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### **Between the law and a hard place – a victim of trafficking meets the Norwegian migration regime**

**Yngvil Grøvdal and Margunn Bjørnholt**

#### **Introduction**

Despite the fact that Norway recognizes victims of trafficking as a group in need of special protection, trafficking victims have been found to have difficulty obtaining protection in Norway and in practice, few of them seem to be granted protection (Brunovskis 2019, Gundersrud 2020).<sup>1</sup> Our aim in this chapter is to elucidate the process leading to this paradox, by exploring the case of one victim of trafficking for sexual exploitation and her (or the) long struggle to obtain protection in Norway.

In the national Action Plan against Trafficking, the Norwegian government describes trafficking as the slavery of our time. The plan contains proposals on how to effectively reduce or eliminate the practice, while at the same time protecting the victims and their rights (Ministry of Justice and Security, 2016, 4, 8). Moreover, Norway has signed and ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (hereinafter the Trafficking Protocol), a supplement to the UN Convention on Transnational Organised Crime, recognising trafficking as a global, criminal problem, as well as the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter the Trafficking Convention). In addition, the Norwegian authorities have

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<sup>1</sup> The Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) has criticised Norway for not establishing a National Referral Mechanism to ensure better knowledge of the actual number of presumed victims of trafficking. At present, the statistics collected by The Coordinating Unit for Victims of Trafficking (KOM), are based solely on information provided voluntarily by Non-Governmental Organisations (NGOs) assisting victims in Norway (GRETA 2017, 7, 10).

committed themselves to protecting women against all forms of violence by ratifying the Istanbul convention.

The Norwegian authorities offer alleged victims of trafficking limited residency as 1) *a reflection period* of six months and 2) *a renewed temporary residence permit* valid for up to a year with the possibility of renewal. According to the Directorate of Immigration (hereinafter UDI), the aims with these residence permits are that victims of trafficking should break with the trafficker(s) as well as to facilitate criminal prosecution of traffickers. However, cooperation with the police for prosecution purposes is not a condition for the reflection period, while being willing to receive different forms of assistance during this time, is. Application for the renewed temporary residence permit, on the other hand, involves several conditions, relating predominantly to the criminal justice aspect. The victims of trafficking must have cut contact with the trafficking milieu and reported the trafficker(s) to the police. The case must be under investigation by the police or under trial in court, both requiring cooperation from the women. None of the abovementioned permits will give permanent residency, though. For that there is the *witness instruction*, *asylum* or, if protection is not otherwise obtained, *residency on humanitarian grounds*. The witness instruction may entail permanent residency and the aