylum applicants to navigate especially when policies are shifty and opaque, when protection criteria are abstract and difficult to grasp, or when approaches are inconsistent from one level of asylum decision-making to the next. This dissertation argues for a novel way of framing vulnerability in the asylum procedure: vulnerability should not only be understood as an inherent characteristic or the circumstances of the individual claimant, but also as *procedural vulnerability*, or a set of structural risks for the claimant that relate, for instance, to the aforementioned shortcomings of the asylum procedure itself.

The dissertation consists of this synthesis and three substudies. The data include asylum decisions concerning 18-34-year-old Iraqi applicants and interviews with legal actors, such as asylum decision-makers and NGO workers, working with asylum-seekers in Finland. Substudy I employed a mixed-method approach, combining both quantitative and qualitative analysis, and substudies II and III used qualitative approaches, such as thematic analysis and qualitative content analysis.

KEYWORDS: discretion, street-level bureaucracy, asylum decision-making, queer asylum, sexual orientation

TURUN YLIOPISTO

Oikeustieteellinen tiedekunta

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TIIVISTELMÄ

Tässä väitöskirjassa selvitetään, kuinka turvapaikkapäätösten tekijät voivat hyödyntää olemassa olevaa lainsäädäntöä ja siihen perustuvaa harkintavaltaansa maahanmuuton kontrolloimiseksi, sekä sitä, millaisia seurauksia harkintavallan käytöllä turvapaikkaprosessissa voi olla haavoittuvaan asemaan joutuneille hakijoille – etenkin yksilöille, jotka hakevat queer-turvapaikkaa.

Ruohonjuuritason lainsoveltajat, yksittäiset julkisen vallan käyttäjät (esim. ylitarkastajat ja tuomarit) ja heidän edustamansa organisaatiot, tekevät päätöksiä turvapaikka-asioissa. Ruohonjuuritason lainsoveltajien harkintavallan käytön määrä, monimutkaisuus ja näkymättömyys tekevät siitä hankalan tutkimuskohteen. Tämä väitöskirja kuitenkin osoittaa, että tällainen tarkastelu on tärkeää, sillä viranomaisten harkintavallan käyttöön liittyvät muutokset voivat vaikuttaa kokonaisia hakijaryhmiä koskevaan kansainväliseen suojeluun.

Aiempi harkintavaltaa koskeva empiirinen tutkimus keskittyy suurelta osin yksittäisten päätöksentekijöiden ratkaisuihin. Tämä väitöskirja laajentaa ymmärrystä harkintavallasta valottamalla, kuinka sitä voidaan turvapaikkapäätöksenteossa ruohonjuuritasolla käyttää kollektiivisesti, ts. laajassa mittakaavassa, ja kuinka sitä voidaan siirtää kolmansille osapuolille, kuten kansalaisjärjestöille. Väitöskirja osoittaa, kuinka turvapaikkaprosessista voi tulla hakijoille vaikeasti hahmotettava etenkin silloin, kun käytännöt muuttuvat tiheään ja läpinäkymättömästi, kun kansainvälistä suojelua koskevat kriteerit ovat abstrakteja ja vaikeasti ymmärrettäviä, tai kun lähestymistavat ovat epäyhtenäisiä turvapaikkapäätöksenteon eri tasoilla. Väitöskirja esittää uutta tapaa kehystää haavoittuvuus turvapaikkaprosessissa: haavoittuvuutta ei tule nähdä yksinomaan yksittäisen turvapaikanhakijan ominaisuutena tai olosuhteena, vaan myös prosessuaalisena haavoittuvuutena, joukkona rakenteellisia riskejä turvapaikanhakijalle, jotka liittyvät esimerkiksi mainittuihin turvapaikkaprosessin puutteisiin.

Väitöskirja koostuu tästä yhteenveto-osuudesta ja kolmesta osatutkimuksesta. Aineistoon sisältyy 18–34 -vuotiaita irakilaisia hakijoita koskevia turvapaikkapäätöksiä sekä turvapaikanhakijoiden kanssa Suomessa työskentelevien oikeudellisten toimijoiden, kuten turvapaikkapäätösten tekijöiden ja järjestötoimijoiden, haastatteluja. Ensimmäisessä osatutkimuksessa hyödynnetään monimenetelmäistä lähestymistapaa, jossa on yhdistetty sekä määrällistä että laadullista analyysia. Toisessa ja kolmannessa osatutkimuksessa käytettiin

laadullisia analyysimenetelmiä, kuten temaattista analyysia ja laadullista sisällönanalyysia.

ASIASANAT: harkintavalta, ruohonjuuritason lainsoveltajat, turvapaikka-päätöksenteko, queer-turvapaikka, seksuaalinen suuntautuminen

Kiitokset

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Johanna Vanto

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List of original publications

This dissertation is based on the following original publications, which are referred to in the text by their Roman numerals:

- I Johanna Vanto, Elsa Saarikkomäki, Anne Alvesalo-Kuusi, Nea Lepinkäinen, Elina Pirjatanniemi, and Juha Lavapuro (2022). *Collectivized Discretion: Seeking Explanations for Decreased Asylum Recognition Rates in Finland after Europe’s 2015 ‘Refugee Crisis’*, *International Migration Review* 56(3), 668–988.
- II Johanna Vanto (2022). *The Queer Story and How to Tell It: DSSH Model in Queer Asylum Determinations*, *Retfaerd* 45(1), 9–26.
- III Johanna Vanto (2022). ”Onko sinulla järjestöltä joku paperi meille?” Queer-kansalaisjärjestöjen rooli ja merkitys seksuaalista suuntautumista koskevassa turvapaikkapäätöksenteossa, *Oikeus* 51(3), 361–380.

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1 Aims and context of study

During 2021–2023, Finland’s Ministry of the Interior conducted a preliminary study concerning the needs for amendments in the Aliens Act and how the planned comprehensive reform of the Act should be implemented.¹ In its 2023 report relating to the comprehensive reform, the Ministry points out ambiguities and the wide interpretive scope available to asylum decision-makers under the existing law. The report suggests that the reform should strike an appropriate balance between more detailed and more general regulatory approaches (Ministry of the Interior 2023, 24–25).² The report recommends leaving some margin of discretion for situations which the law drafters may not be able to foresee or where decision-making might otherwise lead to unreasonable outcomes (Ministry of the Interior 2023, 25). The report notes that highly detailed provisions may be difficult to grasp and instead recommends including, in the legislative bill, more information on the purpose of the intended provision and instructions for its interpretation (Ministry of the Interior 2023, 25). As the 2023 report indicates, discretion will remain an integral part of decision-making in immigration matters, particularly when it comes to international protection.

Even the increasing use of automated decision-making in immigration administration does not quite yet seem to make (human) discretion redundant (see,

¹ Finland, Ministry of the Interior (2021). Reform of the Aliens Act to be launched with a preliminary study, press release, 28 October 2021, available at: https://valtioneuvosto.fi/-/1410869/ulkomaalaislain-uudistaminen-kaynnistyy-esiselvityksella?languageId=en_US [checked: 10 October 2023]; Finland, Ministry of the Interior (2023). Esiselvitys suosittaa ulkomaalaislain kokonaisuudistusta (‘The preliminary report recommends a comprehensive reform of the Aliens Act’ [unofficial translation]), press release, 4 April 2023, available at: <https://valtioneuvosto.fi/-/1410869/esiselvitys-suositaa-ulkomaalaislain-kokonaisuudistusta> [checked: 10 October 2023].

² Finland, Ministry of the Interior (2023). *Näkökohtia ulkomaalaislain kokonaisuudistuksen valmisteluun* (‘Perspectives on the Comprehensive Reform of the Aliens Act’), Helsinki, Publications of the Ministry of the Interior 17, 4 April 2023, available at: <https://urn.fi/URN:ISBN:978-952-324-983-7> [checked: 10 October 2023].

e.g., Bullock 2019).³ A 2022 bill relating to enabling automated decision-making in the activities of the Finnish Immigration Service emphasises excluding matters that involve demanding legal discretion from automated decision-making. The bill makes specific reference to asylum decisions as a group of cases that are of particular importance to the parties' legal protection and where there is usually demanding legal discretion involved.⁴ Furthermore, a 2023 amendment to the Administrative Procedure Act provides that an authority may use automated decision-making only on a matter that does not involve aspects requiring individual assessment or on a matter where such aspects have been assessed by an official (Section 53(e)(2)).⁵

As the abovementioned examples imply, decision-makers' room for manoeuvre to exercise discretion has been viewed as an important defence against questionable policy or norms (Gill et al. 2018, 52).⁶ Furthermore, procedural discretion has been considered important because individuals are different and may face different disadvantages, requiring the decision-maker to treat them differently (Gill et al. 2018, 52).⁷ In their treatise on evidentiary assessment in asylum procedures, Noll (2005, 1) highlights the significance of discretion:

Today, an important fraction of [asylum] applications are arguably decided on the basis of evidentiary assessment rather than on legal issues. In particular, the credibility of the applicant's account plays a central role. This moves decisions into a domain characterised by the discretion of the person who assesses the accounts, and raises the issue where its limits are – or ought to be.⁸

³ Bullock, J. (2019). Artificial Intelligence, Discretion, and Bureaucracy, *American Review of Public Administration* 49(7), 751–761.

⁴ HE 276/2022 vp. Hallituksen esitys eduskunnalle Maahanmuuttoviraston automaattisen päätöksenteon oikaisuvaatimusta koskevaksi lainsäädännöksi ('HE 276/2022 vp. Government proposal to the Parliament on legislation regarding administrative review of automatic decisions at the Finnish Immigration Service' [unofficial translation]).

⁵ Finland, Administrative Procedure Act, Act No. 434/2003, 1 January 2004.

⁶ Gill, N., Rotter, R., BurrIDGE, A., Allsopp, J. (2018). The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals, *Social & Legal Studies* 27(1), 49–78.

⁷ Gill, N., Rotter, R., BurrIDGE, A., Allsopp, J. (2018). The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals, *Social & Legal Studies* 27(1), 49–78.

⁸ Noll, G. (2005). Introduction: Re-mapping Evidentiary Assessment in Asylum Procedures, in Noll, G. (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Boston: Brill, 1–10.

On the flipside, discretion may feature as another source of bureaucratic injustice, which is why some scholars have argued for confining and checking discretionary powers (Culp Davis 1971 in McHarg 2017, 268).⁹

In the asylum system, street-level implementers, such as caseworkers and judges, make decisions regarding access to asylum. *Discretion* is often characterised in terms of the administrator's ability to decide how to act and to choose amongst different alternatives in issues of fact and law (Dörrenbächer 2017; McHarg 2017; Galligan 1990),¹⁰ often in complex and uncertain situations (Bullock 2019, 751).¹¹ The term *street-level implementers* or street-level bureaucrats and bureaucracies, in turn, refers to public employees such as judges and law enforcement personnel, and the organisations that employ them, who grant access to government benefits and services or impose sanctions (Lipsky 1980, 3–4).¹² The street-level implementers' work is characterised by 'mass processing' of excessive client caseloads (Cooper et al. 2015).¹³ In order to resolve the 'workload, complex cases, and ambiguous performance targets', the officials use personal discretion inventively and strategically (Cooper et al. 2015).¹⁴ Taken together, these small acts of using discretion, then, amount to a veritable policy of the organisation in question, as Lipsky (1980; see also Dörrenbächer 2017, 1329) argues.¹⁵ Discretion is a complex phenomenon affected, for instance, by the practices of other street-level actors (Miaz

⁹ Culp Davis, K. (1971). *Discretionary Justice: A Preliminary Inquiry*, Urbana: University of Illinois Press; McHarg, A. (2017). Administrative Discretion, Administrative Rule-making, and Judicial Review, *Current Legal Problems* 70(1), 267–303.

¹⁰ Dörrenbächer N. (2017). Europe at the Frontline: Analysing Street-Level Motivations for the Use of European Union Migration Law, *Journal of European Public Policy* 24(9), 1328–47; McHarg, A. (2017). Administrative Discretion, Administrative Rule-making, and Judicial Review, *Current Legal Problems* 70(1), 267–303; Galligan, D. J. (1990). *Discretionary Powers: A Legal Study of Official Discretion*, Oxford: Oxford University Press.

¹¹ Bullock, J. (2019). Artificial Intelligence, Discretion, and Bureaucracy, *American Review of Public Administration* 49(7), 751–761.

¹² Lipsky, M. (1980). *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation.

¹³ Cooper, M. J., Sornalingam, S., and O'Donnell, C. (2015). Street-level bureaucracy: An underused theoretical model for general practice?, *British Journal of General Practice* 65(636), 376–7.

¹⁴ Cooper, M. J., Sornalingam, S., and O'Donnell, C. (2015). Street-level bureaucracy: An underused theoretical model for general practice?, *British Journal of General Practice* 65(636), 376–7.

¹⁵ Lipsky, M. (1980). *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation; Dörrenbächer N. (2017). Europe at the Frontline: Analysing Street-Level Motivations for the Use of European Union Migration Law, *Journal of European Public Policy* 24(9), 1328–47

& Achermann 2022),¹⁶ the position of the individual decision-maker in the organisation (Miaz 2017),¹⁷ or external political pressures and accountability towards the media (Kim & Semet 2020; Affolter 2021).¹⁸

This article-based doctoral dissertation examines how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power, and what implications the use of discretionary power in the asylum procedure may have for applicants who are made vulnerable – in particular, for those applying for queer asylum.

Now, it is crucial to touch on a particular and somewhat ‘fuzzy’ concept appearing in the research question – namely *control*. My interest in conducting (socio)legal research originally started with the study of deviance and social control, concepts that are perhaps particularly prevalent in the field of critical criminology. The term *social control* is typically used to refer to some form of organised reaction to deviant behaviour (Innes 2003, 3).¹⁹ This approach draws from Cohen’s (1985, 3) definition of social control as:

...those organized responses to crime, delinquency and allied forms of deviant and/or socially problematic behaviour which are actually conceived of as such, whether in the reactive sense (after the putative act has taken place or the actor been identified) or in the proactive sense (to prevent the act).²⁰

Cohen (2011, xxii) discusses a ‘hostile new agenda’ that emerged in Europe over the 1990s, with repeated and ritualised distinction made between genuine refugees fleeing persecution and bogus asylum seekers who are merely economic migrants looking, for instance, to exploit the destination country’s welfare system or other economic opportunities.²¹ The hostile new agenda involves a culture of disbelief, in

¹⁶ Miaz, J. and Achermann, C. (2022). Bureaucracies Under Judicial Control? Relational Discretion in the Implementation of Immigration Detention in Swiss Cantons, *Administration & Society*, 54(4), 629–659.

¹⁷ Miaz, J. (2017). From the Law to the Decision: The Social and Legal Conditions of Asylum Adjudication in Switzerland, *European Policy Analysis*, 3(2), 372–396.

¹⁸ Kim, C. Y. and Semet, A. (2020). An empirical study of political control over immigration adjudication, *Georgetown Law Journal*, 108(3), 579–648; Affolter, L. (2021). *Asylum Matters: On the Front Line of Administrative Decision-Making*, London: Palgrave.

¹⁹ Innes, M. (2003). *Understanding social control: Deviance, crime and social order*, Berkshire: Open University Press.

²⁰ Cohen, S. (1990) [1985]. *Visions of Social Control: Crime, Punishment, and Classification*, Cambridge: Polity Press.

²¹ Cohen, S. (2011) [1972]. *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, London: Routledge.

that refugee-type of foreigners always lie to be granted a residence permit, and that strict criteria of eligibility and tests of credibility must be used to differentiate the deserving refugees from the undeserving economic migrants (Cohen 2011, xxii).²² In labelling asylum seekers as threatening, organisational, public-political, and media discourses all have their role to play (Chavez 2013; De Rycker & Mohd Don 2013; Berry et al. 2016; Chouliaraki & Stolic 2017; Holzberg et al. 2018; Vollmer & Karakayali 2018; Khan 2021).²³ For instance, governments strive to construct migration situations as crises by scapegoating or securitising migrants, as a means of ‘channelling domestic discontent and cementing the power of dominant elites’ (Lindley 2014, 17).²⁴ Such ‘moral panics’ may be viewed as discursive appeals for repressive social control mechanisms (Hier 2011, 532).²⁵ Asylum seekers are rendered ideal objects of social control and coercion, as they can be detained, denied legal counsel, deported and the like (Chan 2005).²⁶ This dissertation scrutinises a particular facet, or arena, of migration control – the use of discretionary power in the asylum procedure.

²² Cohen, S. (2011) [1972]. *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, London: Routledge.

²³ Chavez, L. R. (2013). *The Latino Threat: Constructing Immigrants, Citizens, and the Nation*, Stanford: Stanford University Press; De Rycker, A. and Mohd Don, Z. (2013). Discourse in crisis, crisis in discourse, in De Rycker, A. and Mohd Don, Z. (eds.): *Discourse and Crisis: Critical Perspectives*, Amsterdam: John Benjamins Publishing Company, 3–65; Berry M., Garcia-Blanco I., and Moore K. (2016). Press coverage of the refugee and migrant crisis in the EU: A content analysis of five European countries. Report prepared for the United Nations High Commission for Refugees. <https://www.unhcr.org/protection/operations/56bb369c9/press-coverage-refugee-migrant-crisis-eu-content-analysis-five-european.html> [checked: 10 October 2023]; Chouliaraki L & Stolic T (2017). Rethinking media responsibility in the refugee ‘crisis’: a visual typology of European news, *Media, Culture and Society* 39(8), 1162–1177; Holzberg, B., Kolbe, K., & Zaborowski, R. (2018). Figures of Crisis: The Delineation of (Un)Deserving Refugees in the German Media, *Sociology* 52(3), 534–550; Vollmer B & Karakayali S (2018). The Volatility of the Discourse on Refugees in Germany, *Journal of Immigrant and Refugee Studies* 16(1–2), 118–139; Khan, A. (2021). Who’s to Blame for Asylum ‘Moral Panics’? Asylum Seekers’ Perspectives on UK Policymaking, News Reporting, and Preferences of Identity Construction, in M. D. Frederiksen and I. H. Knudsen (eds.): *Modern Folk Devils: Contemporary Constructions of Evil*, Helsinki: Helsinki University Press, 203–221.

²⁴ Lindley, A. (2014). Exploring crisis and migration: concepts and issues, in Lindley, A. (ed.): *Crisis and Migration: Critical Perspectives*, Routledge, 1–23.

²⁵ Hier, S. (2011). Tightening the focus: Moral panic, moral regulation and liberal government, *British Journal of Sociology* 62(3), 523–541.

²⁶ Chan, W. (2005). Crime, Deportation and the Regulation of Immigrants in Canada, *Crime, Law and Social Change* 44(2), 153–180; Critcher, C. (2009). Widening the focus: Moral panics as moral regulation, *British Journal of Criminology* 49(1), 17–34.

The dissertation consists of this synthesis and three substudies (I, II, and III) employing both qualitative and quantitative approaches. The empirical data include asylum decisions concerning 18-34-year-old Iraqi applicants and interviews with legal actors working with asylum-seekers in Finland. Combining approaches, theorisations, and methods from various disciplines, in particular, sociology of law and legal analysis, this dissertation develops scholarship on street-level bureaucracy, discretionary power, and (procedural) vulnerability.

As noted in substudy I, previous empirical research on discretion in asylum decision-making focuses largely on the choices of the *individual* bureaucrat. In addition, as elaborated in chapter 3 of this synthesis, legislation, policies, and previous research regarding vulnerability in asylum decision-making often (deliberately or not) highlight the vulnerabilities of the *individual* asylum applicant.

This dissertation contributes to knowledge on discretion by highlighting how street-level discretionary power in asylum decision-making may be *collectivised*, or used on a large scale to control migration, and some of it delegated to third parties, such as non-governmental organisations. The dissertation finds that the asylum procedure is rendered difficult for asylum applicants to navigate especially when policies are shifty and opaque, when protection criteria are abstract and difficult to grasp, or when approaches are inconsistent from one level of asylum decision-making to the next. This dissertation argues for a novel way of framing vulnerability in the asylum procedure: vulnerability not only as an inherent characteristic or the circumstances of the individual claimant, but also as *procedural vulnerability*, or a set of structural risks for the claimant that relate, for instance, to the aforementioned shortcomings of the asylum procedure itself.

This synthesis explores first, in chapter 2, the practicalities of how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power. In other words, the aim is to understand how the limits of discretion, or ‘wobble room’, are established and shifted – for instance, in the context of a perceived crisis – in asylum decision-making. This chapter is based on the exploratory analysis of both more general texts pertaining to administrative law as well as those relating more specifically to the asylum procedure. Chapter 2 argues that, rather than a neutral apparatus which, given certain parameters, ‘spits out’ a given decision, the asylum system operationalises the highly vaporous legal framework. The limits of discretion, the chapter suggests, are elastic and sometimes vague, to allow for both small- and large-scale shifts in asylum determinations even in situations where no legal amendments have been made.

Second, this synthesis focuses, in chapter 3, on the implications that the use of discretionary power in the asylum procedure may have for asylum applicants who are made vulnerable – in particular, for those applying for queer asylum. Chapter 3 leans on theoretical social scientific discussions on (procedural) vulnerability and

precarity but also on text analysis of statutory law and selected policy documents. The chapter argues that particularly the concept of procedural vulnerability, more familiar in other substantive contexts (e.g., research on climate change and indigenous peoples), has the potential to expand our understanding of the risks that the use of discretionary power in the asylum procedure may pose for asylum applicants.

Chapter 4 presents the research design of the sub-studies I, II, and III, and chapter 5 introduces the original publications. Finally, in chapter 6, the synthesis makes concluding remarks on the dissertation, summarising key findings and discussing the implication and contributions of the research.

2 Discretionary power in asylum procedure

Street-level bureaucrats have the power to shape law and policy, but considerably reducing this power may not be possible since their work is often too complicated and human intervention necessary for effective service (Lipsky 1980, 15–16).²⁷ But although necessary, discretionary power should not be unconstrained (Bingham 2010; see also Council of Europe’s Venice Commission).²⁸ This contextualising chapter explores the practicalities of how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power. In other words, the aim is to understand how the limits of discretion, or ‘wiggle room’, are established and shifted – for instance, in the context of a perceived crisis – in asylum decision-making. First, I explore the restrictions that legal principles pertaining to administrative decision-making more generally, and asylum decision-making specifically, place on public authorities’ use of discretion. Second, I focus on how legal rules guide decision-making in asylum determinations. Third, I examine the use of non-legislative, or ‘soft law’, policy instruments that are used to supplement asylum decision-making. The analysis in this chapter is exploratory and limited in scope. While this chapter does not offer an exhaustive description of the legislative framework regarding asylum decision-making, it focuses on the *qualities* of legal principles, legal rules, and non-legislative policy instruments that enable the use of discretionary power in asylum decision-making. I argue that, rather than a neutral apparatus which, given certain parameters, ‘spits out’ a given decision, the asylum system operationalises the highly vaporous legal framework. The limits of discretion, I suggest, are elastic and sometimes vague, to allow for both small- and large-scale shifts in asylum determinations even in situations where no legal amendments have been made.

²⁷ Lipsky, M. (1980). *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation.

²⁸ Bingham, T. (2010). *The Rule of Law*, London: Penguin Books; Council of Europe, European Commission for Democracy Through Law (Venice Commission 2011). *Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011)*, CDL-AD(2011)003rev, Strasbourg, 4 April 2011.

2.1 Legal principles

This section explores the restrictions that legal principles pertaining to administrative decision-making more generally, and asylum decision-making specifically, place on public authorities' use of discretion.²⁹ The analysis is exploratory, as discussed above, and does not offer an exhaustive treatise of all applicable legal principles, but rather, focuses on principles that have been highlighted in relevant research literature. First, it is crucial to understand some of the characteristics of legal principles. Legal principles may refer to principles defined by the law, the starting points and goals of legislation, or qualitative requirements for administrative decision-making (Mäenpää 2023).³⁰ Legal principles exist to determine the achievement of a legally relevant purpose, of reaching legally sound decisions (see, e.g., Ávila 2007, 133; Möllers 2018, 103).³¹ Simultaneously, in a constitutional democracy, fundamental legal principles are meant to function as checks on the use of power, upholding the supremacy of human rights (see, e.g., Gribnau 2013).³² Kallio et al. (2018, 45) note that ignoring legal principles may amount to abuse of discretionary power and lead to erroneous decisions.³³ As norms, legal principles may be understood as obligations to be optimised – they are not definitive in the sense that legal rules are (Alexy, 304), but rather, more flexible and broader in scope (Mäenpää 2023).³⁴ Legal principles alone do not form a basis for granting rights or placing duties, but they have a guiding role in interpreting rights and duties expressed through legal rules. Principles are shaped by statutory law, jurisprudence as well as legal doctrine.

²⁹ Legal principles may differ in role and substance between different legal cultures. This analysis emphasises Finnish and other European (and civil law-based) literature regarding legal principles. For more discussion, for instance, on the role of legal principles in Finland and how joining the European Union has affected Finnish legal culture, see, e.g., Tuori, K. (2002). *Foucault'n oikeus*, Helsinki: Sanoma Pro.

³⁰ Mäenpää, O. (2023). *Hallinto-oikeus* ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

³¹ Ávila, H. (2007). Norms: Principles and Rules, in Ávila, H. (ed.), *Theory of Legal Principles*, Law and Philosophy Library, vol. 81, Dordrecht: Springer; Möllers, T. (2018). Working with legal principles demonstrated using private autonomy and freedom of contract as examples, *European Review of Contract Law* 14(2), 101-137.

³² Gribnau, H. (2013). Equality, Legal Certainty and Tax Legislation in the Netherlands – Fundamental Legal Principles as Checks on Legislative Power: A Case Study, *Utrecht Law Review* 9(2), 52–74.

³³ Kallio, H., Kotkas, T., and Palander, J. (2018). *Ulkomaalaisoikeus* ('Immigration Law' [Unofficial translation]), Helsinki: Alma Talent.

³⁴ Alexy, R. (2000). On the Structure of Legal Principles, *Ratio Juris* 13(3), 294–304; Mäenpää, O. (2023). *Hallinto-oikeus* ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

Drawing on Marshall (1950),³⁵ Morris (2012, 40) suggests that ‘rights themselves can act as a possible source of inequality through their imperfect administration and delivery’.³⁶ Schuck (1990) even goes as far as to argue that this gap between ‘law in books’ and ‘law in action’ – as Pound (1910, 15) elaborated it, ‘the distinction between legal theory and judicial administration’³⁷ – is more pronounced in the field of immigration than in other fields of law.³⁸ This gap is perhaps best illustrated by the concept of ‘administrative bordering’, with which Könönen (2018, 143) highlights the role that administrative practices and discretionary power have in migration governance.³⁹ Administrative practices may be understood as an assemblage of activities such as writing, reading, and talking, but also as different forms of knowledge, including implicit or tacit knowledge (e.g., dispositions that emerge from organisational socialisation, experiences on the job, and daily interactions) (Affolter 2021).⁴⁰ Immigration authorities, other street-level bureaucrats, and even non-state actors, such as local registry offices, embassies, social services, banks, or non-governmental organisations, all exert influence on immigration trajectories because of the wide discretionary margin that immigration law provides (Könönen 2018, 144; substudy III).⁴¹ As this chapter demonstrates, as broad and flexible norms, legal principles may be particularly permeable to allow for inflexible administrative bordering practices.

Legal principles have been defined not only in legislation but also in case law and legal doctrine (Mäenpää 2023). Therefore, principles concerning administration can be discussed in multiple senses, as noted by Mäenpää (2023).⁴² They can refer to principles defined by law or to the fundamental premises and objectives of

³⁵ Marshall, T. H. (1950). *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press.

³⁶ Morris, L. (2012). Rights, recognition and judgement: Reflections on the case of welfare and asylum, *British Journal of Politics and International Relations* 14(1), 39–56.

³⁷ Pound, R. (1910). Law in Books and Law in Action, *American Law Review* 44(2), 12–36.

³⁸ Schuck, P. (1990). *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship*, London: Weidenfeld and Nicholson.

³⁹ Könönen, J. (2018). Border Struggles within the State: Administrative bordering of non-citizens in Finland, *Nordic Journal of Migration Research* 8(3), 143–150.

⁴⁰ Affolter, L. (2021). Regular matters: credibility determination and the institutional habitus in a Swiss asylum office, *Comparative Migration Studies* 9(4), 1–16.

⁴¹ Könönen, J. (2018). Border Struggles within the State: Administrative bordering of non-citizens in Finland, *Nordic Journal of Migration Research* 8(3), 143–150.

⁴² Mäenpää, O. (2023). *Hallinto-oikeus* (‘Administrative Law’ [unofficial translation]), Helsinki: Alma Talent.

legislation concerning administration (Tähti 1995).⁴³ Principles can also be used to describe qualitative requirements derived from the law for administrative activities (Mäenpää 2023).⁴⁴ In the Finnish context, few scholars have perhaps elaborated on the key legal principles specifically regarding international protection. However, regarding immigration law more generally, legal principles mentioned by Kuosma (2004) include principles limiting the use of discretionary power (e.g., the service principle, fairness, intended purpose, impartiality, proportionality, protection of legitimate expectations) and principles more specific to immigration law (e.g., the principle of taking into account international conventions bindings on Finland, non-refoulement, and the protection of refugees).⁴⁵ Kallio et al. (2018, 6) add to this list, for instance, compliance with EU obligations, including harmonised norms on international protection, as well as the rule of law principle.⁴⁶

The rule of law principle is essential to understanding the limits of discretionary power in administrative (and judicial) decision-making in general.⁴⁷ Bingham (2010, 8), for instance, defines the rule of law principle as such that ‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’.⁴⁸ The rule of law principle is key to both the European and Finnish national constitutional framework, and it incorporates the legality principle. The legality principle may be understood both in formal and qualitative terms. In a *formal* sense, the legality principle manifests in how the exercise of discretion must remain strictly within the framework defined by the

⁴³ Tähti, A. (1995). *Periaatteet Suomen hallinto-oikeudessa* (‘Principles in Finnish Administrative Law’ [unofficial translation]). Helsinki: Suomalainen Lakimiesyhdistys.

⁴⁴ Mäenpää, O. (2023). *Hallinto-oikeus* (‘Administrative Law’ [unofficial translation]), Helsinki: Alma Talent.

⁴⁵ Kuosma, T. (2004). *Uusi ulkomaalaislaki* (‘New Aliens Act’ [unofficial translation]), Helsinki: Multikustannus.

⁴⁶ Kallio, H., Kotkas, T., and Palander, J. (2018). *Ulkomaalaisoikeus* (‘Immigration Law’ [Unofficial translation]), Helsinki: Alma Talent.

⁴⁷ In the European context, the rule of law principle may be understood somewhat differently in different countries (e.g., ‘Rechtsstaat’ in the German context or ‘l’État de droit’ in French context), but some commonalities have been defined in the Rule of Law Checklist, adopted by the Venice Commission in 2016 (European Commission for Democracy Through Law (Venice Commission 2016). *Rule Of Law Checklist Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)*, CDL-AD(2016)007, Strasbourg, 18 March 2016).

⁴⁸ Bingham, T. (2010). *The Rule of Law*, London: Penguin Books.

law.⁴⁹ According to the Constitution of Finland (Act No. 731/1999), the authority must apply provisions and other lower-level statutes so that the use of discretion remains within the framework defined by the Constitution and other laws.⁵⁰ The same obligation also applies to administrative instructions, regulations, plans and other official sources guiding the use of discretion (Mäenpää 2017, 288).⁵¹ In a *qualitative* sense, the legality principle manifests in how discretion should not permit arbitrary or unreasonable decisions (Bingham 2010; see also Council of Europe’s Venice Commission).⁵² Legality may, therefore, be about more than simply ensuring that the exercise of government power has a formal basis in law (formal legality). Naarttijärvi (2019) refers to ‘qualitative legality’, meaning that the law in question be accessible, clear, precise, non-retroactive, and generally applicable. The individual should be able understand what the law requires of them and to conform to these requirements (see e.g., Naarttijärvi 2019, 40; Hong 2011, 10).⁵³

In practice though, if the aim is to identify a single correct legal outcome, it may be difficult to fully adhere to the legality principle in administrative decision-making. This may be because provisions often grant administrative decision-makers a relatively broad discretionary margin, or because the legal regulation of administrative activities, in some administrative sectors, is left patchy at best (Mäenpää 2023).⁵⁴ For instance, in the immigration context, the law and jurisprudence of the EU, as Brouwer (2021) points out, give Member States much power to determine whether a third country national is ‘a threat to public policy’ – a label which amounts to grounds for refusal of entry or stay for the Schengen

⁴⁹ As provided for by Section 2(3) of the Constitution of Finland, ‘the exercise of public powers shall be based on an Act’ and ‘in all public activity, the law shall be strictly observed’ (Finland, Constitution of Finland, Act No. 731/1999, 1 March 2000).

⁵⁰ According to Section 107 of the Constitution of Finland, if a provision in a Decree or another statute of a lower level than an Act is in conflict with the Constitution or another Act, it shall not be applied by a court of law or by any other public authority (Finland, Constitution of Finland, Act No. 731/1999, 1 March 2000).

⁵¹ Mäenpää, O. (2017). *Yleinen hallinto-oikeus* (‘General Administrative Law’ [unofficial translation]), Helsinki: Alma Talent.

⁵² Bingham, T. (2010). *The Rule of Law*, London: Penguin Books; Council of Europe, European Commission for Democracy Through Law (Venice Commission 2011). *Report on the Rule of Law, Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011)*, CDL-AD(2011)003rev, Strasbourg, 4 April 2011.

⁵³ Naarttijärvi, M. (2019). Legality and Democratic Deliberation in Black Box Policing. *Technology and Regulation* 1(1), 35–48; Hong, S. C. (2011). Liberal Democracy in State of Emergency: Seen By Standing on the Shoulders of Carl Schmitt, in Duttge, G. and Lee, S. W. (eds.), *The Law in the Information and Risk Society*, Göttingen: Universitätsverlag Göttingen, 3–14.

⁵⁴ Mäenpää, O. (2023). *Hallinto-oikeus* (‘Administrative Law’ [unofficial translation]), Helsinki: Alma Talent.

territory.⁵⁵ For EU citizens and their family members, the EU Citizenship Directive 2004/38 provides specific criteria for a ‘threat to public policy’ as grounds for restricting their movement and residence: ‘[t]he personal conduct of the [EU citizen and their family members] must’, according to Article 27(2)(2), ‘represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’.⁵⁶ But for third-country nationals, the Return Directive 2008/115 provides no such criteria.⁵⁷ Brouwer (2021, 57) specifies that the public order and security grounds for banishment leave the Member States a ‘wide margin of appreciation of not only who is to be considered as a risk in terms of committing a serious crime, but also what is to be considered a serious crime’. Brouwer (2021, 61) points out that although CJEU case law⁵⁸ highlights the requirement of case-by-case decision-making and compliance with the principle of proportionality, it is difficult for third-country nationals to challenge the Member States’ broad discretionary power regarding the application of public order grounds.

In asylum procedures, fairness is key in the light of the grave consequences of erroneous decisions and asylum applicants’ vulnerable situations (Reneman 2014, 1–2).⁵⁹ In the Finnish context, fairness is one of the foundational principles of good administration, along with the principle of intended purpose, impartiality, proportionality, and protection of legitimate expectations. The foundational principles of good administration are the minimum qualitative requirements regarding administrative activities, and they are to be considered alongside procedural provisions (Kulla & Salminen 2021, 109).⁶⁰ In Finnish national legislation, these principles are ensured by Section 21(2) of the Constitution⁶¹, on protection under the law, according to which the guarantees of good governance are

⁵⁵ Brouwer, E. (2021). Challenges to EU legality in the field of asylum and migration law, in Kilpatrick, C. and Scott, J. (eds.): *Contemporary Challenges to EU Legality*, Oxford: Oxford University Press, 48–70.

⁵⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance).

⁵⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁵⁸ For instance, Case C- 544/ 15, Fahimian (EU:C:2017:255) paras 40– 43.

⁵⁹ Reneman, M. (2014). *EU Asylum Procedures and the Right to an Effective Legal Remedy*, Oxford: Hart Publishing.

⁶⁰ Kulla, H. and Salminen, J. (2021). *Hallintomenettelyn perusteet* (‘Basics of Administrative Procedure’ [unofficial translation]), Helsinki: Alma Talent.

⁶¹ Finland, Constitution of Finland, Act No. 731/1999, 11 June 1999.

laid down by an Act. Accordingly, Section 6 of the Administrative Procedure Act (Act No. 434/2003)⁶² outlines the use of discretion (Mäenpää 2017, 283)⁶³:

An authority shall treat equally those to whom it is providing services in administrative matters and shall exercise its competence only for purposes that are acceptable under the law. The acts of an authority shall be impartial and proportionate to the objectives sought. These acts shall protect expectations that are legitimate under the legal order.

Fairness refers to similar treatment, as in that people are treated in the same way in similar situations (Kulla & Salminen 2021, 112).⁶⁴ Fairness is a principle of comparison in which two or more cases are compared to each other (Kulla & Salminen 2021, 113).⁶⁵ However, empirical studies have questioned the fairness of asylum decision-making in practice, demonstrating that there is statistical variation in the procedures and outcomes between individual asylum officials, offices and courts, regions, as well as time periods (see, e.g., Neumayer 2005; Ramji-Nogales et al. 2007; Rottman et al. 2009; Toshkov & de Haan 2013; Toshkov 2014; Gill et al. 2015; substudy I).⁶⁶

Beyond the general legal principles of administration, there are principles more specific to asylum decision-making, such as the benefit of the doubt. *In dubio pro refugio*, or the benefit of the doubt principle, means that if decision-makers do not know whether an applicant's claims 'are' credible or not they should decide in favour

⁶² Finland, Administrative Procedure Act, Act No. 434/2003, 1 January 2004.

⁶³ Mäenpää, O. (2017). *Yleinen hallinto-oikeus* ('General Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

⁶⁴ Kulla, H. and Salminen, J. (2021). *Hallintomenettelyn perusteet* ('Basics of Administrative Procedure' [unofficial translation]), Helsinki: Alma Talent.

⁶⁵ Kulla, H. and Salminen, J. (2021). *Hallintomenettelyn perusteet* ('Basics of Administrative Procedure' [unofficial translation]), Helsinki: Alma Talent.

⁶⁶ Neumayer, E. (2005). Asylum recognition rates in Western Europe : Their determinants, variation, and lack of convergence, *Journal of Conflict Resolution* 49(1), 43–66; Ramji-Nogales, J., Schoenholtz, A. I., and Schrag, P. G. (2007). Refugee roulette: disparities in asylum adjudication, *Stanford Law Review* 60(2), 295–412; Rottman, A. J., Fariss, C. J., and Poe, S. C. (2009). The Path to Asylum in the US and the Determinants for Who Gets In and Why, *International Migration Review* 43(1), 3–34; Toshkov, D. and de Haan, L. (2013). The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates, *Journal of European Public Policy* 20(5), 661–683; Tohskov, D. (2014). The dynamic relationship between asylum applications and recognition rates in Europe (1987-2010), *European Union Politics* 15(2), 192–214; Gill, N., Rotter, R., Burrridge, A., Griffiths, M., and Allsopp, J. (2015). Inconsistency in asylum appeal adjudication, *Forced Migration Review* 50(2), 52–54.

of the applicant (Affolter 2022, 1089).⁶⁷ The benefit of the doubt principle is mentioned in the bill regarding the Aliens Act (HE 28/2003 vp, 175)⁶⁸ and included in the Aliens Act itself in the following form:

...the authorities shall decide on the matter in favour of the applicant on the basis of their statement if the applicant has contributed to the examination of the matter as far as possible and if the authorities are convinced of the veracity of the application with regard to the applicant's need for international protection (Section 98(3)).⁶⁹

In practice, however, decision-makers do not always adhere to the benefit of the doubt principle (Hurley & Beaumont 2016; Halliday 2021; substudy III).⁷⁰ Halliday (2021, 730) points out how 'a fear of being duped by duplicitous claimants can orient bureaucracies towards not giving claimants the benefit of the doubt'.⁷¹ Moreover, the immigration control apparatus seems to be geared towards a 'culture of suspicion' where the asylum applicants' claims are met with suspicion and denial at the outset, with discourses structured on the opposition between 'bogus' claimants (or economic migrants) and 'deserving' refugees (Gibson 2013; Tuitt 2016; Affolter 2022; Aradau & Canzutti 2022).⁷² A 2023 (57) report issued by the Ministry of the Interior also notes that, in Finland, immigration matters were long primarily seen as a security issue, and that the aim to restrict entry and view a person's stay in the country from a critical perspective still persists.⁷³

⁶⁷ Affolter, L. (2022). Trained to Disbelieve: The Normalisation of Suspicion in a Swiss Asylum Administration Office, *Geopolitics* 27(4), 1069–1092.

⁶⁸ HE 28/2003 vp. Hallituksen esitys eduskunnalle ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi ('HE 28/2003 vp. Government proposal to the Parliament for the Aliens Act and certain related laws' [unofficial translation]).

⁶⁹ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

⁷⁰ Hurley, M. and Beaumont, E. (2016). Reforming Australia's age determination procedures: Giving asylum seekers the benefit of the doubt, *Alternative Law Journal* 41(1), 30–33; Halliday, S. (2021). Administrative Justice and Street-Level Emotions: Cultures of Denial in Entitlement Decision-Making, *Public Law* 65(4), 727–746.

⁷¹ Halliday, S. (2021). Administrative Justice and Street-Level Emotions: Cultures of Denial in Entitlement Decision-Making, *Public Law* 65(4), 727–746.

⁷² Gibson, S. (2013). Testimony in a Culture of Disbelief: Asylum Hearings and the Impossibility of Bearing Witness, *Journal for Cultural Research* 17(1), 1–20; Tuitt, P. (2016). A-Legality and the Death of the Refugee, *Law and Critique* 27(1), 5–8; Affolter, L. (2022). Trained to Disbelieve: The Normalisation of Suspicion in a Swiss Asylum Administration Office, *Geopolitics* 27(4), 1069–1092; Aradau, C. and Canzutti, L. (2022). Asylum, Borders, and the Politics of Violence: From Suspicion to Cruelty, *Global Studies Quarterly* 2(2), 1–11.

⁷³ Järviö, P. (2023). Selvitys Suomen maahanmuuttohallinnon järjestämisestä ('Study on the organisation of migration administration in Finland'), Publications of the Ministry

Another key principle of asylum law – relevant in the Finnish asylum law discussion at least since the late 1980s (see, e.g., Niemi 1989)⁷⁴ and included in the Constitution of Finland⁷⁵ since the 1990s (HE 309/1993 vp, 17)⁷⁶ – is *non-refoulement*. It is an absolute principle in the sense that no reservations or derogations may be made to it (Refugees Convention, 3; ECHR, 3).⁷⁷ The principle of non-refoulement provides that no one may expel or return (‘refouler’) a refugee against their will to a territory where they fear threats to life or freedom (Refugees Convention, 3).⁷⁸ A perceived crisis may affect the application of a legal principle, such as non-refoulement, somewhat indirectly. Already at the external borders of the EU, rigid border policies appear to constitute a circumvention or breach of non-refoulement (Goldner Lang & Nagy 2021).⁷⁹ For instance, facing an influx in the number of complaints by individuals seeking asylum in the EU, who claim a violation of non-refoulement, the United Nations Human Rights Committee has been inconsistent in its procedure to determine whether a violation occurred. This inconsistency has produced different outcomes in similar cases (i.e., whether or not the applicant is granted asylum). (Garrett & Barrett 2021, 251.)⁸⁰ Such an incongruence may also be in conflict with other key administrative principles, such as the aforementioned principle of fairness. Gammeltoft-Hansen & Hathaway (2014, 11) refer to deflection tactics that amount to an embodiment of non-entrée. Non-

of the Interior 10, Helsinki, 16 March 2023, available at: <https://urn.fi/URN:ISBN:978-952-324-955-4> [checked: 15 May 2023].

⁷⁴ Niemi, J. (1989). *Pakolaisoikeus* (‘Asylum Law’ [unofficial translation]), Helsinki: University of Helsinki.

⁷⁵ Finland, Constitution of Finland, Act No. 731/1999, 11 June 1999.

⁷⁶ HE 309/1993 vp. Hallituksen esitys eduskunnalle perustuslakien perusoikeussäännösten muuttamisesta (‘HE 309/1993 vp. Government proposal to the Parliament for amending the fundamental rights provisions of the constitutional laws’ [unofficial translation]).

⁷⁷ Text of the 1951 Convention Relating to the Status of Refugees, Text of the 1967 Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly, with an Introductory Note by the Office of the United Nations High Commissioner for Refugees (Refugees Convention); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 U.N.T.S. 221.

⁷⁸ Text of the 1951 Convention Relating to the Status of Refugees, Text of the 1967 Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly, with an Introductory Note by the Office of the United Nations High Commissioner for Refugees (Refugees Convention).

⁷⁹ Goldner Lang, I. and Nagy, B. (2021). External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement, *European Constitutional Law Review* 17(3), 442–470.

⁸⁰ Garrett, R. and Barrett, N. (2021). Corrigendum to: Dublin III in Practice: Synthesizing a Framework for European Non-Refoulement Cases at the Human Rights Committee, *Journal of Human Rights Practice* 13(2), 250–269.

entrée is when states prevent refugees from ever reaching their borders to prevent them from benefitting from non-refoulement obligations (Gammeltoft-Hansen & Hathaway 2015).⁸¹ Such policies may rely, for instance, on ‘cooperation-based’ approaches where politically weaker states are pressed to carry out migration control on behalf of the developed world (Gammeltoft-Hansen & Hathaway 2015). As Neylon (2019, 9) notes, states in the EU have created a whole host of legal and political structures that allow them to avoid their non-refoulement responsibilities, particularly under the rubric of the ‘safe third country’.⁸²

In sum, while legal principles exist to determine the achievement of a legally relevant purpose and of reaching legally sound decisions, they are flexible and broad in scope. These qualities may make legal principles particularly permeable to allow for inflexible administrative bordering practices. Furthermore, the role of legal principles in safeguarding human rights may at times be compromised by the politicisation of migration and asylum-seeking.

2.2 Legal rules

Next, this chapter highlights the ways in which legal rules guide decision-making particularly in the context of asylum determinations. Like section 2.1, this section is also exploratory and limited in scope in emphasising statutory law.

Decisions involving the use of administrative power can, as noted by Mäenpää (2023), only be made on the basis and within the framework provided by legislation (*legality principle*, enshrined in Article 2(3) of the Constitution of Finland⁸³).⁸⁴ The administrative decision-maker often has discretionary power, the extent of which may vary considerably depending on the provision that grants the authority their competence (Mäenpää 2023).⁸⁵ Finland’s legislative framework for international protection is a combination of public international law, European Union law, broader international human rights norms, norms of the European Union (EU), and national norms (see, e.g., Aer 2016; Kallio et al. 2018).⁸⁶ Finland is bound by key

⁸¹ Gammeltoft-Hansen, T. and Hathaway, J. (2015). Non-Refoulement in a World of Cooperative Deterrence, *Columbia Journal of Transnational Law* 53(2), 235–84.

⁸² Neylon, A. (2019). Producing Precariousness: ‘Safety Elsewhere’ and the Removal of International Protection Status under EU Law, *European Journal of Migration and Law* 21(9), 1–25.

⁸³ Finland, Constitution of Finland, Act No. 731/1999, 11 June 1999.

⁸⁴ Mäenpää, O. (2023). *Hallinto-oikeus* (‘Administrative Law’ [unofficial translation]), Helsinki: Alma Talent.

⁸⁵ Mäenpää, O. (2023). *Hallinto-oikeus* (‘Administrative Law’ [unofficial translation]), Helsinki: Alma Talent.

⁸⁶ Aer, J. (2016). *Ulkomaalaisoikeuden perusteet* (‘Basic of Immigration Law’ [unofficial translation]), Helsinki: Alma Talent; Kallio, H., Kotkas, T., and Palander, J. (2018).

international and regional human rights instruments, such as the Refugees Convention,⁸⁷ the European Convention on Human Rights⁸⁸ and its interpretations in jurisprudence that apply to asylum claimants (see, e.g., Ferreira 2021),⁸⁹ as well as the EU Charter of Fundamental Rights,⁹⁰ establishing the right to asylum as part of the EU legal order. And while the Constitution of Finland does not include a right to asylum, it does provide protection against non-refoulement (Section 9(4)).⁹¹

The Common European Asylum System (CEAS) provides harmonised rules on asylum reception, procedures, and qualification for international protection (Brouwer 2021, 49).⁹² These harmonised rules have been provided largely in the form of directives, which the EU member states must implement on the national level. Three EU Directives harmonise the conditions under which non-EU citizens may benefit from international protection in the EU (Leboeuf 2022, 7; see also Kallio et al. 2018, 285–292):⁹³ the Qualification Directive (QD),⁹⁴ the Asylum Procedures Directive (APD),⁹⁵ and the Reception Conditions Directive (RCD).⁹⁶ The QD provides uniform criteria for interpreting the definition of a refugee, such as acts of

Ulkomaalaisykeus ('Immigration Law' [Unofficial translation]), Helsinki: Alma Talent.

⁸⁷ Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137 and Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267.

⁸⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 U.N.T.S. 221.

⁸⁹ Ferreira, N. (2021). An exercise in detachment: the Council of Europe and sexual minority asylum claims, in Mole, R. C. M. (ed.), *Queer Migration and Asylum in Europe*, London: UCL Press, 78–108.

⁹⁰ Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

⁹¹ Finland, Constitution of Finland, Act No. 731/1999, 11 June 1999.

⁹² Brouwer, E. (2021). Challenges to EU legality in the field of asylum and migration law, in Kilpatrick, C. and Scott, J. (eds.), *Contemporary Challenges to EU Legality*, Oxford: Oxford University Press, 48–70.

⁹³ Leboeuf, L. (2022). The Juridification of 'Vulnerability' through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants' Experiences, *Laws* 11:3, 45; Kallio, H., Kotkas, T., and Palander, J. (2018). *Ulkomaalaisykeus* ('Immigration Law' [Unofficial translation]), Helsinki: Alma Talent.

⁹⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337, 20.12.2011.

⁹⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013.

⁹⁶ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013.

persecution (Article 9) and reasons for persecution (Article 10). The APD contains minimum criteria regarding the provision of legal and procedural information and counsel to applicants as well as on appeals procedures. The RCD lays down standards for the reception of applicants for international protection in EU member states (Article 1).

In accordance with Article 18 of the EU Charter of Fundamental Rights,⁹⁷ in Finland, Section 87(1) of the Aliens Act (301/2004)⁹⁸ provides a subjective right to asylum if the applicant fulfils the criteria provided by legislation:

Aliens residing in the country are granted asylum if they reside outside their home country or country of permanent residence owing to a well-founded fear of being persecuted for reasons of ethnic origin, religion, nationality, membership in a particular social group or political opinion and if they, because of this fear, are unwilling to avail themselves of the protection of that country.

In other words, an individual who is deemed to have a well-founded fear of being persecuted has the right to asylum.

Asylum decision-making has been dubbed as one of the most difficult and complex forms of decision-making in the modern state (Rousseau et al. 2002; Thomas 2006).⁹⁹ It involves an assessment of future risk ('well-founded fear') based on limited information, often without documentary evidence. The asylum applicant's account may be the only evidence available. But it may not be just the highly limited evidence that makes asylum decision-making difficult and complex. International refugee law, as Vrachnas et al. (2011) argue, is full of controversy regarding the meaning and scope of key terms, such as persecution, due in part to a lack of coherent doctrinal rationale underpinning the Refugees Convention (Vrachnas et al., 2011, xxiv).¹⁰⁰ Furthermore, refugee definition and the asylum systems of refugee-receiving countries are highly politicised and subject to formidable turbulence – in particular, perhaps, in the context of a perceived crisis (Wahlbeck 2022; Stierl & Dadusc 2022; Benton & Papademetriou 2021; Thorburn Stern 2018; Lindley 2014;

⁹⁷ Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

⁹⁸ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

⁹⁹ Rousseau, C., Crépeau, F., Foxen, P., and Houle, F. (2002). The complexity of determining refugeehood: A multidisciplinary analysis of the decision-making process of the Canadian Immigration and Refugee Board, *Journal of Refugee Studies* 15(1), 43–70; Thomas, R. (2006). Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined, *European Journal of Migration and Law* 8(1), 79–96.

¹⁰⁰ Vrachnas, J., Bagaric, M., Dimopoulos, P., Pathinayake, A. (2011). *Migration and Refugee Law: Principles and Practice in Australia*, Cambridge: Cambridge University Press.

substudy I).¹⁰¹ Indeed, Gorman (2019, 490) points out how refugee definition is ‘not static but rather a site of ongoing struggle over asylum protection, evolving in response to changing human rights norms and domestic priorities’.¹⁰²

The asylum procedure begins with the application and the subsequent asylum interview. According to Section 97(2) of the Aliens Act,¹⁰³ the Finnish Immigration Service conducts an asylum interview to establish orally the grounds given by the applicant for the persecution they have faced in their home country or country of permanent residence or for other violations of their rights or related threats. Furthermore, in the asylum interview, according to Section 97a(4) of the Aliens Act,¹⁰⁴ a transcript is drawn up of the asylum interview, and after the interview has finished, the transcript will be interpreted to the applicant, and they will receive information on their opportunity to amend the entries in the transcript or add new details to it.

In these provisions, the process of establishing ‘the grounds given by the applicant’ for persecution or other violations they have faced is presented as mechanical, neutral, and devoid of discretionary elements. However, as Määttä (2015, 32) notes,

(...) the [interview] transcript, which is supposedly a neutral account of the (...) asylum seeker’s actual speech, is in fact a polyphonic product composed of the voices of the speakers, including the interpreter’s, as well as voices originating from adjacent written texts such as laws, regulations, and pieces of evidence referred to during the interview. All these are filtered through framing and stereotyping processes that are embedded in human communication abilities on the one hand, and the normalizing, summarizing, and selection processes that are

¹⁰¹ Wahlbeck, Ö. (2022). Finnish Civil Servants on Harmonization in the Asylum System: A Study in Horizontal Europeanization, *Social Inclusion* 10(3), 58–67; Stierl, M. and Dadusc, D. (2022). The “Covid excuse”: European border violence in the Mediterranean Sea, *Ethnic and Racial Studies* 45(8), 1453–1474; Benton, M. and Papademetriou, D. G. (2021). COVID-19 Is Becoming A “9/11 Moment” For Borders And Health, *Health Affairs (Project Hope)* 40(7), 1162–1169; Thorburn Stern, R. (2018). Proportionate or Panicky? On Developments in Swedish and Nordic Asylum Law in Light of the 2015 ‘Refugee Crisis’, in Stoyanova, V. and Karageorgiou, E. (eds.), *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis*, Leiden: Brill Nijhoff, 233–262; Lindley, A. (2014). Exploring crisis and migration: concepts and issues, in Anna Lindley (ed.), *Crisis and Migration: Critical Perspectives*, London: Routledge, 1–23

¹⁰² Gorman, C. (2019). Singled Out: Scaling Violence and Social Groups as Legal Borderwork in U.S. Asylum Law, *Geographical Review* 109(4), 487–506.

¹⁰³ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

¹⁰⁴ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

embedded in the techniques through which oral language is transformed into a written text on the other hand.¹⁰⁵

The typical asylum interview is a highly mediated and interpreted situation, where countless variables affect the outcome of the interaction. For instance, how the asylum interview is conducted (see, e.g., Chaffelson et al. 2023; Given-Wilson & Memon 2022; Evans Cameron 2018; Herlihy & Turner 2015),¹⁰⁶ the quality of interpretation during the interview (see, e.g., Pöllabauer 2015; Maryns 2013; Keselman et al. 2010),¹⁰⁷ whether the applicant receives support and counsel for the interview (see, e.g., Ruokolainen 2022; Mellinger 2021; BurrIDGE & Gill 2017),¹⁰⁸ as well as individual factors relating to the asylum applicant (see, e.g., Bishop 2021; Visentin et al. 2017; Rogers et al. 2015)¹⁰⁹ all factor in the outcome of the asylum

¹⁰⁵ Määttä, S. K. (2015). Interpreting the discourse of reporting: The case of screening interviews with asylum seekers and police interviews in Finland, *Translation & Interpreting* 7(3), 21–35.

¹⁰⁶ Chaffelson, R., Smith, J. A., Katona, C., and Clements, H. (2023). The challenges faced during home office interview when seeking asylum in the United Kingdom: an interpretative phenomenological analysis, *Ethnic and Racial Studies* 46(7), 1269–1289; Given-Wilson, Z. and Memon, A. (2022). Seeing is believing? A systematic review of credibility perceptions of live and remote video-mediated communication in legal settings, *Applied Cognitive Psychology* 36(6), 1168–1176; Evans Cameron, H. (2018). *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake*, Cambridge: Cambridge University Press; Herlihy, J. and Turner, S. (2015). Untested assumptions: psychological research and credibility assessment in legal decision-making, *European Journal of Psychotraumatology* 6(1), 27380.

¹⁰⁷ Pöllabauer, S. (2015). Interpreting in asylum proceedings, in Mikkelsen, H and Jourdenais, R. (eds.), *The Routledge handbook of interpreting*, London: Routledge, 202–216; Maryns, K. (2013). Disclosure and (re)performance of gender-based evidence in an interpreter-mediated asylum interview, *Journal of Sociolinguistics* 17(5), 661–686; Keselman, O., Cederborg, A., Lamb, M. E., and Dahlström, Ö. (2010). Asylum-seeking minors in interpreter-mediated interviews: what do they say and what happens to their responses?, *Child & Family Social Work* 15(3), 325–334.

¹⁰⁸ Ruokolainen, H. (2022). Volunteers' strategies for supporting asylum seekers with information challenges, *Journal of Documentation* 78(7), 305–326; Mellinger, H. (2021). Quality over quantity: Legal representation at the Asylum Office, *Law & Policy* 43(4), 368–389; BurrIDGE, A. and Gill, N. (2017). Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals, *Antipode* 49(1), 23–42.

¹⁰⁹ Bishop, S. C. (2021). Intercultural Communication, the Influence of Trauma, and the Pursuit of Asylum in the United States, *Journal of Ethnic and Cultural Studies* 8(2), 187–208; Visentin, S., Pelletti, G., Bajanowski, T., and Davide Ferrara, S. (2017). Methodology for the identification of vulnerable asylum seekers, *International Journal of Legal Medicine* 131(6), 1719–1730; Rogers, H., Fox, S., and Herlihy, J. (2015). The importance of looking credible: the impact of the behavioural sequelae of post-

interview. The asylum interview is the result of translation and interpretation in multiple senses: the decision-maker shapes the applicant's account by organising and structuring the interview, formulating questions, drawing up the interview transcript, and drafting the asylum decision; the interpreter makes countless meaningful choices and sometimes outright errors in rendering the participants' speech from one language to another (see, e.g., Määttä et al. 2021);¹¹⁰ additional participants such as a legal counsel or a volunteer (or lack thereof) may support or sometimes hinder the applicant's ability to state their case; and the applicant themselves may (or may not) use various strategies to 'translate' themselves as understandable to the asylum decision-maker, as noted by Akin (2017).¹¹¹

Although, in Finland, the core of legislation on international protection (e.g., Section 87 on asylum, Section 87a on acts of persecution, Section 87b on reasons for persecution, and Section 88 on subsidiary protection of the Aliens Act¹¹²) has remained largely unchanged for years,¹¹³ the government has changed procedural legislation that affects asylum seekers. A 2021 report published by the Ministry of the Interior finds that the focus of the amendments has been on making the asylum process efficient, rather than on protecting the applicants' human rights.¹¹⁴ The amendments contained, for instance, constrictions to the provision of legal aid (HE

traumatic stress disorder on the credibility of asylum seekers, *Psychology, Crime & Law* 21(2), 139–155.

¹¹⁰ Määttä, S., Puumala, E., and Ylikomi, R. (2021). Linguistic, psychological and epistemic vulnerability in asylum procedures: An interdisciplinary approach, *Discourse studies* 23(1), 46–66.

¹¹¹ Akin, D. (2017). Queer asylum seekers: translating sexuality in Norway, *Journal of Ethnic and Migration Studies* 43(3), 458–474.

¹¹² Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

¹¹³ With the exception that the government removed the category of humanitarian protection from the Aliens Act (HE 2/2016 vp. Hallituksen esitys eduskunnalle laiksi ulkomaalaislain muuttamisesta ('HE 2/2016 vp. Government proposal to the Parliament for amending the Aliens Act' [unofficial translation]).

¹¹⁴ Pirjatanniemi, E., Lilja, I., Helminen, M., Vainio, K., Lepola, O., and Alvesalo-Kuusi, A. (2021). *Ulkomaalaislain ja sen soveltamiskäytännön muutosten yhteisvaikutukset kansainvälistä suojelua hakeneiden ja saaneiden asemaan* ('The combined effects of the amendments to the Aliens Act and the practice of applying the Act with regard to the status of those requesting and receiving international protection'), Publications of the Government's analysis, assessment and research activities 10, Helsinki, 16 February 2021, available at: <http://urn.fi/URN:ISBN:978-952-383-009-7> [checked: 10 October 2023].

32/2016 vp; see, e.g., Majamaa et al. 2019),¹¹⁵ the right to appeal (HE 32/2016 vp),¹¹⁶ and the right to make subsequent applications (HE 273/2018 vp).¹¹⁷ The report argues that procedural amendments, such as constrictions to legal aid, have resulted in an increase in the number of appeals and of subsequent asylum applications. This suggests that there may have been significant changes in initial-level asylum decision-making without significant amendments to the substantive provisions regarding international protection in Finland.

Eule (2014, 58) differentiates between procedural discretion, or discretion exercised in the handling of cases, as discussed above, and factual decision discretion, or discretion in whether to grant a residence permit.¹¹⁸ When the asylum authority has conducted the asylum interview, they must decide whether to grant protection to the asylum applicant.

The discretionary elements embedded in the asylum status determination include two key decisions: whether the civil servant finds that the applicant's fear of persecution in the future is well-founded and whether their fear is due to one or more of the reasons stated by the law (i.e., ethnic origin, religion, nationality, membership in a particular social group or political opinion). Mechanically speaking, the decision-maker should weigh the 'facts' of the case, present arguments for and against the decision, identify the 'facts' that form the basis of the decision, and justify their impact on the outcome (Kallio et al. 2018, 112).¹¹⁹ But although asylum authorities are typically framed as neutral and objective (Bodström 2020; Smith-Khan 2017),¹²⁰ they are conditioned, by what Affolter et al. (2019) call 'communities

¹¹⁵ HE 32/2016 vp. Hallituksen esitys eduskunnalle laeiksi ulkomaalaislain ja eräiden siihen liittyvien lakien muuttamisesta ('HE 32/2016 vp. Government proposal to the Parliament for laws amending the Aliens Act and certain related laws' [unofficial translation]); Majamaa, K., Nieminen, K., Lepola, O., Rantala, K., Jauhola, L., Karinen, R., Luukkonen, T., and Kortelainen, J. (2019). *Kohti laadukkaita oikeusapupalveluita* ('Towards High Quality Legal Aid Services'), Publication series of the Government's analysis, assessment and research 60, Helsinki, 28 October 2019, available at: <http://urn.fi/URN:ISBN:978-952-287-793-2> [checked: 10 October 2023].

¹¹⁶ HE 32/2016 vp. Hallituksen esitys eduskunnalle laeiksi ulkomaalaislain ja eräiden siihen liittyvien lakien muuttamisesta ('HE 32/2016 vp. Government proposal to the Parliament for laws amending the Aliens Act and certain related laws' [unofficial translation]).

¹¹⁷ HE 273/2018 vp. Hallituksen esitys eduskunnalle laiksi ulkomaalaislain muuttamisesta ('HE 273/2018 vp. Government proposal to the Parliament for amending the Aliens Act' [unofficial translation]).

¹¹⁸ Eule, T. G. (2014). *Inside Immigration Law: Migration Management and Policy Application in Germany*, London: Routledge.

¹¹⁹ Kallio, H., Kotkas, T., and Palander, J. (2018). *Ulkomaalaisoikeus* ('Immigration Law' [Unofficial translation]), Helsinki: Alma Talent.

¹²⁰ Bodström, E. (2020). Asylum Decisions as Performances: Intertextuality in Internal Credibility Assessment, *International Journal of Refugee Law* 32(4), 623–644; Smith-

of interpretation’, to approach credibility assessment in specific ways.¹²¹ For instance, how asylum decision-makers perceive a ‘correct’ decision is shaped by institutional constraints related to legality, productivity, and accountability as well as actors such as superiors and peers or even imagined figures such as ‘the tax payers’ (Affolter et al. 2019, 266).¹²²

In its 2023 report, the Ministry of the Interior of Finland (2023, 23) notes that while the Aliens Act often allows for more fundamental and human rights-oriented interpretations,¹²³ immigration authorities have not fully relied on this possibility in their practices – for instance, when it comes to provisions such as Section 36(2) on circumvention of the provisions on entry or Section 52 on the issue of residence permits on a discretionary basis on humanitarian grounds.¹²⁴ As a 2023 report examining case law on circumvention of entry provisions, published by the Finnish Human Rights Centre, demonstrates, the legal provision is vague and allows authorities broad discretionary power to assess where a residence permit can be refused on this basis.¹²⁵ Similarly, as regards granting residence permits on a

Khan, L. (2017). Telling Stories: Credibility and the Representation of Social Actors in Australian Asylum Appeals, *Discourse and Society* 28(5), 512–534.

¹²¹ Affolter, L., Miaz, J., and Poertner, E. (2019). Taking the ‘Just’ Decision: Caseworkers and Their Communities of Interpretation in the Swiss Asylum Office, in Gill, N. and Good, A. (eds.), *Asylum Determination in Europe: Ethnographic Perspectives*, London: Palgrave, 263–284.

¹²² Affolter, L., Miaz, J., and Poertner, E. (2019). Taking the ‘Just’ Decision: Caseworkers and Their Communities of Interpretation in the Swiss Asylum Office, in Gill, N. and Good, A. (eds.), *Asylum Determination in Europe: Ethnographic Perspectives*, London: Palgrave, 263–284.

¹²³ And indeed, Section 22 of the Constitution of Finland obliges public authorities to guarantee the observance of basic rights and liberties and human rights (Finland, Constitution of Finland, Act No. 731/1999, 11 June 1999). In addition, authorities must choose, among alternative procedures or measures, the one that best promotes the realisation of fundamental rights (PeVM 25/1994 vp. Perustuslakivaliokunnan mietintö n:o 25 hallituksen esityksestä perustuslakien perusoikeussäännösten muuttamisesta (‘PeVM 25/1994 vp. Report No. 25 of the Constitutional Law Committee on the Government’s proposal for amending the fundamental rights provisions of the constitutional laws’ [unofficial translation]), p. 4)

¹²⁴ Finland, Ministry of the Interior (2023). *Näkökohtia ulkomaalaislain kokonaisuudistuksen valmisteluun* (‘Perspectives on the Comprehensive Reform of the Aliens Act’), Helsinki, Publications of the Ministry of the Interior 17, 4 April 2023, available at: <https://urn.fi/URN:ISBN:978-952-324-983-7> [checked: 10 October 2023].

¹²⁵ Korkman, E. (2023). *Selvitys maahantulosäännösten kiertämisestä koskevasta oikeuskäytännöstä* [‘Report on the case law on circumvention of entry provisions’], Helsinki, Human Rights Centre’s publications 2, 31 January 2023, available at: <https://bin.yhdistysavain.fi/1586428/fM9R8Y7Ax2KbrKMDpiZv0YqB36/Selvitys%20maahantulos%C3%A4%C3%A4nn%C3%B6sten%20kiert%C3%A4mist%C3%A4%20koskevasta%20oikeusk%C3%A4yt%C3%A4.pdf> [checked: 10 October 2023].

discretionary basis on humanitarian grounds, a report issued by the Ministry of the Interior (2022, 22) argues that the wording of the provision fails to provide a precise understanding of its application. Although the wording of the provision would allow for a more flexible application, the threshold for granting a permit is found to have become very high in practice (Ministry of the Interior 2022, 22). The possibility of applying the provision is described as exceptional and very strict, which is why the permit is also considered to be ‘underused’ (Ministry of the Interior 2022, 22).¹²⁶

As regards asylum, some of the reasons for fearing persecution included in Section 87(1) of the Aliens Act (301/2004)¹²⁷ (i.e., ethnic origin, religion, nationality, membership in a particular social group or political opinion) may provide even more discretionary power than others. For instance, regarding *membership in a particular social group*, Gorman (2017, 40) notes that

[w]hile race, religion, nationality, and political opinion have arguably clearer referents, there is no consensus on what constitutes a social group and membership within it. As legal scholar Michelle Foster (2012, 2) describes, it is a “nebulous” term that lacks “self-evident” or “ordinary” meaning.¹²⁸

Although Section 87(b)(3) of the Aliens Act (301/2004)¹²⁹ provides that a common characteristic of a particular social group may also be sexual orientation, neither the provision itself nor the relevant bills (HE 166/2007 vp; HE 9/2014 vp)¹³⁰ provide any further guidance on how asylum decision-makers should assess sexual

¹²⁶ Finland, Ministry of the Interior (2022). *Selvitys mahdollisista kansallisista ratkaisuihin maassa ilman oleskeluoikeutta olevien tilanteeseen* (‘Report on possible national solutions to the situation of people without a right of stay in Finland’), Helsinki, Publications of the Ministry of the Interior 16, 10 February 2022, available at: <http://urn.fi/URN:ISBN:978-952-324-545-7> [checked: 10 October 2023].

¹²⁷ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

¹²⁸ Gorman, C. (2017). Redefining refugees: Interpretive control and the bordering work of legal categorization in U.S. asylum law, *Political Geography* 58(3), 36–45; Foster, M. (2012). The ‘Ground with the Least Clarity’: A comparative study of jurisprudential developments relating to Membership of a Particular Social Group’, United Nations High Commissioner for Refugees Legal and Protection Policy Research Series, PPLA/2012/02, available at: refworld.org/docid/4f7d9472.html [checked: 10 October 2023].

¹²⁹ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

¹³⁰ HE 166/2007 vp, Hallituksen esitys Eduskunnalle laeiksi ulkomaalaislain ja eräiden siihen liittyvien lakien muuttamisesta (‘HE 166/2007 vp. Government proposal to the Parliament for laws amending the Aliens Act and certain related laws’ [unofficial translation]); HE 9/2014 vp, Hallituksen esitys eduskunnalle laiksi ulkomaalaislain muuttamisesta (‘HE 9/2014 vp. Government proposal to the Parliament for amending the Aliens Act’ [unofficial translation])

orientation. In such a context, as noted by Selim et al. (2022, 1), asylum decision-makers ‘often make assumptions regarding human sexuality, sexual identity formation and sexual behavior that are either partially or entirely unsupported by psychological research’.¹³¹ Selim et al. (2022, 1) point out how these assumptions put vulnerable individuals at risk of having to face persecution.¹³² Asylum authorities approaches regarding sexual orientation as a protection category are thus left largely to their discretion and choices between various guidelines (discussed next in section 2.3 on non-legislative policy instruments).

In sum, although decisions involving the use of administrative power can only be made on the basis and within the framework provided by legislation, in practice, decision-making in difficult and complex matters, such as asylum matters, may provide decision-makers with much ‘wobble room’, for instance, to constrict policies. A typical asylum interview is a highly mediated and interpreted situation, where countless variables affect the outcome of the interaction. Procedural amendments, such as constrictions to legal aid, may have a crucial impact on outcomes in asylum decision-making. And while the law allows for – even obliges to – more fundamental and human rights-oriented interpretations, immigration authorities may not fully make use of this possibility in their practices.

2.3 Non-legislative policy instruments

Lastly, this chapter explores the use of various non-legislative, or ‘soft law’, policy instruments that decision-makers rely on to supplement asylum decision-making. Soft law is a set of non-binding principles, guidelines, or standards that provide guidance on how to comply with certain laws and regulations.¹³³ The non-binding quality of administrative guidance entails that it does not independently establish obligations or rights for individuals, and cannot be considered as exercise of

¹³¹ Selim, H., Korkman, J., Pirjatanniemi, E., and Antfolk, J. (2022). Asylum claims based on sexual orientation: a review of psycho-legal issues in credibility assessments, *Psychology, Crime & Law*, DOI: 10.1080/1068316X.2022.2044038.

¹³² Selim, H., Korkman, J., Pirjatanniemi, E., and Antfolk, J. (2022). Asylum claims based on sexual orientation: a review of psycho-legal issues in credibility assessments, *Psychology, Crime & Law*, DOI: 10.1080/1068316X.2022.2044038.

¹³³ Although the divide between ‘hard law’ and ‘soft law’ may not be as rigid or understandings of their differences in bindingness and legal effects as clear, for instance, in the EU’s regulatory practice, as commonly thought (see, e.g., Dermine, P. (2021). The instruments of Eurozone fiscal surveillance through the lens of the soft law/hard law dichotomy – Looking for a new approach, *Journal of Banking Regulation* 23, 7–18; Betts, A. (2010). Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Irregular Migrants, *International Journal of Refugee Law* 22(2), 209–236).

legislative power (Mäenpää 2023).¹³⁴ The legal basis for providing such instructions and recommendations is, as noted by Niemivuo (2020, 94), the power granted to the authority, through regulations, to lead and guide the activities of its subordinate authority.¹³⁵ Soft law includes guidelines, manuals, codes, rules, memoranda, correspondence, circulars, protocols, bulletins, employee handbooks, training materials as well as established policies and practices (Sossin & Smith 2003).¹³⁶ Some of the key soft law instruments, in the context of initial-level asylum determinations in Finland, include UNHCR documents, such as the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and the UNHCR Guidelines on International Protection, as well as European Union Agency for Asylum (EASO) training modules.¹³⁷ In addition, the Finnish Immigration Service relies on a variety of other non-legislative policy instruments in its asylum decision-making. For example, as regards sexual orientation as grounds for asylum, the agency refers to guidelines, reports, and research articles that do not only stem, for instance, from transnational bodies or the state but also from the agency itself, civil society organisations, and individual legal practitioners.¹³⁸ This goes to show how diverse soft law sources can be.

Although administrative soft law is not binding on decision-makers, it may, in practice, have more influence than legislative standards (Sossin & Smith 2003, 869).¹³⁹ This may be particularly true in the asylum context where legislation often provides a wide margin of discretion. For instance, Wahlbeck (2022) notes that, following the 2015 so-called refugee crisis in Europe, there were considerable political disagreements between the European Union (EU) member states regarding legislative changes to the EU asylum system. Yet, administrative processes Europeanised organically within national asylum administrations (Wahlbeck

¹³⁴ Mäenpää, O. (2023). *Hallinto-oikeus* ('Administrative Law' [unofficial translation]), Helsinki: Alma Talent.

¹³⁵ Niemivuo, M. (2020). *Lainvalmistelu – oikeudelliset perusteet ja käytäntö*, Helsinki: Kauppakamari.

¹³⁶ Sossin, L. and Smith, C. W. (2003). Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government, *Alberta Law Review* 40(4), 867–894.

¹³⁷ Finland, Finnish Immigration Service (2021). Maahanmuuttoviraston ohje 17.12.2021 ('Guidelines of the Finnish Immigration Service 17 December 2021' [unofficial translation]), MIG-2110648, 00.02.01, MIGDno-2021-750.

¹³⁸ Finland, Finnish Immigration Service (2022). *Seksuaalinen suuntautuminen ja sukupuoli-identiteetti* ('Sexual orientation and gender identity' [unofficial translation]), received by email on 11 January 2022.

¹³⁹ Sossin, L. and Smith, C. W. (2003). Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government, *Alberta Law Review* 40(4), 867–894.

2022).¹⁴⁰ Drawing on Heidenreich (2019)¹⁴¹ and Radaelli (2002),¹⁴² Wahlbeck suggests this was due to a ‘horizontal Europeanization’, or convergence of national policies and practices in the field of asylum – implying an institutional change, in contrast with a more top-down implementation of common legal frameworks by the EU (Wahlbeck 2022, 65).

As noted by substudy I, in the context of the 2015 perceived crisis, Finland, too, was aiming to harmonise its asylum policies and practices with other European countries, particularly Sweden. Finland’s recognition rate for young Iraqi asylum claimants, for instance, decreased substantially, to the level of Sweden. Substudy I argues that this was due to a large-scale shift in credibility assessment practices, or the assessment of facts and applicants’ claims. Substudy I suggests that the shift in credibility assessment practices was ‘essential to the mass denial of young Iraqi asylum applicants in Finland’. The findings suggest that changes in asylum policies and practices have the potential to generate a large-scale shift in asylum recognition rates.

Due to its less formal nature, administrative soft law may sometimes be more flexible than other forms of legislation, allowing for rapid changes to address emerging issues. And administrative soft law may be perceived as more adaptable in a crisis context than, say, statutory law (McLeod 2022). For instance, in September and December of the ‘crisis’ year 2015, respectively, Finland’s government swiftly issued two ‘action plans’ to curb immigration: one addressing immigration policy in general and another addressing asylum policy more specifically.¹⁴³ Only some of the proposals contained in the documents entailed legislative changes, whereas other proposals focus more on changes in the policies and practices of Finland’s immigration control apparatus, which could be adopted quickly to stop what the

¹⁴⁰ Wahlbeck, Ö. (2022). Finnish Civil Servants on Harmonization in the Asylum System: A Study in Horizontal Europeanization, *Social Inclusion* 10(3), 58–67.

¹⁴¹ Heidenreich, M. (ed.) (2019). *Horizontal Europeanisation: The transnationalisation of daily life and social fields in Europe*, London: Routledge.

¹⁴² Radaelli, C. M. (2002). The domestic impact of European Union public policy: Notes on concepts, methods, and the challenge of empirical research, *Politique européenne* 5(1), 105–136.

¹⁴³ Finnish Government (2015a). Government action plan on immigration [only in Finnish], 11 September 2015, Helsinki, <https://valtioneuvosto.fi/documents/10616/334517/Hallituksen%20maahanmuuttopolitiittiset%20toimenpiteet/186046e8-46c7-450c-98cf-45b2e2d19c2c> [checked: 10 October 2023]; Finnish Government (2015b). Government action plan on asylum policy [official translation], 8 December 2015, Helsinki, vnk.fi/documents/10184/1058456/Hallituksen_turvapaikkapoliittinen_toimenpideohjelman_08122015+EN.pdf/3e555cc4-ab01-46af-9cd4-138b2ac5bad0 [checked: 10 October 2023].

government called ‘the uncontrolled flow of asylum seekers’ into Finland (Finnish Government 2015b, 1).¹⁴⁴

A downside with the flexibility and adaptability of administrative soft law is that it may exist independently of any parliamentary authority or oversight, making it subject to accountability issues (Sossin & Smith 2003; McLeod 2022).¹⁴⁵ As noted by Sossin and Smith (2003, 887),

Legislation and Regulations are subject to Parliamentary accountability and procedural formality (they must be enacted or issued in a particular fashion, published in a particular form, vetted for compliance with constitutional strictures, and are subject to Parliamentary debate). Soft law is subject to no such criteria.

Administrative soft-law does not stem from democratically elected representatives, but is developed, handpicked, and applied by the bureaucracy, sometimes through relatively opaque processes. Rapid and opaque changes in asylum policies and practices may make it difficult for an asylum seeker to predict outcomes in a process where, if residence permit is denied, they could be forced to face persecution.

Administrative soft law may arguably benefit administrative decision-making by encouraging consistency, certainty, and efficiency (O’Sullivan 2007, 258).¹⁴⁶ Ideally, administrative soft law can provide guidance and standardisation for administrative bodies, which can help ensure that similar cases are treated in a similar manner. This may be a valid point *within* a bureaucratic agency. But as substudy II demonstrates, the use of administrative soft law instruments, such as guidelines, may make asylum decision-making incoherent between the initial-level agency and the appeals-level court. For instance, as regards queer asylum credibility assessment, administrative court judges may not ascribe importance to or even understand the so-called DSSH model (acronym from the words ‘Difference’, ‘Stigma’, ‘Shame’, and ‘Harm’) endorsed by the Finnish Immigration Service (substudy II). Furthermore, as Sossin and Smith (2003, 887) note, ‘courts cannot

¹⁴⁴ Finnish Government (2015b). Government action plan on asylum policy [official translation], 8 December 2015, Helsinki, vnk.fi/documents/10184/1058456/Hallituksen_turvapaikkapolitiinen_toimenpideohjelma_08122015+EN.pdf/3e555cc4-ab01-46af-9cd4-138b2ac5bad0 [checked: 10 October 2023].

¹⁴⁵ McLeod, M. (2022). Distancing From Accountability? Governments’ Use of Soft Law in the COVID-19 Pandemic, *Federal Law Review* 50(1), 3–19.

¹⁴⁶ O’Sullivan, M. (2007). Failure to exercise discretion or perform duties, in Groves, M. and Lee, H. P. (eds.), *Australian administrative law: Fundamentals, principles and doctrines*, Cambridge: Cambridge University Press, 253–264.

treat guidelines as law because to do so would recognize that public administration is subject to laws of its own design', which would offend the separation of powers.¹⁴⁷

In the Finnish context, as noted by Mäenpää (2019, 443), the decision-making authority of the administrative court is particularly influenced by the distinction between executive power and judicial power: the administrative court cannot assume the tasks of the administrative authority nor position itself in the role of the authority.¹⁴⁸ When applying legislation, the task of the administrative court is not to make independent administrative decisions; rather, its decision-making authority is directed towards assessing the legality of the administrative decision in question and exercising judicial power (Mäenpää 2019, 443).¹⁴⁹ This focuses and limits the administrative court's decision-making authority to the subsequent evaluation of the legality of the decision-making process (Mäenpää 2019, 443).¹⁵⁰ Although the same legal norms are applied at both levels of decision-making (the initial level at the Finnish Immigration Service and the appeals level at administrative courts), their relationship with soft law-type norms differs significantly. While soft law, such as various guidelines, forms a key set of norms for the Finnish Immigration Service, the administrative court is tasked with assessing the legality of the soft law instruments and their application at the initial level.¹⁵¹ The ensuing incoherence between different levels of asylum decision-making, emanating from the use of soft law at the initial decision-making level, may make the asylum system increasingly difficult for an individual to navigate and decision-making outcomes increasingly harder to predict.

Despite the non-binding nature of administrative soft law, 'people will be', as noted by Weeks (2016, 2), 'subjected to real and legally effective consequences' as a result of its operation.¹⁵² For instance, as substudy II suggests, in Finland, the DSSH model steers credibility assessment in asylum decision-making regarding

¹⁴⁷ Sossin, L. and Smith, C. W. (2003). Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government, *Alberta Law Review* 40(4), 867–894.

¹⁴⁸ Mäenpää, O. (2019). *Oikeudenkäynti hallintoasioissa* ('Legal Proceedings in Administrative Matters' [unofficial translation]), Helsinki: Alma Talent.

¹⁴⁹ Mäenpää, O. (2019). *Oikeudenkäynti hallintoasioissa* ('Legal Proceedings in Administrative Matters' [unofficial translation]), Helsinki: Alma Talent.

¹⁵⁰ Mäenpää, O. (2019). *Oikeudenkäynti hallintoasioissa* ('Legal Proceedings in Administrative Matters' [unofficial translation]), Helsinki: Alma Talent.

¹⁵¹ In addition, the supreme overseers of legality in Finland, namely the Parliamentary Ombudsman and the Chancellor of Justice, have intervened in their decisions regarding issues with administrative guidelines (see, e.g., decisions: OKV/570/10/2021, 9 February 2023, Chancellor of Justice; OKV/23/10/2020, 6 July 2020, Chancellor of Justice; OKV/1401/1/2014, 30 July 2015, Chancellor of Justice).

¹⁵² Weeks, G. (2016). *Soft Law and Public Authorities: Remedies and Reform*, Oxford: Hart Publishing.

sexual orientation – so forcefully, in fact, that ‘[p]roducing a coherent narrative of difference [embedded in the DSSH model] is a prerequisite for being granted the status of (queer) refugee’ (substudy II, 18). Substudy II demonstrates how the DSSH model reproduces an understanding of sexual identity development as a linear process (beginning with a first realisation, or ‘awakening’) and the ideal expression of same-sex interest as a Westernised and heteronormative monogamous relationship based on romantic love. Substudy II highlights the role that administrative soft law has in shaping understandings regarding an entire asylum protection category. Furthermore, the lack of clarity in some forms of administrative soft law could lead to confusion about what is expected from individuals. The DSSH model, for instance, risks ‘excluding those queer asylum applicants who are unable to convey emotions or to relate to the culturally context-sensitive abstractions embedded in the model’ (substudy II, 25).

In sum, although administrative soft law has some advantages, such as flexibility and the potential to encourage consistency, certainty, and efficiency in decision-making, it also involves risks for individuals seeking asylum. This dissertation suggests that administrative soft law may increase inconsistency between initial-level and appeals-level asylum decision-making. Administrative soft law may also shape understandings regarding an asylum protection category in ways that may confuse and exclude certain groups of asylum applicants. The risks associated with administrative soft law are exacerbated by the fact that it may exist independent of parliamentary authority or oversight. This lack of accountability is highly problematic, given that changes in asylum policies and practices have, as suggested by the findings of this dissertation, the potential to generate a large-scale shift in asylum recognition rates.

3 Procedural vulnerability in asylum system

This chapter focuses on the risks that the use of discretionary power in the asylum procedure may pose for asylum applicants who are made vulnerable – in particular, for those applying for queer asylum. First, this chapter explores social scientific perspectives on *vulnerability*, *procedural vulnerability*, and *precarity* in the asylum context. The chapter argues that particularly the concept of procedural vulnerability, more familiar in other substantive contexts (e.g., research on climate change and indigenous peoples), has the potential to expand our understanding of the risks that the use of discretionary power in the asylum procedure may pose for asylum applicants. The concept of procedural vulnerability may shift the conversation away from viewing disadvantaged individuals as inherently vulnerable, and towards recognising policy processes that generate vulnerability (Rivera et al. 2022, 220).¹⁵³ Second, this chapter examines how ‘vulnerability’ in the asylum procedure is construed in legal and policy documents and how discretionary power features there. More specifically, the aim is to explore who it is that legal and policy documents mean when they refer to vulnerable asylum applicants, whose vulnerability is not discussed (the ‘not-so-vulnerable’ asylum applicants), and what the material consequences associated with a vulnerable status are in the context of the asylum procedure. Furthermore, the aim is to identify the main legal and non-legislative policy instruments that provide for the protection of vulnerable groups in the Finnish asylum system. Third, taking queer asylum as a case in point, this chapter examines how sociological and legal construals of vulnerability relate to queer asylum-seeking and how discretionary power features in the assessment of the queer subject’s vulnerability.

¹⁵³ Rivera, D., Jenkins, B., and Randolph, R. (2022). Procedural Vulnerability and Its Effects on Equitable Post-Disaster Recovery in Low-Income Communities, *Journal of the American Planning Association* 88(2), 220–231.

3.1 Precarity and (procedural) vulnerability in asylum decision-making

The idea that the asylum procedure may exacerbate the claimant's vulnerability is not new to scholarship on asylum decision-making. For instance, Määttä et al. (2021, 47) approach vulnerability as 'a shared condition intertwined with the institutional asylum process'.¹⁵⁴ However, this understanding has, thus far, not been properly conceptualised in research literature. This chapter argues for the need to adopt the concept of 'procedural vulnerability' in the context of asylum decision-making – a concept that is perhaps more familiar in other research fields (e.g., research on climate change, environmental change, and indigenous peoples).¹⁵⁵ The concept of procedural vulnerability may, as noted by Rivera et al. (2022, 220), shift the conversation away from viewing disadvantaged individuals as inherently vulnerable, and instead help to recognise policy processes that generate vulnerability.¹⁵⁶ Instead of highlighting 'the individual's capacity [or lack thereof] to remain resilient and active in the migration process' (UNHCR & IDC 2016, 2)¹⁵⁷, there is a need for a broader, more structural understanding of vulnerability. It is not just that individuals arrive to the asylum procedure with their pre-existing vulnerabilities, but that, as this chapter suggests, 'procedural vulnerability' could be used to refer to the ways in which the asylum procedure itself produces and exacerbates vulnerability.

¹⁵⁴ Määttä, S., Puumala, E., and Ylikomi, R. (2021). Linguistic, psychological and epistemic vulnerability in asylum procedures: An interdisciplinary approach, *Discourse studies* 23(1), 46–66.

¹⁵⁵ Some examples include: Rivera, D. Z., Jenkins, B., and Randolph, R. (2022). Procedural Vulnerability and Its Effects on Equitable Post-Disaster Recovery in Low-Income Communities, *Journal of the American Planning Association* 88(2), 220–231; Rivera, D. Z. (2020). Disaster Colonialism: A Commentary on Disasters beyond Singular Events to Structural Violence, *International Journal of Urban and Regional Research* 44(1), 126–135; Hsu, M., Howitt, R., and Miller, F. (2015). Procedural Vulnerability and Institutional Capacity Deficits in Post-Disaster Recovery and Reconstruction: Insights from Wutai Rukai Experiences of Typhoon Morakot, *Human Organization* 74(4), 308–318; Veland, S., Howitt, R., Dominey-Howes, D., Thomalla, F., and Houston, D. (2013). Procedural vulnerability: Understanding environmental change in a remote indigenous community, *Global Environmental Change* 23(1), 314–326; Howitt, R. (2012). Sustainable indigenous futures in remote Indigenous areas: relationships, processes and failed state approaches, *GeoJournal* 77(6), 817–828.

¹⁵⁶ Rivera, D., Jenkins, B., and Randolph, R. (2022). Procedural Vulnerability and Its Effects on Equitable Post-Disaster Recovery in Low-Income Communities, *Journal of the American Planning Association* 88(2), 220–231.

¹⁵⁷ The UN Refugee Agency (UNHCR) and International Detention Coalition (IDC) (2016). Vulnerability screening tool – Identifying and addressing vulnerability: a tool for asylum and migration systems, available at: www.refworld.org/detention.html [checked: 10 October 2023].

In order to grasp how the concept of procedural vulnerability could expand our understanding of the risks that the use of discretionary power in the asylum procedure may pose for asylum applicants, it is crucial to first explore social scientific perspectives and critique regarding ‘vulnerability’ in the asylum context.

In an ontological sense, vulnerability may be understood as a condition shared by all human beings and other living things (Fineman 2008; Cole 2016, 263; Hokkanen et al. 2021, 72)¹⁵⁸: all bodies are fundamentally vulnerable and all lives fundamentally precarious. However, the ontological understanding of vulnerability may overlook the ways in which the social conditions of individuals and groups differ (Hokkanen et al. 2021, 73).¹⁵⁹ Through power disparities and inequalities, some are rendered more vulnerable than others. Cole (2016, 266) calls attention to vulnerabilities that deepen inequality and inflict harm.¹⁶⁰ ‘The intersection of race, ethnicity, gender, culture, religion, language and nationality’ presents challenges to vulnerable asylum applicants, as noted by Baillot et al. (2012).¹⁶¹ Drawing on Johnson (2011),¹⁶² Gill et al. (2018, 55) point out that asylum applicants are often traumatised and discussing events that may be painful to recall, as well as operating via an interpreter and in a cultural context that may be very unfamiliar to them.¹⁶³

Vulnerability is commonly understood in everyday language to encompass a range of undesirable circumstances and characteristics, including harm, weakness, fragility, dependence, and helplessness, which are associated with shortcomings and

- ¹⁵⁸ Fineman, M. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition, *Yale Journal of Law & Feminism* 20(1), 1–17; Cole, A. (2016). All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique, *Critical Horizons* 17(2), 260–277; Hokkanen, J., Soronen, A., Talvitie-Lamberg, K., and Valtonen, S. (2021). Haavoittuvuuden kudelmat: Digitaalinen subjekti ja haavoittuvuus datavetoista yhteiskuntaa käsittelevässä tutkimuskirjallisuudessa, *Media & Viestintä* 44(2), 69–91.
- ¹⁵⁹ Hokkanen, J., Soronen, A., Talvitie-Lamberg, K., and Valtonen, S. (2021). Haavoittuvuuden kudelmat: Digitaalinen subjekti ja haavoittuvuus datavetoista yhteiskuntaa käsittelevässä tutkimuskirjallisuudessa, *Media & Viestintä* 44(2), 69–91.
- ¹⁶⁰ Cole, A. (2016). All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique, *Critical Horizons* 17(2), 260–277.
- ¹⁶¹ Baillot, H., Cowan, S., and Munro, V. E. (2012). ‘Hearing the Right Gaps’: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process, *Social & Legal Studies* 21(3), 269–296.
- ¹⁶² Johnson, T. A. M. (2011). On silence, sexuality and skeletons: Reconceptualizing narrative in asylum hearings, *Social & Legal Studies* 20(1), 57–78.
- ¹⁶³ Gill, N., Rotter, R., BurrIDGE, A., Allsopp, J. (2018). The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain’s Asylum Appeals, *Social & Legal Studies* 27(1), 49–78.

reduced abilities (Cole 2016, 264; Shildrick 2002, 71).¹⁶⁴ Therefore, scholars point to the stigmatising, essentialising, and stereotyping risks related to the concept of vulnerability (see, e.g., Peroni & Timmer 2013, 1057).¹⁶⁵ The concept of vulnerability contains pitfalls, in particular if asylum seekers are represented as aid-dependent victims, objects of pity, and sentimental human interest (Khan 2021, 204; Lindley 2014, 12).¹⁶⁶ Framing asylum seekers as victims may overlook their agency, as many are active and mobile in the pursuit of a better life (Lindley 2014, 12).¹⁶⁷ Presenting vulnerability and agency as opposite poles is unhelpful, as it is entirely possible to be both vulnerable and active depending on the situation (Kaukko & Wernesjö 2017, 17).¹⁶⁸ Vulnerability and agency are, thus, dynamic and context-dependent (Tarvainen ym. 2022, 5).¹⁶⁹ However, in describing asylum seekers as active agents, the media, for instance, often emphasises the wrong kind of activity, such as cheating and crime (Horsti 2009, 78).¹⁷⁰ In the same vein, refugee-receiving countries may be represented as victims of migrants' agency, as though migrants were performing a hostile, violent act simply by crossing borders (Vezovnik 2018, 47).¹⁷¹

Vulnerability may also be used to wield power over asylum seekers. Politicians and other immigration authorities may refer to vulnerability to draw distinctions

¹⁶⁴ Cole, A. (2016). All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique, *Critical Horizons* 17(2), 260–277; Shildrick, M. (2002). *Embodying the Monster: Encounters with the Vulnerable Self*, Thousand Oaks, CA: Sage Publications.

¹⁶⁵ Peroni, L. and Timmer, A. (2013). Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law, *International Journal of Constitutional Law* 11(4), 1056–1085.

¹⁶⁶ Khan, A. (2021). Who's to Blame for Asylum 'Moral Panics'? Asylum Seekers' Perspectives on UK Policymaking, News Reporting, and Preferences of Identity Construction, in Frederiksen, M. D. and Knudsen, I. H. (eds.), *Modern Folk Devils: Contemporary Constructions of Evil*, Helsinki: Helsinki University Press, 203–221; Lindley, A. (2014). Exploring crisis and migration: concepts and issues, in Lindley, A. (ed.): *Crisis and Migration: Critical Perspectives*, London: Routledge, 1–23.

¹⁶⁷ Lindley, A. (2014). Exploring crisis and migration: concepts and issues, in Lindley, A. (ed.): *Crisis and Migration: Critical Perspectives*, London: Routledge, 1–23.

¹⁶⁸ Kaukko, M. and Wernesjö, U. (2017). Belonging and participation in liminality: Unaccompanied children in Finland and Sweden, *Childhood* 24(1), 7–20.

¹⁶⁹ Tarvainen, L., Laine, M., Leisti, M., Rautakorpi, M., Selim, H. and Skrifvars, J. (2022). *Haavoittuva asema turvapaikkaprosessissa*, Helsinki: Pakolaisneuvonta.

¹⁷⁰ Horsti, K. (2009). Kyllä Suomeen yksi nainen mahtuu! Turvapaikanhakijat uhreina ja uhkana suomalaisessa julkisuudessa, in Keskinen, K., Rastas, A., and Tuori, S. (eds.), *En ole rasisti, mutta... Maahanmuutosta, monikulttuurisuudesta ja kritiikistä*, Tampere: Vastapaino & Nuorisotutkimusverkosto, 77–86.

¹⁷¹ Vezovnik, A. (2018). Securitizing Migration in Slovenia: A Discourse Analysis of the Slovenian Refugee Situation, *Journal of Immigrant and Refugee Studies* 16(1–2), 39–56.

between refugees who are deemed to deserve protection and others who do not, such as ‘bogus’ asylum seekers and economic migrants (Smith & Waite 2018, 2; Goodman et al. 2017, 106).¹⁷² The authorities portray refugees as deserving of protection because ‘refugee’ is, as noted by Goodman et al. (2017, 106), a moral category that includes people who hold some position of social worth based on their vulnerability and whom there is an ethical duty to support.¹⁷³ Asylum applicants who do not fit the ‘victim’ role are deemed ‘bogus migrants’ and denied asylum (Giametta 2016).¹⁷⁴ For instance, a lack of emotion and failure to show feelings that indicate suffering may render the asylum applicant suspicious in the asylum process (Perego 2021, 149).¹⁷⁵

Anderson and Soennecken (2022, 2) argue that ‘the language of precariousness is better suited for highlighting the considerable role that the state plays in constructing the category of vulnerability’.¹⁷⁶ Precarity refers to those who experience precariousness and is typically used to describe ‘lives characterised by uncertainty and instability’ (Lewis et al. 2015, 10). Rather than being a pathologised status or set of circumstances like ‘vulnerability’, precarity may more readily be perceived as a phenomenon generated by social and political contexts. A precarious right to residence makes individuals vulnerable to exploitation (Lewis et al. 2015, 9) and deportation may, for forced migrants, mean returning to persecution.¹⁷⁷ Migrant’s precarious immigration status and lack of rights to residency, work and welfare are instrumentally exploited, for instance, in the labour market (Lewis et al. 2015). Asylum seekers typically confront precariousness not just in relation to the

¹⁷² Smith, K. and Waite, L. (2018). New and enduring narratives of vulnerability: rethinking stories about the figure of the refugee, *Journal of Ethnic and Migration Studies* 45(13), 2289–2307; Goodman, S., Sirriyeh, A. and McMahon, S. (2017). The evolving (re)categorisations of refugees throughout the “refugee/migrant crisis”, *Journal of Community and Applied Social Psychology* 27(2), 105–114; Morris, L. (2012). Rights, recognition and judgement: Reflections on the case of welfare and asylum, *British Journal of Politics and International Relations* 14:1, 39–56.

¹⁷³ Goodman, S., Sirriyeh, A., and McMahon, S. (2017). The evolving (re)categorisations of refugees throughout the “refugee/migrant crisis”, *Journal of Community and Applied Social Psychology* 27(2), 105–114.

¹⁷⁴ Giametta, C. (2016). Narrativising one’s sexuality/ gender: Neo-liberal humanitarianism and the right of asylum, in Stella, F., Taylor, Y., Reynolds, T., and Rogers, A. (eds.), *Sexuality, Citizenship and Belonging: Transnational and intersectional perspectives*, London: Routledge, 55–72.

¹⁷⁵ Perego, A. (2021). (Des)haciendo fronteras: Latin American LGBTIQ* asylum seekers in Spain in the process of credibility assessment, in Mole, R. C. M. (ed.): *Queer Migration and Asylum in Europe*, London: UCL Press, 132–161.

¹⁷⁶ Anderson, M. M. and Soennecken, D. (2022). Locating the Concept of Vulnerability in Canada’s Refugee Policies at Home and Abroad, *Laws* 11(2), 1–25.

¹⁷⁷ Lewis, H., Dwyer, P., Hodkinson, S., and Waite, L. (2015). *Precarious Lives: Forced Labour, Exploitation, and Asylum*, Bristol: Bristol University Press.

unknown outcome of their asylum application, but also in relation, for instance, to securing formal and secure employment or accessing the housing market (Olatz Ribera-Almandoz & Garcés-Mascareñas 2022, 5).¹⁷⁸ States generate precarity, Neylon (2019, 6) argues, as it allows them to monitor and police the ‘deservingness’ of the newcomers.¹⁷⁹ Law, Butler (2006, 55) notes, can even be suspended, deployed tactically and partially, or regarded as an instrument that the state may use to constrain and monitor a given population. Such tactics are deployed ‘in order to heighten the discretionary power of those who are asked to rely on their own judgment to decide fundamental matters of justice, life, and death’ (Butler 2006, 54).¹⁸⁰

But as the concept of precarity does not really address the asylum procedure, this is where the concept of ‘procedural vulnerability’ comes to the fore. Procedural vulnerability arises from people’s relationship to power and the ways that power is exercised (Hsu et al. 2015, 309).¹⁸¹ In Indigenous scholarship on disasters, procedural vulnerability is typically understood as ‘structural erasure that persists through “...wickedly complex administrative systems...”’ (Howitt 2012, 820, in Rivera et al. 2022, 222).¹⁸² Instead of simply essentialising vulnerability as a list of ‘special needs’ categories of persons (e.g., unaccompanied minors; disabled people; pregnant women; victims of human trafficking; or persons with serious illnesses or mental disorders), the concept of procedural vulnerability could shift the focus on administrative and judicial processes that exacerbate and create vulnerability. Factors that may contribute to procedural vulnerability in the asylum decision-making context include, for instance, vague, opaque, and abstract criteria for receiving a residence permit that leave street-level bureaucrats with much unchecked discretionary power (substudy II), swiftly changing and inconsistent asylum policies

¹⁷⁸ Olatz Ribera-Almandoz, C. D. and Garcés-Mascareñas, B. (2022). ‘Our home, your home?’ The precarious housing pathways of asylum seekers in Catalonia, *Housing Studies*, DOI: 10.1080/02673037.2022.2141202.

¹⁷⁹ Neylon, A. (2019). Producing Precariousness: ‘Safety Elsewhere’ and the Removal of International Protection Status under EU Law, *European Journal of Migration and Law* 21(9), 1–25.

¹⁸⁰ Butler, J. (2006). *Precarious Life: The Powers of Mourning and Violence*, New York: Verso.

¹⁸¹ Hsu, M., Howitt, R., and Miller, F. (2015). Procedural Vulnerability and Institutional Capacity Deficits in Post-Disaster Recovery and Reconstruction, *Human Organization* 74(4), 308–318.

¹⁸² Howitt, R. (2012). Sustainable indigenous futures in remote Indigenous areas: relationships, processes and failed state approaches, *GeoJournal* 77(6), 817–828; Rivera, D. Z., Jenkins, B., and Randolph, R. (2022). Procedural Vulnerability and Its Effects on Equitable Post-Disaster Recovery in Low-Income Communities, *Journal of the American Planning Association*, 88(2), 220–231.

(substudy I), or discrepancies between decision-making at the initial level and the appeals level (substudy II).

In sum, there are stigmatising, essentialising, and stereotyping risks related to the concept of vulnerability. The concept of precarity perhaps takes better into account social and political contexts, in how uncertainty and instability make individuals vulnerable to exploitation and exclusion from society. But the idea that the asylum procedure itself may exacerbate the claimant's vulnerability has, thus far, not been properly conceptualised in research literature. This chapter argues for the need to adopt the concept of 'procedural vulnerability' in the context of asylum decision-making.

3.2 Vulnerability in asylum law and non-legislative policy instruments

Next, this chapter examines how vulnerability in the asylum procedure is construed in legal and policy documents and how discretionary power features there. More specifically, this section focuses on who it is that legal and policy documents mean when they refer to vulnerable asylum applicants, whose vulnerability is not discussed (the 'not-so-vulnerable' asylum applicants), and what the material consequences associated with a vulnerable status are in the context of the asylum procedure. Furthermore, this section identifies the main legal and non-legislative policy instruments that provide for the protection of vulnerable groups in the Finnish asylum system. The basic assumption is that Finnish national legislation regarding asylum is in harmony with international and EU law obligations (see, e.g., Kallio et al. 2018, 10),¹⁸³ but this chapter also aims to make this broader context visible. While in chapter 2 I examined the limits of discretion in asylum decision-making in a broader sense, in this chapter I focus on discretion regarding the concept of vulnerability.

The term 'vulnerability' is widely used and operationalised in the international policy community serving refugees, displaced persons, and others in need of assistance (Suhrke 2003, 105).¹⁸⁴ Asylum seekers are often understood to comprise a vulnerable group in need of special protection, as is the case, for instance, in the jurisprudence of the European Court of Human Rights.¹⁸⁵ Yet the preferential

¹⁸³ Kallio, H., Kotkas, T., and Palander, J. (2018). *Ulkomaalaisyöikeus* ('Immigration Law' [Unofficial translation]), Helsinki: Alma Talent.

¹⁸⁴ Suhrke, A. (2003). Human security and the protection of refugees, in Newman, E. and van Selm, J. (eds.), *Refugees and forced displacement: International security, human vulnerability, and the state*, New York: United Nations University Press, 93–108.

¹⁸⁵ *M.S.S. v. Belgium and Greece*, App. No. 30696/09, 53 Eur. H.R. Rep. 2, para. 251 (2011).

treatment associated with a vulnerable status does not apply equally to all asylum applicants. Rather, the asylum system is geared towards creating differentiations between asylum applicants. The major UN agencies with humanitarian programmes have working definitions, guidebooks, and models for identifying vulnerable groups and individuals in their respective mandate sectors (Suhrke 2003, 105). Vulnerability is, as Leboeuf (2022, 2) argues, also becoming an increasingly important concept within EU asylum law and EU policy discourse on asylum and migration.¹⁸⁶ This tendency has been illustrated, for instance, by reactions to the COVID-19 pandemic, including the Resolution by the European Parliament calling on the European Commission and member states to consider the impact of the pandemic measures on persons in vulnerable situations (European Parliament, at para. 4, in Leboeuf 2022, 2).¹⁸⁷ It has also been illustrated by the EU's answer to people fleeing the war in Ukraine, such as the EU Commission Operational Guidelines for the implementation of the temporary protection urging member states to protect 'particularly vulnerable categories of persons fleeing Ukraine, with a view to preventing the trafficking in human beings' (in Leboeuf 2022, 3).¹⁸⁸

Vulnerability, as Leboeuf (2022, 12) suggests, has become a conceptual tool for determining asylum applicants who will receive some form of preferential treatment, such as adaptations to the reception conditions, the asylum procedure, or through recognition of specific individual challenges that have a bearing on the assessment of the asylum application. The exercise of discretion regarding vulnerability has been justified with its compensatory, or 'ameliorating', function: the aim, it is suggested, is 'to redress any inequality arising from difference or disadvantage' (Judicial College 2013, foreword, in Gill et al. 2018, 52).¹⁸⁹ Few would perhaps disagree with the importance of protecting those who are most vulnerable, but the system based on differentialisations between applicant groups may also run the risk of exacerbating

¹⁸⁶ Leboeuf, L. (2022). The Juridification of 'Vulnerability' through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants' Experiences, *Laws* 11:3, 45.

¹⁸⁷ Leboeuf, L. (2022). The Juridification of 'Vulnerability' through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants' Experiences, *Laws* 11:3, 45.

¹⁸⁸ Leboeuf, L. (2022). The Juridification of 'Vulnerability' through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants' Experiences, *Laws* 11:3, 45.

¹⁸⁹ Judicial College (2013) *The Equal Treatment Bench Book. London, July 2022 revision*, available at: <https://www.judiciary.uk/wp-content/uploads/2022/10/Equal-Treatment-Bench-Book-July-2022-revision-2.pdf> [checked: 15 May 2023], in Gill, N., Rotter, R., Burridge, A., Allsopp, J. (2018). The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals, *Social & Legal Studies* 27(1), 49–78.

the very vulnerabilities it is purportedly seeking to mitigate. Despite the growing importance of the concept of vulnerability, its legal construals are far from clear, unequivocal, or uniform (see, e.g., Limantė & Tereškinas 2022; Mendola & Pera 2022; Ippolito & Sánchez 2017).¹⁹⁰ Rather, as a legal concept, vulnerability is fuzzy and flexible, allowing for ‘mobilisation in various ways depending on the political agenda’ (Leboeuf 2022, 3). Due to its vagueness, vulnerability is an ideal concept for wielding discretionary power.

Three EU Directives harmonise the conditions under which non-EU citizens may benefit from international protection in the EU (Leboeuf 2022, 7):¹⁹¹ the Qualification Directive (QD), the Asylum Procedures Directive (APD), and the Reception Conditions Directive (RCD) (see also chapter 2.2). As Leboeuf (2022, 7) notes, the provisions contained in these Directives have ‘the overall effect of requiring EU member states to identify the special needs of vulnerable asylum applicants’. In accordance with RCD,¹⁹² the Finnish legislation provides for special procedural guarantees for certain asylum applicants. According to Section 96 a of the Aliens Act,

[a]pplicants with special needs arising from a vulnerable status referred to in Section 6 of the Act on the Reception of Persons Applying for International Protection (746/2011, hereafter ‘Reception Act’) or otherwise ascertained during the asylum procedure are given support to ensure that they can benefit from the rights connected with the asylum procedure and comply with the related responsibilities.¹⁹³

As noted by Pirjatanniemi et al. (2021, 103), the Finnish government decided to leave many aspects of the directives relating to recognising and considering vulnerabilities during the asylum procedure as matters that are to be addressed by

¹⁹⁰ Limantė, A. and Tereškinas, A. (2022). Definition of Vulnerable Groups, in Limantė, A. and Pūraitė-Andrikiienė, D. (eds.), *Legal Protection of Vulnerable Groups in Lithuania, Latvia, Estonia and Poland: Trends and Perspectives*, London: Springer, 3–28; Mendola, D. and Pera, A. (2022). Vulnerability of refugees: Some reflections on definitions and measurement practices, *International Migration* 60(5), 108–121; Ippolito, F. and Sánchez, S. I. (eds., 2017). *Protecting Vulnerable Groups: The European Human Rights Framework*, Hart Publishing.

¹⁹¹ Leboeuf, L. (2022). The Juridification of ‘Vulnerability’ through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants’ Experiences, *Laws* 11:3, 45.

¹⁹² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

¹⁹³ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

means of administrative soft law.¹⁹⁴ Section 6 of the Reception Act expressly mentions very few examples of factors that contribute to vulnerability (e.g., age and physical or psychological condition). The provision states that vulnerable status and the resulting special needs are determined individually and that special needs are considered throughout the processing of the application for international protection. A government bill relating to the Reception Act¹⁹⁵ specifies that the definition of a person in a vulnerable situation is not fully comprehensive and that it had been deemed unnecessary to include a detailed list of vulnerable groups in the law (HE 171/2014 vp, 10).¹⁹⁶ A government bill relating to the Aliens Act¹⁹⁷ refers to vulnerable groups mentioned in the EU Reception Conditions Directive (RCD)¹⁹⁸ (e.g., victims of human trafficking or victims of female genital mutilation), but likewise, notes that the list included in the Directive is not exhaustive (HE 218/2014 vp, 39).¹⁹⁹ In fact, one of the aims with the recast version of the EU Asylum Procedures Directive (APD)²⁰⁰ was to expand the previously limited concept of vulnerable applicants by putting in place the notion of applicants in need of special procedural guarantees.²⁰¹

¹⁹⁴ Pirjatanniemi, E., Lilja, I., Helminen, M., Vainio, K., Lepola, O., and Alvesalo-Kuusi, A. (2021). *Ulkomaalaislain ja sen soveltamiskäytännön muutosten yhteisvaikutukset kansainvälistä suojelua hakeneiden ja saaneiden asemaan* ('The combined effects of the amendments to the Aliens Act and the practice of applying the Act with regard to the status of those requesting and receiving international protection'), Publications of the Government's analysis, assessment and research activities 10, Helsinki, 16 February 2021, available at: <http://urn.fi/URN:ISBN:978-952-383-009-7> [checked: 10 October 2023].

¹⁹⁵ Finland, Act on the Reception of Persons Applying for International Protection and on the Identification of and Assistance to Victims of Trafficking in Human Beings (Reception Act'), Act No. 746/2011, 1 September 2011.

¹⁹⁶ HE 171/2014 vp. Hallituksen esitys eduskunnalle laiksi kansainvälistä suojelua hakevan vastaanotosta annetun lain muuttamisesta ('HE 171/2014 vp. Government proposal to the Parliament for a law amending the Act on the Reception of Persons Applying for International Protection' [unofficial translation]).

¹⁹⁷ Finland, Aliens Act, Act No. 301/2004, 30 April 2004.

¹⁹⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013.

¹⁹⁹ HE 218/2014 vp. Hallituksen esitys eduskunnalle laiksi ulkomaalaislain muuttamisesta ('HE 218/2014 vp. Government proposal to the Parliament for amending the Aliens Act' [unofficial translation]).

²⁰⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013.

²⁰¹ European Union Agency for Asylum (2018). EASO Annual Report 2018: 4.10. Vulnerable applicants, available at: <https://euaa.europa.eu/easo-annual-report-2018/410-vulnerable-applicants#ar626> [checked: 10 October 2023].

In its guidelines, the Finnish Immigration Service has opted for a more explicit approach. In accordance with RCD, the agency (2021, 17) lists specific groups in need of special procedural guarantees during the asylum procedure, such as: unaccompanied minors; disabled people; pregnant women; single parents with minor children; persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence; victims of human trafficking; persons with serious illnesses or mental disorders; or victims of gender-based violence.²⁰² The agency's guidelines (2021, 17) elaborate that 'merely' the fact that the applicant has a vulnerable status does not mean that the applicant has special needs. According to the agency, it is essential that the applicant's opportunities to use their rights and to fulfil their obligations in the asylum procedure are limited regarding their individual circumstances. The agency highlights that the existence of special procedural needs is always determined on a case-by-case basis.²⁰³ This elaboration is consistent with what Paasche and Skilbrei (2017, 163), drawing on Zetter (2007),²⁰⁴ call 'a restrictive turn in contemporary European asylum policy and keen attention to detail in the institutional labelling of refugees and migrants'.²⁰⁵ Comparing the wording of the law and the immigration control authority's guidelines reveals that while the law refers, in a more neutral or even positive tone, to the individual determination of vulnerable status, the guidelines stress the scarce and discretionary nature of special procedural guarantees. In other words, the guidelines are more focused than the law on the elements that allow the decision-maker to limit the provision of special procedural guarantees. The listing of specific vulnerable groups, even just to exemplify, creates the impression of exclusivity (unintended or not). And yet, by referring to individual, case-by-case assessment, both the legal rules and the administrative soft law leave the decision-maker with a wide discretionary margin to determine whether the asylum applicant has special needs.

The listing of vulnerable groups reflects the authorities' understandings of people who hold some position of social worth based on their vulnerability and

²⁰² Finland, Finnish Immigration Service (2021). Maahanmuuttoviraston ohje 17.12.2021 ('Guidelines of the Finnish Immigration Service 17 December 2021' [unofficial translation]), MIG-2110648, 00.02.01, MIGDno-2021-750.

²⁰³ Finland, Finnish Immigration Service (2021). Maahanmuuttoviraston ohje 17.12.2021 ('Guidelines of the Finnish Immigration Service 17 December 2021' [unofficial translation]), MIG-2110648, 00.02.01, MIGDno-2021-750.

²⁰⁴ Zetter, R. (2007). More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization, *Journal of Refugee Studies* 20(2), 172–192.

²⁰⁵ Paasche, E. and Skilbrei, M. (2017). Gendered Vulnerability and Return Migration, *Temida* 20(2), 149–166.

whom there is an ethical duty to support (Goodman et al. 2017, 106).²⁰⁶ It is interesting how the list of vulnerable groups, emanating from EU law and deployed by the Finnish Immigration Service, is highly gendered, excluding the figure of the ‘young, healthy, working-age male asylum applicant’. As noted by scholars, young single asylum-seeking men are rarely seen to be in a vulnerable position.²⁰⁷ Contemporary immigration debates feature the gendered and racialised figure of the ‘criminal alien’ who is hypermasculinised in its ‘symbolic penetration of the border and as a (sexual) threat to vulnerable women and children’ (Mayers 2019, 68).²⁰⁸ Drawing on Mahler and Pessar (2006), Paasche and Skilbrei (2017, 162) note that male migrants are typically assumed to be independent ‘breadwinners’ as compared to females who migrate to accompany or reunite with their husbands. Masculinity is not associated with vulnerability and its connotations of passivity and helplessness (Paasche & Skilbrei 2017, 163).²⁰⁹ Asylum applicants who do not fit the ‘victim’ role are deemed ‘bogus migrants’ and denied asylum (Giametta 2016).²¹⁰ Crucial differentiations are created before any decisions on whether to grant protection are even made: whether an asylum applicant is deemed as having special needs due to their vulnerability has material consequences in the asylum procedure.

The APD (para. 29) states that asylum applicants in need of special procedural guarantees should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international

²⁰⁶ Goodman, S., Sirriyeh, A. and McMahon, S. (2017). The evolving (re)categorisations of refugees throughout the “refugee/migrant crisis”, *Journal of Community and Applied Social Psychology* 27(2), 105–114.

²⁰⁷ But as researchers in the European research project RAISD point out, young single men may face compounded vulnerabilities as asylum seekers, including the lack of family support, being treated as adults in the asylum system, susceptibility to discrimination and labour market exploitation as well as lack of targeted services (RAISD – Reshaping Attention and Inclusion Strategies for Distinctively vulnerable people among the forcibly displaced (2023). ARU in Finland – the work of the University of Helsinki, available at: <https://raisd-h2020.eu/research/aru/finland/> [checked: 10 October 2023]).

²⁰⁸ Mayers, L. (2019). (Re)Making a politics of protection in immigration policy: the “criminal alien,” gendered vulnerability, and the management of risk, *Citizenship Studies* 23(1), 61–77.

²⁰⁹ Paasche, E. and Skilbrei, M. (2017). Gendered Vulnerability and Return Migration, *Temida* 20(2), 149–166.

²¹⁰ Giametta, C. (2016). Narrativising one’s sexuality/ gender: Neo-liberal humanitarianism and the right of asylum, in Stella, F., Taylor, Y., Reynolds, T., and Rogers, A. (eds.), *Sexuality, Citizenship and Belonging: Transnational and intersectional perspectives*, London: Routledge, 55–72.

protection.²¹¹ The Finnish national legislation²¹² or the relating government bill²¹³ do not specify the precise content of such special procedural guarantees. The Finnish Immigration Service (2021, 17), however, lists examples of support offered to an asylum applicant who is deemed to need special procedural guarantees:

- arranging for a caseworker who is specialised in vulnerable groups;
- organising the asylum hearing in two parts or reserving a longer time than usual for the asylum interview
- ensuring that the applicant has the possibility to supplement what they have told in the asylum interview;
- guiding the applicant to obtain legal counsel;
- guiding the applicant to obtain healthcare services; or
- guiding the applicant to seek support from a civil society organisation.²¹⁴

According to the agency's guidelines, the gender of the interviewer and the interpreter may be significant where the applicant has a vulnerable status (2021, 51).²¹⁵ Female applicants in particular, the guidelines (2021, 51) specify, should be arranged to have a female interviewer and interpreter, if there is any indication that the interview will cover 'sensitive' topics. This shows, again, how the guidelines for offering support during the asylum procedure are gendered, omitting, for example, instances where a male asylum applicant may need specific arrangements for discussing 'sensitive' topics. For instance, individuals of any gender may have had to endure sexual violence, and it may be a topic that is difficult for the individual to bring up, in an asylum interview, due to its taboo nature (Gray et al. 2019).²¹⁶ Furthermore, as noted by Gray et al. (2019, 207–8), sexual violence is often

²¹¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

²¹² Finland, Act on the Reception of Persons Applying for International Protection and on the Identification of and Assistance to Victims of Trafficking in Human Beings ('Reception Act'), Act No. 746/2011, 1 September 2011.

²¹³ HE 171/2014 vp. Hallituksen esitys eduskunnalle laiksi kansainvälistä suojelua hakevan vastaanotosta annetun lain muuttamisesta ('HE 171/2014 vp. Government proposal to the Parliament for a law amending the Act on the Reception of Persons Applying for International Protection' [unofficial translation]).

²¹⁴ Finland, Finnish Immigration Service (2021). Maahanmuuttoviraston ohje 17.12.2021 ('Guidelines of the Finnish Immigration Service 17 December 2021' [unofficial translation]), MIG-2110648, 00.02.01, MIGDno-2021-750.

²¹⁵ Finland, Finnish Immigration Service (2021). Maahanmuuttoviraston ohje 17.12.2021 ('Guidelines of the Finnish Immigration Service 17 December 2021' [unofficial translation]), MIG-2110648, 00.02.01, MIGDno-2021-750.

²¹⁶ Gray, H., Stern, M., and Dolan, C. (2019). Torture and sexual violence in war and conflict: The unmaking and remaking of subjects of violence, *Review of International Studies* 46(2), 197–216.

associated in particular with the victimisation of women and has arguably historically widely been seen as both private and apolitical (in contrast with public, political forms of harm associated with male victims), which has meant that the sexual nature of the harms experienced by male victims/survivors of sexual violence is obscured.²¹⁷

In sum, the special procedural guarantees help to ensure that the asylum seeker's application is assessed with expertise and that the applicant is reserved more time, opportunities, and support for presenting their case. For instance, receiving expert legal counsel may help the applicant to present their case in a way that will appear rational and relevant to the official (Noll 2005, 39).²¹⁸ Counsel has also been found to be a crucial factor in successful outcomes in the asylum procedure (Rehaag 2011).²¹⁹ Furthermore, as discussed in substudy III, the fact that the asylum applicant has a chance to receive support and guidance from a civil society organisation, may be important with regard to the outcome of asylum status determinations. Being labelled as 'vulnerable' has material consequences for the applicant in the asylum procedure, which may help compensate for inequality arising from difference or disadvantage (Gill et al. 2018, 52).²²⁰ But the labelling may also function as yet another 'filtering device', or means to control and exclude certain migrants (Giametta 2018; substudy II), in the asylum system. The asylum system relies on emphasising vulnerability in some groups of people and erasing it in others.

3.3 Vulnerability in queer asylum procedure

Taking queer asylum as a case in point, this chapter examines how sociological and legal construals of vulnerability relate to queer asylum-seeking and how discretionary power features in the assessment of the queer subject's vulnerability. The 'culture of suspicion' – or the idea that asylum decision-making is 'slanted towards the disbelief of the narrative and the discrediting of the applicant' (Jubany

²¹⁷ Gray, H., Stern, M., and Dolan, C. (2019). Torture and sexual violence in war and conflict: The unmaking and remaking of subjects of violence, *Review of International Studies* 46(2), 197–216.

²¹⁸ Noll, G. (2005). Introduction: Re-mapping Evidentiary Assessment in Asylum Procedures, in Noll, G. (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Boston: Brill, 1–10.

²¹⁹ Rehaag, S. (2011). The Role of Counsel in Canada's Refugee Determinations System: An Empirical Assessment, *Osgoode Hall Law Journal* 49(1), 71–116.

²²⁰ Gill, N., Rotter, R., Burrige, A., Allsopp, J. (2018). The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals, *Social & Legal Studies* 27(1), 49–78.

2011, 84)²²¹ – is perhaps particularly prevalent in the context of queer asylum decision-making where authorities may sometimes hold the view that claims regarding, for instance, sexual orientation are ‘easy to make and impossible to disprove’ (Millbank 2009, 4).²²² As Llewellyn (2021, 209) notes, queer asylum ‘has been flagged as a potential avenue for individuals wishing to defraud the immigration system’.²²³ This section focuses on queer asylum as it illuminates potential blind spots regarding special procedural guarantees in the asylum system. Queer asylum denotes a markedly complex and abstract international protection category, involving a broad discretionary margin for asylum decision-makers, as sub-studies II and III demonstrate. Were these complexities, abstractions, and potential for the use of discretionary power balanced by special procedural guarantees, queer subjects might face a less daunting task of convincing authorities of their need for international protection.

Queer migrants may become vulnerable in multiple ways, experiencing intersecting stigma and discrimination (Alessi et al. 2021).²²⁴ They may, for instance, encounter racism from host communities and homophobia from diaspora communities (Alessi 2016).²²⁵ Therefore, the stress that queer asylum claimants face may be exacerbated by the very lack of supportive communities, which may be available to other immigrant groups (Llewellyn 2021).²²⁶ Furthermore, sexuality and sex are areas which inevitably make the body vulnerable (Cvetkovich 2003 in Koivunen et al. 2018, 9).²²⁷ The asylum procedure has the potential to exacerbate

²²¹ Jubany, O. (2011). Constructing truths in a culture of disbelief: Understanding asylum screening from within, *International Sociology* 26(1), 74–94.

²²² Millbank, J. (2009). ‘The Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations, *International Journal of Refugee Law* 21(1), 1–33.

²²³ Llewellyn, C. (2021). Captive While Waiting to Be Free: Legal Violence and LGBTQ Asylum Applicant Experiences in the USA, *Sexuality Research and Social Policy* 18(1), 202–212.

²²⁴ Alessi, E. J., Cheung, S., Kahn, S., and Yu, M. (2021). A Scoping Review of the Experiences of Violence and Abuse Among Sexual and Gender Minority Migrants Across the Migration Trajectory, *Trauma, Violence, & Abuse* 22(5), 1339–1355.

²²⁵ Alessi, E. J. (2016). Resilience in Sexual and Gender Minority Forced Migrants: A Qualitative Exploration, *Traumatology* 22(3), 203–213.

²²⁶ Llewellyn, C. (2021). Captive While Waiting to Be Free: Legal Violence and LGBTQ Asylum Applicant Experiences in the USA, *Sexuality Research and Social Policy* 18(1), 202–212.

²²⁷ Cvetkovich, A. (2003). *An Archive of Feelings: Trauma, Sexuality, and Lesbian Public Cultures*, Durham, NC: Duke University Press.; Koivunen, A., Kyrölä, K., and Ryberg, I. (2018). Vulnerability as a political language, in Koivunen, A., Kyrölä, K., and Ryberg, I. (eds.), *The Power of Vulnerability: Mobilising affect in feminist, queer and anti-racist media cultures*, Manchester: Manchester University Press, 1–26.

the queer subject's vulnerability. According to Perego's (2021, 149) informant W., a Brazilian transgender woman, the asylum interview

...is like opening a trunk [como abrir un baúl] and leaving everything there: your life, your traumas, your privacy. ... Everything at the mercy of those who pass by²²⁸

The paradigmatic, gendered asylum claimant is a (heterosexual) male applying for asylum on the grounds of political opinion or ethnicity, typically after facing persecution in the public sphere (see, e.g., Akbari & Vogler 2021; Koçak 2020; Gupta 2016).²²⁹ The expectation that people face public persecution, as noted by Llewellyn (2021, 210), may render invisible queer individuals who encountered most of their violence in the private sphere.²³⁰ Those not fitting the paradigmatic understanding of an asylum applicant risk the denial of a residence permit. There is, for instance, no 'gay bone', as noted by Fassin & Salcedo (2015, 1120),²³¹ in other words, no consensus on how sexual orientation should be understood or assessed. Yet during immigration procedures, queer migrants may encounter homonormative expectations and policing of norms regarding sexuality and gender (Giametta 2017; Abbey 2022; substudies II and III; regarding the Finnish context, see also Czimbalmos & Rask 2022).²³² In order to appear convincing in the asylum procedure, queer claimants may feel pressure to portray 'a Western style loud and

²²⁸ Perego, A. (2021). (Des)haciendo fronteras: Latin American LGBTIQ* asylum seekers in Spain in the process of credibility assessment, in Mole, R. C. M. (ed.), *Queer Migration and Asylum in Europe*, London: UCL Press, 132–161.

²²⁹ Akbari, R. and Vogler, S. (2021). Intersectional Invisibility: Race, Gender, Sexuality, and the Erasure of Sexual Minority Women in US Asylum Law, *Law & Social Inquiry* 46(4), 1062–1091; Koçak, M. (2020). Who is "Queerer" and Deserves Resettlement?: Queer Asylum Seekers and Their Deservingness of Refugee Status in Turkey, *Middle East Critique* 29(1), 29–46; Gupta, A. (2016). Dead silent: heuristics, silent motives, and asylum, *Columbia Human Rights Law Review* 48(1), 1–52.

²³⁰ Llewellyn, C. (2021). Captive While Waiting to Be Free: Legal Violence and LGBTQ Asylum Applicant Experiences in the USA, *Sexuality Research and Social Policy* 18(1), 202–212.

²³¹ Fassin, E. and Salcedo, M. (2015). Becoming Gay? Immigration Policies and the Truth of Sexual Identity, *Archives of Sexual Behavior* 44(5), 1117–25.

²³² Giametta, C. (2017). *The Sexual Politics of Asylum: Sexual Orientation and Gender Identity in the UK Asylum System*, New York: Routledge; Abbey, M. (2022). Queer Performance on the Border: Making Critical Fun of European Immigration Regimes, *European Journal of Cultural Studies* 25(4), 957–972; Czimbalmos, M. and Rask, S. (2022). *Sexual and Gender Minorities Among Foreign-Origin Populations in Finland: An intersectional analysis*, report 9/2022, Helsinki: Finnish Institute for Health and Welfare (THL).

proud sexual identity’ (Akin 2017, 463),²³³ or to ‘pass’ as credible members of a sexual minority in the eyes of various gatekeepers, such as queer rights organisations (Giametta 2017; substudy III).²³⁴

In Finland, as Substudy II demonstrates, westernised identity constructions and (heteronormative) expectations of long-term same-sex romantic relationships are some of the implied criteria through which the asylum system differentiates between credible queer refugees and ‘undeserving’ economic migrants.²³⁵ Queer asylum assessment is demanding on the claimant in that it expects the individual to be able to elaborate on the development of their sexual identity or to discuss feelings, such as shame regarding their ‘difference’ or romantic attachment to a same-sex partner. Claimants who focus on dimensions of sexual orientation that asylum decision-makers deem inessential and would rather avoid discussing, such as sexual acts, run the risk of being labelled ‘bogus’ migrants. With this in mind, a queer asylum claimant might benefit from special procedural guarantees (discussed in section 3.2), such as being arranged a specialised caseworker or guided to obtain legal counsel or support from a civil society organisation.

In international legal instruments, migration status and sexual or gender minority status are both often included in general criteria for establishing vulnerability, as Limantė and Tereškinas (2022, 15–16) point out.²³⁶ For instance, according to the EU Asylum Procedures Directive (para. 29), certain applicants may need ‘special procedural guarantees’ due, among other things, to their sexual orientation.²³⁷ International human rights, refugee, and migration bodies have also repeatedly included sexual orientation as a factor that contributes to vulnerability. For instance, a 2019 joint press release by the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations High Commissioner for Refugees (UNHCR) underscores the ‘unique vulnerability and specific needs of lesbian, gay, bisexual,

²³³ Akin, D. (2017). Queer asylum seekers: translating sexuality in Norway, *Journal of Ethnic and Migration Studies* 43(3), 458–474.

²³⁴ Giametta, C. (2020). New asylum protection categories and elusive filtering devices: the case of ‘Queer asylum’ in France and the UK, *Journal of Ethnic and Migration Studies* 46(1), 142–157.

²³⁵ Regarding queer asylum applicants’ lived experiences in the Finnish asylum procedure, see: Czimbalmos, M. and Rask, S. (2022). *Sexual and Gender Minorities Among Foreign-Origin Populations in Finland: An intersectional analysis*, report 9/2022, Helsinki: Finnish Institute for Health and Welfare (THL).

²³⁶ Limantė, A. and Tereškinas, A. (2022). Definition of Vulnerable Groups, in Limantė, A. and Pūraitė-Andrikiienė, D. (eds.), *Legal Protection of Vulnerable Groups in Lithuania, Latvia, Estonia and Poland: Trends and Perspectives*, London: Springer, 3–28.

²³⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

trans, intersex and gender diverse (LGBTI) asylum-seekers and refugees’ (OHCHR/UNHCR 2019).²³⁸ The International Organization for Migration (IOM) has also included sexual orientation in its ‘determinants of migrant vulnerability model’, developed to identify, protect, and support migrants who have faced or are at risk of violence, exploitation, or abuse before, during or after migrating and to guide interventions that can reduce vulnerability (IOM 2019).²³⁹ Yet in the European Union (EU), according to the European Asylum Support Office (EASO), ‘[e]ffective and swift identification of vulnerable applicants remains a challenge overall, especially with regard to non-visible vulnerabilities’, such as sexual orientation (EASO 2020, 99).²⁴⁰

A factor that contributes to the deficiencies in identifying vulnerability relating to sexual orientation may be the discretionary power allotted to national immigration authorities and the vagueness of EU guidelines (see also Pirjatanniemi et al. 2021, 103).²⁴¹ For instance, in 2016, EASO launched a tool for identification of persons with special needs (IPSN Tool), intended for the use of officials and other actors in contact with applicants for international protection (EUAA 2016).²⁴² The tool features a detailed tick-box type list of indicators of special needs (e.g., age, sex, gender identity and sexual orientation, or various physical and psychosocial

²³⁸ OHCHR – Office of the High Commissioner for Human Rights & UNHCR – United Nations High Commissioner for Human Rights (2019). UN rights experts urge more protection for LGBTI refugees, press release, 1 July 2019, available at: <https://www.unhcr.org/news/press/2019/7/5d19bdc04/un-rights-experts-urge-protection-lgbti-refugees.html> [checked: 10 October 2023].

²³⁹ IOM – International Organization for Migration (2019). IOM Handbook on Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse, Geneva, 5 December 2019, PUB2019/002/R, available at: https://publications.iom.int/system/files/pdf/avm_handbook.pdf [checked: 10 October 2023]

²⁴⁰ EASO – European Asylum Support Office (2020). EASO Asylum Report 2020: Annual Report on the Situation of Asylum in the European Union, Valletta, 1 July 2020, available at: <https://euaa.europa.eu/sites/default/files/EASO-Asylum-Report-2020.pdf> [checked: 10 October 2023].

²⁴¹ Pirjatanniemi, E., Lilja, I., Helminen, M., Vainio, K., Lepola, O., and Alvesalo-Kuusi, A. (2021). *Ulkomaalaislain ja sen soveltamiskäytännön muutosten yhteisvaikutukset kansainvälistä suojelua hakeneiden ja saaneiden asemaan* (‘The combined effects of the amendments to the Aliens Act and the practice of applying the Act with regard to the status of those requesting and receiving international protection’), Publications of the Government’s analysis, assessment and research activities 10, Helsinki, 16 February 2021, available at: <http://urn.fi/URN:ISBN:978-952-383-009-7> [checked: 10 October 2023].

²⁴² EUAA – European Union Agency for Asylum (2016). EASO launches tool for identification of persons with special needs (IPSN Tool), press release, 27 January 2016, available at: <https://euaa.europa.eu/news-events/easo-launches-tool-identification-persons-special-needs-ipsn-tool> [checked: 10 October 2023].

indicators) and special needs categories (e.g., disabled people, pregnant women, LGBTI) (EUAA 2023).²⁴³ The tool offers guidance for each stage of the initial-level asylum procedure – from making an application to the end of the procedure. But regarding the LGBTI category, at least, the guidance offered by the tool is underwhelming: the IPSN Tool predominantly offers generic recommendations applicable to most special needs categories and frequently prompts the case officer to refer to ‘national practice’. Recommendations that relate more specifically to the LGBTI category are cautiously and vaguely articulated: ‘[h]aving to [discuss matters such as sexual orientation or gender identity] in a formal context, such as in an asylum interview, may prove additionally daunting, and should be taken into consideration when discussing issues of LGBTI with individuals’, and that ‘[i]ndividuals should be provided the space to freely divulge as early as practical for them to do so and if they choose to (if not relevant to the asylum application), what their sexual orientation and gender identity is’ (EUAA 2023).²⁴⁴

Finnish national legislation relating to asylum seeking does not explicitly mention membership in a sexual or gender minority as criteria for establishing vulnerability (Rautakorpi 2011, 54).²⁴⁵ In its procedural guidelines (2021, 51), the Finnish Immigration Service mentions that the officers conducting asylum interviews should take into account the applicant’s individual and general circumstances, such as the applicant’s cultural background, gender, sexual orientation, gender identity, or vulnerable status.²⁴⁶ And for instance, the reference to sexual orientation and vulnerability as two *separate* entities suggests that the agency may not perceive (non-heterosexual) sexual orientation as a factor that is directly linked to vulnerability. This impression is supported by the agency’s guidelines on the assessment of asylum applications relating to sexual orientation and gender identity (2022): vulnerability is not mentioned in the document even once.²⁴⁷ This suggests that the immigration authorities are left with much discretionary power to assess the queer subject’s vulnerability.

²⁴³ EUAA – European Union Agency for Asylum (2023). IPSN Tool, available at: <https://ipsn.easo.europa.eu/ipsn-tool> [checked: 10 October 2023].

²⁴⁴ EUAA – European Union Agency for Asylum (2023). IPSN Tool, available at: <https://ipsn.easo.europa.eu/ipsn-tool> [checked: 10 October 2023].

²⁴⁵ Rautakorpi, M. (2022). Seksuaali- ja sukupuolivähemmistöt turvapaikkaprosessissa, in Laine, M., Leisti, M., Rautakorpi, M., Selim, H., and Skrifvars, J. (eds.), *Haavoittuva asema turvapaikkaprosessissa*, Helsinki: Pakolaisneuvonta.

²⁴⁶ Finland, Finnish Immigration Service (2021). Maahanmuuttoviraston ohje 17.12.2021 (‘Guidelines of the Finnish Immigration Service 17 December 2021’ [unofficial translation]), MIG-2110648, 00.02.01, MIGDno-2021-750.

²⁴⁷ Finland, Finnish Immigration Service (2022). Seksuaalinen suuntautuminen ja sukupuoli-identiteetti (‘Sexual orientation and gender identity’ [unofficial translation]), received by email on 11 January 2022.

In sum, in international legal instruments, migration status and sexual or gender minority status are both often included in general criteria for establishing vulnerability. Queer asylum claimants may be at risk of vulnerabilities of many kinds – also of the procedural kind (for instance, due to abstract and complex protection criteria or inconsistent approaches from one level of asylum decision-making to the next, as discussed in sub-studies II and III). Despite that, the identification of vulnerable applicants and the ensuing provision of special procedural guarantees remains a challenge regarding non-visible vulnerabilities, such as sexual orientation.

4 Research design of substudies

This synthesis explores the overarching research questions through the examination of three empirical substudies. This chapter elaborates on the chosen research questions, methodology, data and methods, as well as ethical considerations relating to the study. In one substudy, the data includes written asylum decisions, while in the remaining two substudies, the data was gathered through interviews.

4.1 Research questions

The overall aim of this dissertation is to explore how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power, and what implications the use of discretionary power in the asylum procedure may have for applicants who are made vulnerable – in particular, for those applying for queer asylum. I address these research questions through this synthesis and three empirical substudies, each of which also possess separate research objectives. Table 1 presents the research questions of both this synthesis and the individual substudies as well as the data and methods used in the substudies.

Table 1. Summary of key research questions and findings.

Overarching research question (synthesis): The aim of the study is to build understanding on: (1) how asylum decision-makers are able to operationalise the existing legal framework to control migration, by using their discretionary power, and (2) what implications the use of discretionary power may have for asylum seekers who are made vulnerable – in particular, for those applying for queer asylum.

Research questions (articles)	Key findings (articles)	Research questions (synthesis)
<p>What are the reasons for the dramatic drop in asylum recognition rates and Finnish immigration control authorities' use of discretion in asylum credibility assessment in the context of the 2015 perceived refugee crisis in Europe? (I)</p>	<p>Asylum decision-makers' inconsistent assessment of similar facts and lack of faith in the veracity of applicants' claims were essential to the mass denial of young Iraqi asylum applicants in Finland. Asylum officers are able to bring about such a shift via 'collectivised discretion', or large-scale use of discretion, in asylum status determinations to control migration.</p>	
<p>How do asylum decision-makers' understand queer asylum determinations and is the 'narrative of difference' embedded in the DSSH model manifested in their understandings? (II)</p>	<p>The DSSH model provides a 'narrative of difference' that asylum decision-makers can apply to assess the credibility of queer asylum claims. The model risks excluding claimants who are unable to convey emotions or to relate to the culturally context-sensitive abstractions embedded in the model. By imposing an essentialist narrative on queer refugees, the DSSH model may function as a filtering tool in the asylum system. The article highlights the power that asylum decision-makers have in shaping understandings regarding an entire asylum protection category.</p>	<p>(1) How are the limits of discretion, or 'wobble room', established and shifted – for instance, in the context of a perceived crisis – in asylum decision-making? (2)</p> <p>(2) What are the risks that the use of discretionary power poses for asylum applicants who are made vulnerable – in particular, for those applying for queer asylum? (3)</p>
<p>How do Finnish asylum decision-makers and those working at queer rights organisations (queer NGOs) perceive queer NGOs' role and importance in queer asylum decision-making? (III)</p>	<p>Queer NGOs' statements about asylum claimants can support the claims and help strengthen the claimant's case. The organisations shape perceptions of a 'credible queer asylum applicant'. However, the relationship between the NGOs and asylum system can put claimants in a difficult position if they do not want to participate in the NGOs' activities or if the NGOs do not recognise their sexuality.</p>	

4.2 Theory and methodology

This dissertation focuses on analysing the use of discretionary power in the asylum procedure. The metatheoretical position of this dissertation may be characterised as *critical realist*, combining a realist ontology (reality exists independently of the mind or social actors) with a constructivist epistemology (our understanding of reality is a construction based on our own perspectives and points of view) (see, e.g., Frauley & Pearce 2007, 4).²⁴⁸ By acknowledging the role of interpretation, critical realism offers a way of reconciling the objective reality of a situation with the subjective experiences of those involved. The position adopted in this dissertation is critical also in terms of the implied goal of critiquing, challenging, and transforming (Merriam & Tisdell 2015, 10).²⁴⁹ ‘Those who engage in critical research’, as noted by Merriam and Tisdell (2015, 10), ‘frame their research questions in terms of power – who has it, how it’s negotiated, what structures in society reinforce the current distribution of power, and so on’. In addition, the metatheoretical framework of the dissertation draws from queer theory and queer migration scholarship in refusing ‘to attach bodies in any strictly identitarian manner’ to ‘challenge and reconfigure the dominant frameworks’ (Luibheid 2008, 169).²⁵⁰ This approach also aligns with the code of research ethics of the International Association for the Study of Forced Migration (IASFM 2018, 2), which encourages researchers to ‘acknowledge intersecting, unequal power relations, which are exacerbated in forced migration contexts’, and to take steps to mitigate their effect on, for instance, on research results.²⁵¹ The IASFM code of research ethics (2018, 3), reminds researchers to commit themselves to actively challenging repressive social structures.²⁵²

²⁴⁸ Frauley, J. and Pearce, F. (2007). Critical Realism and the Social Sciences: Methodological and Epistemological Preliminaries, in Frauley, J. and Pearce, F. (eds.), *Critical Realism and the Social Sciences: Heterodox Elaborations*, University of Toronto Press, 3–29.

²⁴⁹ Merriam, S. B. and Tisdell, E. J. (2015). *Qualitative Research: A Guide to Design and Implementation*, San Francisco, Ca: Wiley.

²⁵⁰ Luibhéid, E. (2008). Queer/Migration: An Unruly Body of Scholarship, *GLQ: A Journal of Lesbian and Gay Studies* 14(2–3), 169–190.

²⁵¹ International Association for the Study of Forced Migration (IASFM 2018). *Code of ethics: Critical reflections on research ethics in situations of forced migration*, <https://iasfm.org/wp-content/uploads/2018/11/IASFM-Research-Code-of-Ethics-2018.pdf>.

²⁵² International Association for the Study of Forced Migration (IASFM 2018). *Code of ethics: Critical reflections on research ethics in situations of forced migration*, <https://iasfm.org/wp-content/uploads/2018/11/IASFM-Research-Code-of-Ethics-2018.pdf>.

There is, as noted by Merriam and Tisdell (2015, 16), ‘a particular theoretical framework or lens that informs a research study that the researcher makes visible’.²⁵³ The researcher should acknowledge that their selected perspective may not be the sole valid viewpoint and should explore alternative theories and methodologies to comprehend a social phenomenon (Helminen 2019, 59).²⁵⁴ Considering alternative underpinnings in terms of theories and methods helps to provide a more thorough understanding of the subject. Combining approaches from various disciplines, in particular, sociology of law and legal analysis, this dissertation draws from scholarship on street-level bureaucracy and (procedural) vulnerability. However, it would be equally acceptable to choose other interpretive frameworks. Migration studies are an interdisciplinary research field that encompasses sociology, economics, geography, political science, anthropology, and other social sciences, with different theoretical and methodical traditions. To examine asylum decision-making, scholars have, for instance, used legal scholarship, ethnographic perspectives, cognitive psychology, or sociolinguistics (Johannesson 2022).²⁵⁵

Methodically, the approach underpinning the substudies may be described as pragmatic, for instance, in terms of combining different methods because they provide a different perspective on the topic (Hammond 2005, 241).²⁵⁶ *Pragmatism* has sometimes been described as the most suitable paradigm for mixed-methods research (such as that in this dissertation), as it draws on ‘what works’, using a variety of approaches, and valuing both objective and subjective knowledge (Hanson et al. 2005, 226).²⁵⁷ The dissertation may also be described as pragmatic in terms of employing ‘pragmatic’ approaches such as abduction – ‘movement back and forth between different approaches to theory and data’ (Morgan 2007, 71).²⁵⁸ The design of the substudies has been ‘*emergent and flexible*, responsive to changing conditions

²⁵³ Merriam, S. B. and Tisdell, E. J. (2015). *Qualitative Research: A Guide to Design and Implementation*, San Francisco, Ca: Wiley.

²⁵⁴ Helminen, M. (2019). *Finnish civil society organizations in criminal justice - exploring their possibilities to fulfil mission values and maintain autonomy from a comparative perspective*, article-based dissertation, Turku: University of Turku.

²⁵⁵ Johannesson, L. (2022). The Symbolic Life of Courts: How Judicial Language, Actions, and Objects Legitimize Credibility Assessments of Asylum Appeals, *Journal of International Migration and Integration*, <https://doi.org/10.1007/s12134-022-00989-4>.

²⁵⁶ Hammond, C. (2005). The wider benefits of adult learning: An illustration of the advantages of multi-method research, *International Journal of Social Research Methodology: Theory and Practice* 8(3), 239–255.

²⁵⁷ Hanson, W. E., Creswell, J. W., Plano Clark, V. L., Petska, K. S., and Creswell, J. D. (2005). Mixed Methods Research Designs in Counseling Psychology, *Journal of Counseling Psychology* 52(2), 224–235.

²⁵⁸ Morgan, D. (2007). Paradigms lost and pragmatism regained: Methodological implications of combining qualitative and quantitative methods, *Journal of Mixed Methods Research* 1(1), 48–76.

of the study in progress’ (Merriam & Tisdell 2015, 18).²⁵⁹ For instance, in substudy I, not all relevant variables were known ahead of time, which entailed in Merriam & Tisdell’s (2015, 18) words, being ‘comfortable with the ebb and flow of a qualitative [and quantitative] investigation and trust in the process’.

4.3 Data and methods

In this section, I discuss the data and methods chosen for the substudies. I first describe the data and how it was collected, and I then outline the approaches used to analyse the data.

4.3.1 Asylum decisions concerning 18–34-year-old Iraqi applicants (substudy I)

The number of asylum applications to Finland multiplied in 2015 as compared to the previous years, although the number of applications returned to the previous level in the following years (Non-Discrimination Ombudsman 2018, 52).²⁶⁰ In 2017, the Non-Discrimination Ombudsman of Finland, University of Turku Faculty of Law, and the Åbo Akademi University Human Rights Institute collaborated on a pilot study to examine Finnish asylum decisions in the crisis context.²⁶¹ Pursuant to Section 4 of the Act on the Non-Discrimination Ombudsman,²⁶² the Ombudsman has a broad right of access to the Finnish Immigration Service’s database, so the Ombudsman granted the research team a permit to access the data for substudy I.

²⁵⁹ Merriam, S. B. and Tisdell, E. J. (2015). *Qualitative Research: A Guide to Design and Implementation*, San Francisco, Ca: Wiley.

²⁶⁰ Finland, Non-Discrimination Ombudsman (2018). The Report of the Non-Discrimination Ombudsman to the Parliament 2018 [official translation], April 12, 2018, Helsinki, <https://rm.coe.int/fin-the-report-of-the-non-discrimination-ombudsman-to-the-parliament/16808b7cd2> [checked: 10 October 2023].

²⁶¹ Saarikkomäki, E., Oljakka, N., Vanto, J., Pirjatanniemi, E., Lavapuro, J., and Alvesalo-Kuusi, A. (2018). Kansainvälistä suojelua koskevat päätökset Maahanmuuttovirastossa 2015–2017. Pilottitutkimus 18–34-vuotiaita Irakin kansalaisia koskevista myönteisistä ja kielteisistä päätöksistä (‘Decisions on international protection at the Finnish Immigration Service from 2015 to 2017. Pilot study on positive and negative decisions concerning individuals aged 18 to 34 from Iraq’ [unofficial translation]), oikeustieteellisen tiedekunnan raportteja ja katsauksia 1, available at: <https://research.utu.fi/converis/portal/detail/Publication/35928443> [checked: 10 October 2023].

²⁶² Finland, Act on the Non-Discrimination Ombudsman, Act No. 1326/2014, 1 January 2015.

The data analysed in substudy I consist of positive (i.e., awarding asylum, subsidiary protection, or residence permit on compassionate grounds²⁶³) and negative (i.e., denying residence permits in any of the aforementioned categories) international protection decisions concerning 18- to 34-year-old Iraqi citizens (n=243). The study uses a total of 125 decisions made from April to August 2015 (census, complete enumeration). From 2017, the study uses a total of 118 decisions made from June to August (simple random sample, partial enumeration). The two time periods in 2015 and 2017 were chosen to compare the decisions before and after the perceived refugee crisis that peaked in the fall of 2015. To investigate the reasons for the drop in recognition rates for young Iraqi applicants, the research team analysed, first, whether there were any quantitative changes from 2015 to 2017 in the asylum applicant pool or in which aspects of asylum applicants' statements the Finnish Immigration Service deemed credible. Next, the research team examined whether there were any qualitative changes in how the Finnish Immigration Service justified whether to grant international protection and whether the agency's reasoning changed between the periods.

4.3.1.1 Mixed-method analysis

Substudy I involved a mixed-method approach to analyse the asylum decision documents. The substudy involved a combination of quantitative and qualitative data collection methods and data analysis methods. As Creswell et al. (2003, 212) define it, mixed-method research refers to 'the collection or analysis of both quantitative and qualitative data in a single study in which the data are collected concurrently or sequentially, are given a priority, and involve the integration of the data at one or more stages in the process of research'.²⁶⁴ A mixed-method approach may allow both

²⁶³ This residence permit category (Section 52 of the Aliens Act) was previously known in English as 'residence permit on compassionate grounds', but is now translated as residence permit 'on a discretionary basis on humanitarian grounds'. It is not included in Chapter 6 of the Aliens Act regarding international protection and is not, per se, an international protection category. However, at the asylum interview, the authorities must also establish whether there are grounds other than international protection for giving the applicant the right of residence (Section 97a(2) of the Aliens Act). (Finland, Aliens Act, Act No. 301/2004, 30 April 2004, unofficial translation available at: https://www.finlex.fi/fi/laki/kaannokset/2004/en20040301_20191163.pdf.)

²⁶⁴ Creswell, J. W., Plano Clark, V. L., Gutmann, M. L., and Hanson, W. E. (2003). Advanced mixed methods research designs, in Tashakkori, A. and Teddlie, C. (eds.), *Handbook of mixed methods in social and behavioral research*, Thousand Oaks, CA: Sage, 209–240.

generalising the results from a sample to population and gaining a deeper, enriched understanding of the subject under study (Hanson et al. 2005, 224).²⁶⁵

Substudy I argues that a mixed-method approach was needed to explore immigration officers' use of collectivised discretion, as such an approach enables the examination of both the scale and substance of the use of collectivised discretion in the mass denial of young Iraqi asylum-seekers in Finland. The substudy finds that, 'unlike case law and statutes, which can alter legal out-comes in a single judgment or act, initial interpretive shifts in asylum decision-making are made *en masse*, and their full extent may be observed by combining quantitative and qualitative methods'. Substudy I finds that quantitative approaches alone do not address precisely how decision-makers use collectivised discretion, but qualitative approaches alone cannot address the scale of interpretive shifts. Substudy I maintains that a mixed-method approach can shed light on large-scale, collective discretionary shifts in the application of asylum law and in initial-level decision-making more generally.

From the international protection decisions, the research team coded information regarding the research aims into an SPSS data matrix. Variables consisted of, for instance, the applicant's socio-demographic background and application grounds (i.e., what kinds of rights infringements the applicant may have suffered, what the applicant feared, whether the applicant reported reasons for persecution). In addition, the research team coded the Finnish Immigration Service's assessment of the case's facts, the caseworker's justification for the decision, and whether the caseworker believed the applicant. Most variables were created based on the conditions for providing international protection to asylum applicants, as established by Chapter 6 of the Aliens Act (e.g., acts of persecution specified in Section 87a, reasons for persecution specified in Section 87b, and criteria for subsidiary protection provided by Section 88 of the Aliens Act). However, while reading the asylum decisions, the research team found that some additional categories were needed to provide more detailed information about phenomena that are not explicitly mentioned in the abovementioned provisions of the Aliens Act (e.g., kidnapping).

The research team used cross tables as a statistical analysis method and Pearson's chi-squared statistical analysis method, as well as Pearson's chi-squared test to test for statistical significance. The team then conducted a power analysis to estimate the smallest sample size suitable for the statistical analysis. Power analysis can be used

²⁶⁵ Hanson, W. E., Creswell, J. W., Plano Clark, V. L., Petska, K. S., and Creswell, J. D. (2005). Mixed Methods Research Designs in Counseling Psychology, *Journal of Counseling Psychology* 52(2), 224–235.

to estimate a sample size which shows an effect if one is present (Uttley 2019).²⁶⁶ The research team concluded that a sample of around 120 (for each period) would be suitable for the analysis (crosstables).

The research team then carried out a qualitative content analysis into the data to examine the types of argumentation used in the different periods. Regarding 2015, the research team was able to explore both positive and negative decisions, but for 2017, the team was only able to examine negative decisions, since positive decisions no longer included any explanations or justifications.²⁶⁷ For decisions in which asylum authorities did not consider the applicant's fear objectively justified (either fully, as in the case of decisions in which international protection had been entirely refused, or partly, as in the case of positive decisions in which some doubts regarding the justification of the applicant's fear had remained), the research team examined the justifications used for this assessment.

Content analysis is, as summed up by Vaismoradi et al. (2013, 400), 'a systematic coding and categorizing approach used for exploring large amounts of textual information unobtrusively to determine trends and patterns of words used, their frequency, their relationships, and the structures and discourses of communications'.²⁶⁸ Content analysis allows both qualitative analysis and quantification (Vaismoradi et al. 2013, 400).²⁶⁹ For substudy I, the text from individual decisions was condensed and coded. The codes were recoded by highlighting specific words, phrases or sentences that represent certain concepts or themes, and sorted into 56 tentative subthemes. The analysis then involved increasing the level of abstraction by dividing the subthemes into different categories (see, e.g., Graneheim et al. 2017).²⁷⁰ The research team compared the categories, themes, and subthemes, and read through the data several times to make sure that the interpretations made were sound.

²⁶⁶ Uttley, J. (2019). Power Analysis, Sample Size, and Assessment of Statistical Assumptions: Improving the Evidential Value of Lighting Research, *LEUKOS* 15(2–3), 143–62.

²⁶⁷ Facing the increasing number of asylum applications, the Finnish Immigration Service adopted this practice around the turn of the year 2015–2016 to make asylum determinations more efficient (information obtained from the Finnish Immigration Service by email on March 3, 2020).

²⁶⁸ Vaismoradi, M., Turunen, H., and Bondas, T. (2013). Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study, *Nursing and Health Sciences* 15(3), 398–405.

²⁶⁹ Vaismoradi, M., Turunen, H., and Bondas, T. (2013). Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study, *Nursing and Health Sciences* 15(3), 398–405.

²⁷⁰ Graneheim, U. H., Lindgren, B., and Lundman, B. (2017). Methodological challenges in qualitative content analysis: A discussion paper, *Nurse Education Today* 56, 29–34.

4.3.2 Interviews with legal actors (substudies II and III)

The data for substudies II and III was gathered through semi-structured thematic expert interviews conducted in 2019. In a semi-structured thematic interview, the interviewer has a general idea of the topics they want to cover and the questions they want to ask, but they are also open to allowing the interviewee to steer the conversation in different directions if they bring up relevant and interesting information (Kallio et al. 2016, 2955; Ayres 2008, 810).²⁷¹

I selected the expert interviewees by means of purposeful sampling – a type of the non-probability sampling method in which the researcher selects participants for the study based on specific criteria that are relevant to the research question(s) and that are assumed to yield ‘rich’ information (see, e.g., Palinkas et al. 2015, 534).²⁷² Purposeful sampling can be used to select participants that are especially knowledgeable about or experienced with a phenomenon of interest as well as able, available, and willing to communicate their experiences and opinions (Palinkas et al. 2015, 534).²⁷³ The experts chosen for substudies II and III are *professional experts*²⁷⁴ who are typically in a position of power and who have internal knowledge of the structures, procedures and events in a given organisation (see, e.g., Littig 2009, 100).²⁷⁵ The key criterion for selecting participants was their professional expertise or knowledge of queer asylum decision-making at the grassroots level, or street level, in Finland. Based on this criterion, I decided to conduct interviews with the street-

²⁷¹ Kallio, H., Pietilä, A., Johnson, M., and Kangasniemi, M. (2016). Systematic methodological review: developing a framework for a qualitative semi-structured interview guide, *Journal of Advanced Nursing* 72(12), 2954–2965; Ayres, L. (2008). Semi-structured Interview, in Given, L. M. (ed.), *The Sage Encyclopedia of Qualitative Research Methods*, London: Sage, 810–811.

²⁷² Palinkas, L. A., Horwitz, S. M., Green, C. A., Wisdom, J. P., Duan, N., and Hoagwood, K. (2015). Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research, *Administration and Policy in Mental Health and Mental Health Services Research* 42(5), 533–544.

²⁷³ Palinkas, L. A., Horwitz, S. M., Green, C. A., Wisdom, J. P., Duan, N., and Hoagwood, K. (2015). Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research, *Administration and Policy in Mental Health and Mental Health Services Research* 42(5), 533–544.

²⁷⁴ In contrast, asylum applicants themselves may be seen as having *experience-based expertise* – as having *lived experience* of the asylum procedure (see, e.g., Meriluoto, M. (2018). Neutral experts or passionate participants? Renegotiating expertise and the right to act in Finnish participatory social policy, *European Journal of Cultural and Political Sociology*, 5:1-2, 116–139). In future research, this lived experience is important to investigate, particularly in the context of Finland.

²⁷⁵ Littig, B. (2009). Interviewing the Elite — Interviewing Experts: Is There a Difference?, in Bogner, A., Littig, B. and Menz, W. (eds.): *Interviewing Experts*, London: Palgrave Macmillan, 98–113.

level asylum decision-makers themselves as well as with legal counsels and individuals working in queer rights organisations that provide services to asylum seekers.

In line with Lipsky's (1980) classic definition, I refer to street-level asylum decision-makers as public employees that interact with citizens (and non-citizens alike) directly and have discretion over significant aspects of individuals' lives.²⁷⁶ As examples of street-level bureaucrats, Lipsky (1980) provides, for instance, the employees of the various court systems (i.e. judges) and other public employees.²⁷⁷

However, from the pool of potential interviewees, I excluded members of the Supreme Administrative Court of Finland. This goes against 'the mainstream approach in the field of law', which still focuses, as noted by Biland & Steinmetz (2017, 298), on higher courts such as constitutional or supreme courts.²⁷⁸ The Supreme Administrative Court judges are in considerably less direct interaction with individuals, as appealing to the Supreme Administrative Court usually requires leave to appeal. The volume of cases is smaller and the symbolic distance between the individual and the judge(s) is longer, as justice in administrative matters is in the final instance administered by the Supreme Administrative Court (Section 99(1) of the Constitution of Finland).²⁷⁹ The key tasks of the high court include ensuring uniformity of legal practice as well as examining matters where a *manifest* error may have occurred or where some other *serious* grounds exist for granting leave to appeal (Section 111 of the Administrative Judicial Procedure Act).²⁸⁰ The Supreme Administrative Court judges are not faced with similar kinds of pressures as decision-makers at the street-level 'to not only produce qualitatively "good decisions", but also adequate quantities' (Affolter 2021, 147).²⁸¹ The symbolic distance between the individual and the Supreme Administrative Court judges is further highlighted by the fact that the procedure is primarily *written*, as the high court may even decline to arrange an oral hearing²⁸² despite the request of a party if

²⁷⁶ Lipsky, M. (1980). *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation.

²⁷⁷ Lipsky, M. (1980). *Street Level Bureaucracy: Dilemmas of the Individual in Public Services*, New York: Russell Sage Foundation.

²⁷⁸ Biland, É. and Steinmetz, H. (2017). Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts, *Law & Social Inquiry* 42(2), 298–324.

²⁷⁹ Finland, Constitution of Finland, Act No. 731/1999, 1 March 2000.

²⁸⁰ Finland, Administrative Judicial Procedure Act, Act No. 808/2019, 1 January 2020.

²⁸¹ Affolter, L. (2021). *Asylum Matters: On the Front Line of Administrative Decision-Making*, London: Palgrave.

²⁸² At the level of regional administrative courts, where the credibility of an asylum claimant's sexual orientation is at issue, the court must arrange an oral hearing and hear the appellant in person (KHO:2017:120, 7 July 2017, Supreme Administrative Court of Finland).

the matter concerns a request for a review of an administrative court and it is not necessary to arrange an oral hearing in order to examine the matter (Section 57 of the Administrative Judicial Procedure Act).²⁸³

To arrange the interviews, I requested the interviewees' background organisations to provide a research permit. The organisations were provided with information about the study beforehand, and some of the organisations requested a copy of the thematic interview structure before granting the research permit. The organisations were responsible for recruiting participants: they provided a list of individuals who had agreed to be interviewed, whom the researcher then contacted.

It is important to be mindful of the aims of purposeful sampling. Qualitative sampling techniques, such as purposeful sampling, often aim to offer a 'window-like' view of the phenomenon being studied and the rich depth of qualitative data (see, e.g., Koerber & McMichael 2008).²⁸⁴ Qualitative in-depth interviews provide insight into processes and subjectivities, but often at the expense of representativeness (Nielsen 2012, 953).²⁸⁵ The way in which the interviewees were recruited involved the possibility for the background organisations to influence the selection of participants. The individuals chosen for the sample may respond differently than those not selected. Participants may also self-select, meaning they choose to participate because they believe they have the characteristic or experience being studied, leading to a potentially skewed sample. However, when interviewing experts in a very niche subject matter of which relatively little is known (in this case, queer asylum decision-making in Finland), it may be beneficial that the participants are experienced in the topic being studied. This may provide for more nuanced data. It should also be considered that since queer asylum decision-making is a relatively marginal area of expertise in Finland, the pool of potential experts to be interviewed is bound to be small. However, to minimise a geographically more skewed sample (for instance, between the capital city area and other parts of Finland), the participants (in particular, decision-makers at the Finnish Immigration Service and administrative courts) were selected from various cities in different parts of Finland.

The number of interviewees was 15, but only the interviews of 13 of them were selected for further analyses. The other two interviewees were legal counsels, but as the research questions in substudies II and III did not address the views, experiences, and attitudes of legal counsels, their interviews were excluded from further analyses.

²⁸³ Finland, Administrative Judicial Procedure Act, Act No. 808/2019, 1 January 2020.

²⁸⁴ Koerber, A. and McMichael, L. (2008). Qualitative Sampling Methods: A Primer for Technical Communicators, *Journal of Business and Technical Communication* 22(4), 454–473.

²⁸⁵ Nielsen, L. B. (2012). The Need for Multi-Method Approaches in Empirical Legal Research, in Cane P. and Kritzer H. B. (eds.): *The Oxford Handbook of Empirical Legal Research*, Oxford: Oxford University Press, 951–975.

The interviews with the legal counsels were used, however, to provide valuable background information for other interviews and for the substudies II and III in general. The remaining interviewees included three individuals working in queer rights organisations, six decision-makers at the Finnish Immigration Service, and four judges at regional administrative courts. I conducted the interviews face-to-face or online and recorded them with the participants' permission. The interviews were conducted in Finnish, transcribed word-for-word, and translated partially into English for substudy III.

4.3.2.1 Thematic analysis and qualitative content analysis

All the substudies (I, II, III) involved elements of qualitative content analysis and thematic analysis (TA). In research literature, qualitative content analysis and TA are sometimes discussed interchangeably and difference between the approaches have often not been clearly specified (Vaismoradi et al. 2013, 399–400).²⁸⁶ However, Vaismoradi et al. (2013, 398) point out that ‘in spite of many similarities between approaches, including cutting across data and searching for patterns and themes, their main difference lies in the opportunity for quantification of data’. By quantification, Vaismoradi et al. (2013, 398) refer to measuring the frequency of different categories and themes. It can be concluded that quantification played a role in the analysis of the data overall, although this is always not as visible in reporting the results. Since features of qualitative content analysis have been described in section 4.3.1.1, this section focuses more on TA. Together with qualitative content analysis, TA has formed the basis for the analysis of the interview data.

Thematic analysis (TA), as noted by Clarke & Braun (2017, 297), is a research method that may be used to identify, analyse, and interpret patterns of meaning (‘themes’) within qualitative data,²⁸⁷ such as the interviews examined in substudies II and III. TA is typically done through a process of reading, re-reading, and coding the data, and then identifying recurring patterns and themes in the coded data (see, e.g., Clarke & Braun 2017, 297). Themes, as Clarke & Braun (2017, 297) point out, provide a framework organising and reporting the researcher’s analytic observations. The aim is to understand the meaning and context of the data and to uncover the sometimes underlying experiences, perspectives, beliefs, and practices of the study participants (Clarke & Braun 2017, 297).

²⁸⁶ Vaismoradi, M., Turunen, H., and Bondas, T. (2013). Content analysis and thematic analysis: Implications for conducting a descriptive study, *Nursing and Health Sciences* 15(3), 398–405.

²⁸⁷ Clarke, V. and Braun, V. (2017). Thematic analysis, *Journal of Positive Psychology* 12(3), 297–298.

I first read through the interview transcripts and conducted an initial coding using NVivo. The emerging categories and themes helped in formulating the research aims for substudies II and III. As noted by Braun & Clarke (2006, 86), thematic analysis involves searching across a data set (in this case expert interviews) to find repeated patterns of meaning. With both studies (II and III), the goals of searching for repeated patterns of meaning were different.

The aim of substudy II was to examine whether the narrative of difference embedded in the DSSH (Difference, Stigma, Shame, and Harm – a tool used to assess the credibility of queer asylum claims in Finland) model is manifested in decision-makers' understandings of queer asylum determinations. Since the DSSH model itself provided the structure for the analysis, the coding focused on identifying meanings relating to different dimensions of the model, such as 'Difference' or 'Shame'. In other words, the different dimensions of the DSSH model were identified as the initial coding categories (Potter & Levine-Donnerstein 1999, 266).²⁸⁸ In this sense, the approach may be described as more deductive or 'top down', where coding was driven by a quite specific research question (Braun & Clarke 2006, 83–84).²⁸⁹ In general, as noted by Hsieh & Shannon (2005, 1283), key limitations of the deductive approach include how researchers approach the data with a strong bias and how they might be more likely to find evidence supporting the theory.²⁹⁰ However, employing the DSSH model as a framework for the analysis is justified in the sense that the Finnish Immigration Service (2022, 4–5) has subscribed to using the tool in its queer asylum credibility assessment.²⁹¹ The issue then was not whether the DSSH model was being used but, rather, *how* the use of the tool is manifested in the interviewees' output.

The aim of substudy III was to investigate how Finnish asylum decision-makers and those working at queer rights organisations (queer NGOs) perceive the role and importance of queer NGOs' in queer asylum decision-making. In this substudy, the approach was more abductive. An abductive approach, as noted by (Graneheim et al. 2017, 31), implies a movement back and forth between inductive and deductive approaches.²⁹² In an abductive approach, the analysis is not directly based on theory

²⁸⁸ Potter, W. J. and Levine-Donnerstein, D. (1999). Rethinking validity and reliability in content analysis, *Journal of Applied Communication Research* 27(3), 258–284.

²⁸⁹ Braun, V. and Clarke, V. (2006). Using thematic analysis in psychology, *Qualitative Research in Psychology* 3(2), 77–101.

²⁹⁰ Hsieh, H. and Shannon, S. E. (2005). Three Approaches to Qualitative Content Analysis, *Qualitative Health Research* 15(9), 1277–1288.

²⁹¹ Finland, Finnish Immigration Service (2022). Seksuaalinen suuntautuminen ja sukupuoli-identiteetti ('Sexual orientation and gender identity' [unofficial translation]), received by email on 11 January 2022.

²⁹² Graneheim, U. H., Lindgren, B., and Lundman, B. (2017). Methodological challenges in qualitative content analysis: A discussion paper, *Nurse Education Today* 56, 29–34.

but linkages to theory are discernible (see, e.g., Timmermans and Tavory 2012, 173).²⁹³ Substudy III combined interpretations made based on the data with previous research and case law, which also informed both the coding and the reporting of results.

4.3.2.2 Narrative analysis

Substudy II utilises elements of narrative analysis. Narrative analysis is a research method used in the social sciences with the basic premise that ‘the telling of stories can elucidate the meanings attached to participants’ experiences’ (Benson 2005, 595).²⁹⁴ Narrative analysis involves the analysis and interpretation of narrative signs, which may involve writing, sound, visual or other elements that convey meaning (Squire et al. 2014, 5).²⁹⁵ It aims to apprehend, for instance, what stories can tell about the narrators and their worlds or how narratives work and how they affect people’s understandings and actions (Squire et al. 2014, 8).²⁹⁶ Narrative research may be interested in how people use narratives to construct and communicate their experiences, identities, and relationships with others (see, e.g., Esin 2011).²⁹⁷

In substudy II, the approach was of a deductive quality, owing to the aspects discussed in section 4.3.2.1. I sifted through the interview data to find narrative meaning relating to ‘a specific and readily scripted narrative’: the narrative of difference featured in the DSSH model. I used the DSSH model as a lens through which I examined the interview data: the different dimensions of the DSSH model (for instance, ‘Difference’ or ‘Shame’) formed a basis for the analysis and gave structure to the presentation of findings.

As noted in substudy II, I approach the narrative of difference, embedded in the DSSH model, as a form of stereotypical or standardised autobiographical storytelling. As Hydén argues, sometimes the content of the narrative is less important than who is telling the story and to what audience. This applies to such standardised or stereotypical stories (e.g., stories about addiction or religious

²⁹³ Timmermand, S. and Tavory, I. (2012). Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis, *Sociological Theory* 30(3), 167–186.

²⁹⁴ Benson, P. (2018). Narrative Analysis, in Phakiti, A., De Costa, P., Plonsky, L., and Starfield, S. (eds.), *The Palgrave Handbook of Applied Linguistics Research Methodology*, London: Palgrave Macmillan, 595–613.

²⁹⁵ Squire, C., Davis, M., Esin, C. Andrews, M. Harrison, B., Hydén, L., and Hydén, M. (2014). *What is Narrative Research?* New York: Bloomsbury Academic.

²⁹⁶ Squire, C., Davis, M., Esin, C. Andrews, M. Harrison, B., Hydén, L., and Hydén, M. (2014). *What is Narrative Research?* New York: Bloomsbury Academic.

²⁹⁷ Esin, C. (2011). Narrative Analysis Approaches, in Frost, N. (ed.), *Qualitative Research Methods in Psychology: Combining Core Approaches*, Berkshire: Open University Press, 92–118.

conversion) that are usually divided into parts concerning life before the turning point, the turning point itself, and life after the turning point. This type of autobiographical storytelling is a ritual that changes the status of the participant(s). As Hydén (2013, 44) notes, ‘the storytelling has a performative force; by telling the story a certain identity is put in place’.²⁹⁸ Denzin points out how the notion that lives are turned around by key events, or epiphanies, is deep-rooted in Western thought. At least since Augustine, Denzin notes, the idea of *transformation* has been a central part of the autobiographical and biographical form. This means, as Denzin (2014, 14) suggests, that ‘biographical texts will typically be structured by the significant turning-point moments in a subject’s life’.²⁹⁹

The narrative of difference embedded in the DSSH model has characteristics of Westernised stereotypical autobiographical storytelling: the asylum applicant is expected to identify a ‘turning point or milestone’ that helped them to realise their difference and to recount their life events before and after, and in relation to, that turning point. Producing a coherent narrative of difference is a prerequisite for being granted the status of (queer) refugee. For the queer subject, it may be simultaneously a liberating and constricting narrative, serving as a powerful form of control in the immigration system (see, e.g., Smith & Waite 2018, 2290).³⁰⁰

4.4 Ethical considerations

Ethical principles for research with human participants, issued by the Finnish National Board on Research Integrity TENK in 2019, include respecting the dignity and autonomy of human research participants and conducting research so that it does not cause significant risks, damage or harm to research participants, communities or other subjects of research.³⁰¹ Previous TENK guidelines issued in 2009, also relevant for this research, approach the matter in similar ways, highlighting respect for the

²⁹⁸ Hydén, L. (2013). Identity, self, narrative, in: M. Hyvärinen, L. Hydén, M. Saarenheimo, and M. Tamboukou (eds), *Beyond Narrative Coherence*, Amsterdam: John Benjamins Publishing Company, 33–48.

²⁹⁹ Denzin, N. K. (2017). *Interpretive Autoethnography*, Sage Publications.

³⁰⁰ Smith, K. and Waite, L. (2018). New and enduring narratives of vulnerability: rethinking stories about the figure of the refugee, *Journal of Ethnic and Migration Studies* 45(13), 2289–2307.

³⁰¹ Finnish National Board on Research Integrity TENK (2019). The ethical principles of research with human participants and ethical review in the human sciences in Finland: Finnish National Board on Research Integrity TENK guidelines 2019, available at: https://tenk.fi/sites/default/files/2021-01/Ethical_review_in_human_sciences_2020.pdf [checked: 10 October 2023].

autonomy of research subjects, avoidance of harm, as well as privacy and data protection.³⁰²

The data included in this dissertation are asylum decision documents and expert interviews. For substudy I, the Non-Discrimination Ombudsman in Finland granted a research permit allowing the research group to use confidential written asylum decisions as data. The Data Protection Ombudsman was provided with a register description of scientific research (in Finnish: 'tieteellisen tutkimuksen rekisteriseloste'), as previously required by Sections 36 and 37 of the now repealed Personal Data Act (523/1999).³⁰³ The asylum decisions were retrieved from the case management system for immigration matters (UMA). The decision documents were retrieved, stored, and examined using an encrypted device. Information from the decision documents was coded with the aim of minimising information that could be used to identify an individual. In reporting the findings, the research group further minimised details that could risk the identification of individual asylum applicants.

As for substudies II and III involving expert interview data, I observed the principles referred to in the TENK guidelines. For instance, I informed the participants about the aims of the interview study and the participants' rights. In addition, I requested the participants' consent in different ways (in writing and orally during the interview). As the TENK guidelines cited above highlight, the principle of avoidance of harm is crucial for research with human participants. In particular, the pool of individuals working in queer rights organisations in Finland is bound to be small, so the potential for harm for these individuals or their background organisations is not non-existent. Due to these risks, I refrained, for instance, from naming the specific background organisations of these interviewees. But especially as regards asylum decision-making, it must be noted that the 2009 TENK guidelines (p. 9) specify that '[p]articularly research concerning the use of power and the functioning of social institutions must not be restricted on the grounds that results can have negative effects for subjects'.³⁰⁴ Conducting research concerning the use of power is therefore necessarily a balancing act between different interests and principles.

³⁰² Finnish National Advisory Board on Research Ethics (2009). Ethical principles of research in the humanities and social and behavioural sciences and proposals for ethical review, available at: <https://tenk.fi/sites/tenk.fi/files/ethicalprinciples.pdf> [checked: 10 October 2023].

³⁰³ Finland, Personal Data Act, Act No. 523/1999, 1 June 1999.

³⁰⁴ Finnish National Advisory Board on Research Ethics (2009). Ethical principles of research in the humanities and social and behavioural sciences and proposals for ethical review, available at: <https://tenk.fi/sites/tenk.fi/files/ethicalprinciples.pdf> [checked: 10 October 2023].

In the social sciences, the term *positionality* generally refers to the researcher's relationship to the phenomenon under study (see, e.g., LaRocco et al. 2020).³⁰⁵ The researcher's positionality can include the perspective they have on the phenomenon under study due to their life experiences and social status. This type of reflexivity is linked to questioning the (positivist) idea that science can achieve neutral, value-free, objective knowledge about phenomena (Andreassen & Myong 2017).³⁰⁶ Rather, the aim is to better understand how the researcher's knowledge is situated in particular sets of social relations (Griffith 1998, 374).³⁰⁷ Depending on the research task at hand, reflections on positionality may involve various aspects such as gender, class, educational background, or membership in a particular ethnic group.

In reflecting on my positionality as a researcher, I draw on the (albeit dichotomous and somewhat static) insider/outsider typology used to differentiate status in various contexts. The insider/outsider typology offers a tool for examining the researcher's relation to the groups in which they are conducting research (Griffith 1998, 374).³⁰⁸ As a researcher in this dissertation project, I would position myself in many ways as an outsider – a researcher who, in Griffith's (1998, 361) words, 'does not have an intimate knowledge of the group being researched prior to their entry into the group'.³⁰⁹ Prior to the study, I had not been in an employment relationship with the authorities or agencies under scrutiny or volunteered in any of the non-governmental organisations examined, nor had I been on the receiving end of their services. I also have not received any funding from the background organisations of my interviewees.³¹⁰ For the most part of my doctoral dissertation work, I was in a doctoral researcher position under an employment contract with the University of

³⁰⁵ LaRocco, A. A., Shinn, J. E., and Madise, K. (2020). Reflections on Positionalities in Social Science Fieldwork in Northern Botswana: A Call for Decolonizing Research, *Politics & Gender* 16, 845–873.

³⁰⁶ Andreassen, R. and Myong, L. (2017). Race, Gender, and Researcher Positionality Analysed Through Memory Work, *Nordic Journal of Migration Research* 7(2), 97–104.

³⁰⁷ Griffith, A. I. (1998). Insider / Outsider: Epistemological Privilege and Mothering Work, *Human Studies* 21(4), 361–376.

³⁰⁸ Griffith, A. I. (1998). Insider / Outsider: Epistemological Privilege and Mothering Work, *Human Studies* 21(4), 361–376.

³⁰⁹ Griffith, A. I. (1998). Insider / Outsider: Epistemological Privilege and Mothering Work, *Human Studies* 21(4), 361–376.

³¹⁰ The Finnish code of conduct for research integrity and procedures for handling alleged violations of research integrity in Finland also highlights the requirement for researchers to report sources of funding and potential conflicts of interest (Finnish National Board on Research Integrity TENK (2023). The Finnish code of conduct for research integrity and procedures for handling alleged violations of research integrity in Finland, Publications of the Finnish National Board on Research Integrity TENK 4/2023, https://tenk.fi/sites/default/files/2023-05/RI_Guidelines_2023.pdf, 13).

Turku.³¹¹ The latter part of this time period, I was working either partially or fully in the research project SILE (Silent Agents Affected by Legislation: From an insufficient knowledge base to inclusive solutions) funded by the the Strategic Research Council (SRC) within the Research Council of Finland.³¹² In addition, I have received a scholarship from the March the 25th Foundation (Maaliskuun 25 päivän rahasto sr). On the one hand, this means that I do not have a lived familiarity with the group(s) being researched or the tacit knowledge, gained through being an insider in the organisations, to inform my research. Although gaining access to professional experts interviewed for substudies II and III was relatively uncomplicated, the level of trust and openness of the interviewees might have been higher had I been an insider. On the other hand, being an outsider may have guarded me against, for instance, my experiences and perspectives becoming dominant in the knowledge constructed (Mohler & Rudman 2022, 1512).³¹³

However, reliance on identity categories may also run the risk of essentialising what may often be fluid and flexible identities in research processes (Mohler & Rudman 2022, 1511).³¹⁴ Mohler & Rudman (2022, 1512; see also, e.g., Kapinga et al. 2022) point to the dynamic and fluid nature of negotiating positionality, noting that ‘researchers must address how they function as insiders and outsiders concurrently, and thereby occupy a space in-between as they shift between positions of similarity and difference’.³¹⁵ To provide a simplified example, as a researcher with a legal degree, it may have been easier for me to gain access to and to establish a good rapport with judges with whom I shared this attribute. And relating more broadly to the phenomenon under study, I also position myself as an outsider in that I do not have lived experience of forced displacement or the process of seeking asylum. I am privileged to have lived in a relatively safe environment and to have

³¹¹ Before formally beginning my dissertation work, I was employed for a few months in 2017 by the Non-Discrimination Ombudsman to collect data (i.e., written asylum documents) for the research project discussed in substudy I.

³¹² Project numbers: 335442, 335654.

³¹³ Mohler, E. C. and Rudman, D. (2022). Negotiating the Insider/Outsider Researcher Position within Qualitative Disability Studies Research, *The Qualitative Report* 27(6), 1511–1521.

³¹⁴ Mohler, E. C. and Rudman, D. (2022). Negotiating the Insider/Outsider Researcher Position within Qualitative Disability Studies Research, *The Qualitative Report* 27(6), 1511–1521.

³¹⁵ Mohler, E. C. and Rudman, D. (2022). Negotiating the Insider/Outsider Researcher Position within Qualitative Disability Studies Research, *The Qualitative Report* 27(6), 1511–1521; Kapinga, L., Huizinga, R., and Shaker, R. (2022). Reflexivity through positionality meetings: religion, muslims and ‘non-religious’ researchers, *International Journal of Social Research Methodology* 25(1), 103–117.

had a very high degree of personal freedom of movement (even across the borders of nation states and continents) throughout my life.

5 Introduction to original publications

Next, I will present the summaries of the main findings of the three substudies. I will address the overarching research question of how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power. The summary of each of the three substudies contributes to the overarching research aim, but also answers the specific research questions as outlined in the previous chapter. Furthermore, since this synthesis also aims at providing new insights into what implications the use of discretionary power in the asylum procedure may have for applicants who are made vulnerable – in particular, for those applying for queer asylum, I will next also reflect on the findings through this lens.

5.1 Substudy I

Substudy I examines the drop in asylum recognition rates for young Iraqi applicants in Finland during the 2015 perceived refugee crisis in Europe. It analyses the reasons behind the mass denial of young Iraqi applicants (aged 18–34) and Finnish immigration control authorities' use of discretion in asylum credibility assessment. The substudy focuses on Iraqi citizens of this age group because they were the largest asylum applicant group in Finland in the periods examined. From the substudy's outset, statistics demonstrated that Iraqi applicants' recognition rate plummeted from 2015 to 2017 in Finland, with those granted such protection having previously been in the majority and later in a distinct minority. The substudy compares decision-making during two time periods and argues that inconsistent assessment and lack of trust in applicants' claims led to the mass denial. The findings show that asylum officers can have a significant impact on decision-making without legal changes, through their use of 'collectivised discretion' in controlling migration.

After the perceived refugee crisis, immigration control authorities in Finland provided three main reasons for the drop in asylum recognition rates. First, the authorities suggested that the asylum-seeker profile had changed in Finland in the fall of 2015 and was different from that seen in Sweden and Norway because a large number of unaccompanied young Iraqi men had arrived in Finland. A greater share of asylum applicants in neighbouring countries were allegedly Iraqi families

with children. Second, the authorities suggested that more applicants were coming from more peaceful regions of Iraq or from regions deemed more secure, especially southern Iraq. And third, the authorities asserted that the Finnish Immigration Service had sought to harmonise Finland's asylum decision-making practices with other European countries, particularly Sweden. The substudy analysed whether the first and second reasons (i.e., changes in the applicant profile and changes relating to the regional security situation in Iraq) are reflected in the data of written asylum determinations concerning young Iraqi applicants (the third reason falling outside the data's scope).

To examine the veracity of the Finnish authorities' suggestion that the asylum applicant pool changed in the 2015 crisis (i.e., more unaccompanied young men and more applicants from safer areas of Iraq), the substudy scrutinised whether there were quantitative changes in applicants' socio-demographic characteristics between the periods, in terms of gender, family ties, and religion. The analysis found no shift in the asylum applicant pool that could explain the drop in recognition rates. The share of men, women, and applicants with families remained the same in both periods, challenging Finnish authorities' moralising, gendered notions that while neighbouring countries received families with children, many newcomers to Finland were unaccompanied young men. The analysis also did not find a decline in how often applicants reported past persecution or fear of future violence. The only change observed in the applicant pool was that the share of Sunni applicants, as compared to Shia applicants, dropped (32 percentage points) in 2017, yet the Sunni continued to be the largest applicant group in both periods. Whether this decline had some impact on the drop in recognition rates is beyond the substudy's scope. However, the asylum applicants' religious background is unlikely to be the key explanation for the decline in recognition rates, as recognition rates dropped in a similar way for all three of the largest, arguably heterogeneous, asylum applicant groups in Finland from different origin countries (in 2016, citizens of Iraq, Afghanistan, and Somalia).

Furthermore, the substudy intended to investigate whether asylum applicants in 2017 originated from areas deemed 'more peaceful parts of Iraq' or 'areas of improved security', as Finnish authorities suggested, by comparing the areas indicated in the decisions against Finnish policy guidelines for different parts of Iraq. However, in both periods, the substudy found that decision makers did not indicate any part of Iraq in the vast majority of asylum decisions, and it was, therefore, not possible to carry out an analysis that would yield reliable results. The substudy cannot rule out the influence of geographical variation in applicants' origins or of increased safety in a particular region on asylum status determinations, which may have implicitly factored in the decisions. The article's findings suggest, however, that this facet of decision-making was not made explicit to most asylum

applicants. The article argues that such a large share of missing information is problematic and calls into question the transparency of asylum decision-making.

The substudy demonstrated that immigration officers' use of collectivised discretion after the perceived refugee crisis (in 2017) was manifested in their lack of faith in the veracity of applicants' claims. The article finds that collectivised discretion was visible in asylum credibility assessments in two ways. First, in quantitative terms, in 2017, asylum officers were less likely to believe applicants' reasons for seeking asylum or their claims regarding past infringements and future risks than in 2015. Second, in qualitative terms, in 2017, asylum officers assessed similar facts inconsistently, as compared to 2015, and demonstrated a lack of faith in the veracity of applicants' claims. The findings, thus, indicate that both quantitative and qualitative changes in asylum credibility assessments were essential to the drop in recognition rates. The substudy asserts that concrete changes in Finland's international protection practices closely match the objectives and content of the Finnish government's 2015 asylum policy action plan and the series of crisis-based policies aiming to shrink the population of asylum-seekers.

It is crucial to consider what implications the use of discretionary power in the asylum procedure may have for applicants who are made vulnerable – in particular, for those applying for queer asylum. The article argues that collectivised discretion or efforts to ensure uniformity with political goals can lead to arbitrary results in the application of asylum law and potentially force those in need of refugee protection to face deportation. Where the use of discretionary power in crisis constricts access to protection for the asylum applicant population overall, the risks may be heightened for applicants who are in the margins of the already marginalised asylum applicant population. As the following two substudies demonstrate, asylum decision-makers' discretionary power is exceedingly great, in particular, in more abstract and ambiguous protection grounds, such as sexual orientation.

5.2 Substudy II

Substudy II focuses on a specific tool that asylum authorities in Finland, and in a number of other refugee-receiving countries in Europe and elsewhere in the world, use to assess the credibility of queer asylum claims. European and Finnish national legislation and jurisprudence leave asylum decision-makers with a wide margin of discretion in assessing queer asylum claims. For guidance, some refugee-receiving countries, including Finland, rely on the so-called DSSH (Difference, Stigma, Shame, and Harm) model. The model provides a go-to narrative, a so-called 'narrative of difference', that asylum decision-makers can apply to assess the credibility of claims regarding sexual orientation.

The substudy finds that the narrative of difference embedded in the DSSH model has characteristics of stereotypical or standardised autobiographical storytelling: the asylum applicant is expected to identify a ‘turning point or milestone’ that helped them to realise their difference and to recount their life events before and after, and in relation to, that turning point. Producing a coherent narrative of difference is a prerequisite for being granted the status of (queer) refugee. This makes the narrative embedded in the DSSH model powerful and its use in queer asylum determinations important to investigate. The DSSH model underscores the applicant’s sexual identity, rather than other dimensions of sexual orientation (such as sexual behaviour). The substudy argues that by imposing and reproducing an essentialist narrative on queer refugees the DSSH model may function as a filtering tool in the asylum system.

Based on an analysis of interviews with asylum decision-makers at the Finnish Immigration Service and at regional administrative courts, the substudy explored whether the narrative of difference embedded in the DSSH model is manifested in decision-makers’ understandings of queer asylum determinations. The substudy shows how the DSSH model primes the asylum decision-maker to expect a specific narrative, the narrative of difference, from the queer asylum applicant. The substudy demonstrates how the DSSH model reproduces an understanding of sexual identity development as a linear process (beginning with a first realisation/awakening) and the ideal expression of same-sex interest as a (Westernised and heteronormative) monogamous relationship based on romantic love. Furthermore, the DSSH model operationalises abstract and affective concepts (e.g., sexual identity, stigma, shame) that are difficult to grasp even for asylum decision-makers.

The findings suggest that judges, in particular, had qualms about the abstractions and affective discourse that characterise the DSSH model. Some judges preferred assessing, for instance, the veracity of concrete events in the past rather than the asylum applicant’s feelings. According to the substudy, this was a clear difference between initial-level (the Finnish Immigration Service) and appeals-level (administrative courts) decision-makers. And this difference, as the substudy finds, is also a structural problem: if initial-level asylum decision-makers adhere to a specific narrative – one that asylum decision-makers at the appeals level may not adhere to or even recognise – then asylum decision-makers at different levels are talking past one another.

Substudy II argues that the vague criteria for membership in a particular social group make an ideal site to wield interpretive power to control migration, which can exacerbate asylum applicants’ procedural vulnerability. The substudy highlights the power asylum decision-makers have in shaping the understandings regarding an entire asylum protection category. As producing a coherent narrative of difference, embedded in the DSSH model, is a prerequisite for being granted the status of (queer)

refugee, the model risks excluding those queer asylum applicants who are unable to convey emotions or to relate to the culturally context-sensitive abstractions embedded in the model. The use of administrative soft law instruments, such as the DSSH model, makes asylum decision-making incoherent between the initial-level agency and the appeals-level court, as discussed in chapter 2.3 of this synthesis. This incoherence emanating from the use of soft law may render the asylum system increasingly difficult for an individual to navigate and decision-making outcomes increasingly harder to predict.

5.3 Substudy III

The third substudy explores the role and significance of queer rights organisations in queer asylum decision-making. Queer rights organisations have a highly institutionalised role in asylum-seeking in Finland: reception centres encourage asylum applicants to participate in the activities offered by the organisations, and immigration authorities support the organisations' work by offering interpreting services. Based on analysis of interviews with individuals working at such organisations and asylum decision-makers, the substudy argues that also the organisations participate in asylum decision-making, in a broader sense, by determining a credible member of a sexual minority. The wider aim of the substudy is to offer new perspectives to discussions regarding immigration control and the uneasy alliance between third-sector service providers and public authorities.

The substudy shows that asylum decision-makers were interested in asylum claimants' participation in activities at queer rights organisations. Furthermore, the substudy finds that asylum decision-makers may even actively ask the claimants for queer rights organisations' statements. Although decision-makers highlighted the importance of the claimant's own account in asylum status determinations, the views of queer rights organisations may also have an impact on the outcomes of asylum decision-making. The asylum decision-makers viewed queer rights organisations' statements as useful in cases where some doubts remained regarding the claimant's credibility and as supporting the applicant's claims. Some asylum decision-makers believed that queer rights organisations have expertise on sexuality, which, as the substudy suggests, gives the organisations indirect power in asylum status determinations. The substudy finds that asylum decision-makers at different levels regarded the queer rights organisations' statements somewhat differently: administrative court judges had cautiously positive attitudes towards the statements, whereas decision-makers at the Finnish Immigration Service were more sceptical.

The substudy finds that, through activities at queer rights organisations, asylum claimants may gain knowledge on how to discuss sexual orientation in ways that decision-makers understand and deem essential for a credible queer asylum account.

The substudy notes that not all applicants, however, are in an equally good position to attend the activities of queer rights organisations. Some of the asylum claimants may not be able to participate due to accelerated asylum procedures, distance between their reception centre and the queer rights organisation, or because they are not aware of local queer rights organisations. The queer rights organisations' activities for asylum claimants are mostly organised in bigger cities in Southern Finland. Asylum authorities, on the other hand, may have placed queer asylum claimants in reception centres in parts of Finland where distances to the nearest relevant activities are long. Furthermore, the claimants may have to queue to queer rights organisations for months, as there may be more of those willing to participate than the organisations are able to accommodate. It is also possible that some asylum claimants experience the queer rights organisations' activities as something that is 'not for them' or as too risky.

Non-state actors, such as non-governmental organisations, also exert influence on immigration trajectories because of the wide discretionary margin afforded by immigration law, as noted by chapter 2.1 of this synthesis. Receiving support and guidance from a queer rights organisation may be important with regard to the outcome of asylum status determinations. So as discussed in chapter 3.3, in order to appear convincing in the asylum procedure, queer claimants may feel pressure to 'pass' as credible members of a sexual minority in the eyes of gatekeepers, such as queer rights organisations. Again, this setting may add to asylum claimants' procedural vulnerability. The queer rights organisations' importance in queer asylum decision-making puts those claimants in a difficult position who do not want or are unable to participate in the activities or whose sexuality goes unrecognised by the organisations.

6 Concluding discussion

In this doctoral dissertation, I examined how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power, and what implications the use of discretionary power in the asylum procedure may have for applicants who are made vulnerable – in particular, for those applying for queer asylum. The dissertation consists of this synthesis and three substudies.

In this synthesis, I explored first, in chapter 2, the practicalities of how asylum decision-makers are able to operationalise the *existing* legal framework to control migration, by using their discretionary power. In other words, the aim was to understand how the limits of discretion, or ‘wobble room’ are established in asylum decision-making. Legal principles are broad and flexible, and they may be compromised by inflexible administrative bordering practices. Decision-makers may not always adhere to the benefit of the doubt principle and may approach asylum claims with suspicion. Asylum decision-making is complex and subjective, often relying solely on the applicant's account. Administrative soft law may have more influence than legislative standards but lacks parliamentary oversight and accountability. Rapid changes in asylum policies and practices may make it difficult for asylum seekers to predict outcomes, potentially putting them at risk of persecution if their residence permit is denied. In chapter 2, I argued that, rather than a neutral apparatus which, given certain parameters, ‘spits out’ a given decision, the asylum system operationalises the highly vaporous legal framework. The limits of discretion, the chapter suggested, are elastic and sometimes vague, to allow for both small- and large-scale shifts in asylum determinations even in situations where no legal amendments have been made.

Second, in this synthesis I focused, in chapter 3, on the implications that the use of discretionary power in the asylum procedure may have for asylum applicants who are made vulnerable – in particular, for those applying for queer asylum. In the chapter, I argued that particularly the concept of *procedural vulnerability*, more familiar in other substantive contexts (e.g., research on climate change and indigenous peoples), has the potential to expand our understanding of the risks that the use of discretionary power in the asylum procedure may pose for asylum

applicants. The idea that the asylum procedure may exacerbate the claimant's vulnerability is not new to scholarship on asylum decision-making. But although there is a need for a broader, more structural understanding of vulnerability, this understanding has, thus far, not been properly conceptualised in research literature on asylum decision-making. It is not just that individuals arrive to the asylum procedure with their pre-existing vulnerabilities, but that, as I suggested in chapter 3, the concept of procedural vulnerability could be used to refer to the ways in which the asylum procedure itself produces and exacerbates vulnerability.

The data in this empirical study include asylum decisions concerning 18-34-year-old Iraqi applicants and interviews with legal actors working with asylum-seekers in Finland. Substudy I employed a mixed-method approach, combining both quantitative and qualitative analysis, and substudies II and III used qualitative approaches.

In substudy I, we focused on the mass denial of asylum to young Iraqi applicants in Finland in the context of the 2015 so-called refugee crisis, highlighting the asylum decision-makers' inconsistent assessment of facts and lack of faith in the applicants' claims. In substudy II, I examined the use of the DSSH model, which is a tool used to assess the credibility of asylum claims based on sexual orientation and argues that it risks excluding queer asylum applicants who are unable to relate to the culturally context-sensitive abstractions embedded in the model. In substudy III, I explored the role and importance of queer rights organisations in queer asylum decision-making, finding that it may put some claimants in a difficult position if their sexuality goes unrecognised or if they do not want to participate in the activities of the organisations. Overall, the sub-studies highlight the power that asylum decision-makers have in shaping understandings regarding asylum protection categories and the uneasy relationship between NGOs and the migration control apparatus.

Previous empirical research on discretion emphasises the output of the individual street-level bureaucrat, as pointed out in substudy I. This dissertation has contributed to knowledge on discretion by highlighting how street-level discretionary power in asylum decision-making may be collectivised, or used on a large scale to control migration, and some of it even delegated to third parties, such as non-governmental organisations. I found that the asylum procedure is rendered difficult for asylum applicants to navigate especially when policies are shifty and opaque, when protection criteria are abstract and difficult to grasp, or when approaches are inconsistent from one level of asylum decision-making to the next. I have argued for a novel way of framing vulnerability in the asylum procedure: vulnerability not only as an inherent characteristic or the circumstances of the individual claimant, but as *procedural vulnerability*, or a set of structural risks for the claimant that relate, for instance, to the aforementioned shortcomings of the asylum procedure itself.

As discussed in substudy I, as the analysis is limited to one country and one particular group of asylum applicants (namely, Iraqi applicants aged 18–34), there is a need for further research on recognition rates in the context of crisis. According to substudy I, more research is warranted, for example, on possible differences between applicant groups from different origin countries and on the situation in other refugee-receiving countries. Substudy I suggests that different approaches and data, such as multivariate analysis or interviews with asylum applicants and asylum decision-makers, could help provide an even more nuanced picture of collectivised discretion.

As for the limitations regarding substudies II and III, as the data consist of interviews with professional experts, more empirical research is needed on the queer asylum claimants' *lived* experiences, views, and opinions regarding the asylum procedure in Finland and related phenomena, such as the claimants' participation in the activities of queer rights organisations. And as discussed in substudy III, future research on queer asylum decision-making in Finland would also benefit from the analysis of written documents, such as asylum interview transcripts, initial-level asylum decisions, or administrative court decisions.³¹⁶

As discussed in the introduction, in 2023, the Finnish Ministry of the Interior published a report regarding perspectives on the comprehensive reform of the Aliens Act. The report (2023, 8) finds that: regulation regarding non-citizens is scattered into several acts drafted separate from the Aliens Act, the internal systematic structure of the Aliens Act has suffered due to multiple amendments, the Aliens Act includes numerous internal references which makes interpreting individual provisions more difficult, and the legislative bills needed to interpret the provisions of the Aliens Act are scattered due to the aforementioned amendments. The report (2023, 8) contends that, in the changes made to the Aliens Act, there has been inconsistency from one government term to another. The report (2023, 8) states that since the Aliens Act deeply affects an individual's legal status as well as fundamental and human rights, it should be expected to exhibit a certain degree of stability. The report (2023, 9) concludes that the comprehensive reform is to be guided, among other things, by a fundamental and human rights-based approach. The report indicates that the legal status of asylum seekers and other non-citizens, to varying degrees, has been made relatively difficult from a legislative perspective.

Furthermore, on a broader level, the European Union is negotiating on the New Pact on Migration and Asylum, and the negotiations are set to be concluded by

³¹⁶ On the analysis of initial-level queer asylum decisions, see however: Selim, H., Lindblad, P., Vanto, J., Skrifvars, J., Alvesalo-Kuusi, A., Korkman, J., Pirjatanniemi, E., and Antfolk, J. (2023). (In)credibly Queer? Assessments of Asylum Claims Based on Sexual Orientation, preprint available at: <https://psyarxiv.com/92r3f/> [checked: 10 October 2023].

February 2024.³¹⁷ Civil society actors, for instance, have criticised the pact for encouraging the use of the ‘safe third country’ concept, which would leave much discretionary power for member states and is feared to erode the prohibition of refoulement.³¹⁸ In addition, the European Commission’s proposal on border procedures, as noted by scholars, is very complex and involves, among other things, a ‘pre-entry phase’ during which the asylum seekers’ entry into the territory of EU member states has not yet been authorised, which can create a highly vague legal space for the asylum seekers.³¹⁹ The new border procedure, pursuant to the Asylum Procedures Directive³²⁰, will introduce into Finnish law an accelerated procedure for processing, immediately at or near the border, asylum applications which are ‘likely to be unfounded’.³²¹ Assessing which asylum claims should lead to an accelerated procedure at the border will also leave asylum authorities with much discretionary power.

The situation is not much easier when it comes to authorities applying the legislation on the street-level. For instance, since 2022, the Finnish Immigration Service has been simultaneously in the grips of both an organisational reform,³²² implementing reforms towards ‘open, transparent and customer-focused’

³¹⁷ European Commission (2023). What is the New Pact on Migration and Asylum of the EU?, available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum_en [checked: 10 October 2023].

³¹⁸ European Network Against Racism (2023). The New European Union Pact on Migration: Racializing Migration to and in Europe, policy brief, 20 June 2023, Brussels, <https://www.enar-eu.org/wp-content/uploads/The-New-EU-Pact-on-Migration-Racializing-Migration-to-and-in-Europe-Formatted.pdf>.

³¹⁹ Wessels, J. (2023). The New Pact on Migration and Asylum: Human Rights challenges to border procedures, blog post, 5 January 2021, German Network for Forced Migration Studies, available at: <https://fluchtforschung.net/the-new-pact-on-migration-and-asylum-human-rights-challenges-to-border-procedures/> [checked: 10 October 2023].

³²⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013.

³²¹ Finland, Ministry of the Interior (2023). Ministry of the Interior to continue preparations to introduce border procedure, press release, 28 July 2023, available at: <https://valtioneuvosto.fi/en/-/1410869/ministry-of-the-interior-to-continue-preparations-to-introduce-border-procedure> [checked: 10 October 2023].

³²² Helsingin Sanomat (2022). Ilkka Haahtela valittiin Maahanmuutto-viraston uudeksi ylijohantajaksi (‘Ilkka Haahtela appointed as the new Director General of the Finnish Immigration Service’ [unofficial translation]), news report, 8 September 2022, available at: <https://www.hs.fi/politiikka/art-2000009054713.html> [checked: 15 May 2023].

approaches,³²³ and the aftermath of a public scandal.³²⁴ In December 2022, the Finnish newspaper Helsingin Sanomat published an article on the case of a Mongolian nurse.³²⁵ The Finnish Immigration Service had denied the nurse a work-based residence permit and issued them a deportation decision, concealing the justifications of its decision and suggesting that the nurse had presented forged documents.³²⁶ Later, the Finnish Immigration Service conducted an inquiry and admitted to errors during the processing of the case.³²⁷ In addition, in early 2023, the Finnish Immigration Service conducted a legality control regarding its decision-making: the agency examined a sample of negative decisions issued in 2022 on extended permits that were applied for on the basis of work, studies, or family ties.³²⁸ Based on the legality control, the agency found that it had made procedural errors in almost a tenth of the cases (9%, n=16).³²⁹ The agency is having ‘an external audit carried out of its instructions for applying the law, and of the way in which these

³²³ Finland, Finnish Immigration Service (2022). Finnish Immigration Service conducts inquiry into case of Mongolian nurse, press release, 16 December 2022, available at: https://migri.fi/-/maahanmuuttovirasto-teki-selvityksen-mongolialaisen-sairaanhoitajan-tapauksesta?languageId=en_US [checked: 15 May 2023].

³²⁴ Helsingin Sanomat (2022). Työtaistelu ('Worker's fight' [unofficial translation]), news report, 12 December 2022, available at: <https://www.hs.fi/kaupunki/art-2000009149382.html> [checked: 15 May 2023].

³²⁵ Helsingin Sanomat (2022). Työtaistelu ('Worker's fight' [unofficial translation]), news report, 12 December 2022, available at: <https://www.hs.fi/kaupunki/art-2000009149382.html> [checked: 15 May 2023].

³²⁶ Helsingin Sanomat (2022). Työtaistelu ('Worker's fight' [unofficial translation]), news report, 12 December 2022, available at: <https://www.hs.fi/kaupunki/art-2000009149382.html> [checked: 15 May 2023].

³²⁷ Finland, Finnish Immigration Service (2022). Finnish Immigration Service conducts inquiry into case of Mongolian nurse, press release, 16 December 2022, available at: https://migri.fi/-/maahanmuuttovirasto-teki-selvityksen-mongolialaisen-sairaanhoitajan-tapauksesta?languageId=en_US [checked: 15 May 2023].

³²⁸ Finland, Finnish Immigration Service (2023). Legality control of negative decisions completed, results ready to benefit the development of Finnish Immigration Service's work, press release, 18 April 2023, available at: https://migri.fi/-/laillisuusvalvonta-kielteisiin-paatoksiin-valmistunut-tuloksia-hyodynnetaan-maahanmuuttoviraston-kehitystyossa?languageId=en_US [checked: 15 May 2023].

³²⁹ Finland, Finnish Immigration Service (2023). Final report on the legality control of negative decisions issued in 2022 on applications for extended permits (in Finnish), available at: https://migri.fi/documents/5202425/5701276/Selvitys_Erillisvalvonta+vuonna+2022+tehtyihin+kielteisiin+jatko-oleskelulupap%C3%A4%C3%A4t%C3%B6ksiin.pdf/58253d56-9836-c318-a9a7-493921f49d6f/Selvitys_Erillisvalvonta+vuonna+2022+tehtyihin+kielteisiin+jatko-oleskelulupap%C3%A4%C3%A4t%C3%B6ksiin.pdf?t=1681802273606 [checked: 10 October 2023].

guidelines take customers' circumstances into account'.³³⁰ Based on the audit, the agency will update its guidelines for interpreting the law.³³¹

The developments at the level of the European Union and nationally in Finland continue to highlight the importance of discretionary power and non-legislative policy instruments in immigration decision-making more broadly. Furthermore, as discussed in the introduction, automation will also be an increasingly crucial factor in the context of immigration decision-making (see, e.g., Malik & Lepinkäinen 2022),³³² even if its usage continues to be restricted in the future.³³³ These aspects of immigration decision-making warrant increased attention in future research, which could also benefit from incorporating the concept of procedural vulnerability to address various structural risks for the individual applicant in the asylum system.

³³⁰ Finland, Finnish Immigration Service (2022). Finnish Immigration Service conducts inquiry into case of Mongolian nurse, press release, 16 December 2022, available at: https://migri.fi/-/maahanmuuttovirasto-teki-selvityksen-mongolialaisen-sairaanhoitajan-tapauksesta?languageId=en_US [checked: 10 October 2023].

³³¹ Finland, Finnish Immigration Service (2022). The Finnish Immigration Service reforms its guidelines for the application of law, press release, 23 February 2023, available at: https://migri.fi/-/maahanmuuttovirasto-uudistaa-lainsoveltamisohjeensa?languageId=en_US [checked: 10 October 2023].

³³² Malik, H. and Lepinkäinen, N. (2022). Between algorithmic and analogue harms: the case of automation in Finnish Immigration Services, *Justice, Power and Resistance* 5(3), 270–291.

³³³ Helsingin Sanomat (2023). EU haluaa kieltää tekoälyn käytön ihmisten pisteytykseen, manipulointiin ja etä-tunnistukseen ('The EU wants to ban the use of artificial intelligence for scoring individuals, manipulation, and remote identification' [unofficial translation]), news report, 11 May 2023, available at: <https://www.hs.fi/politiikka/art-2000009571237.html> [checked: 10 October 2023].



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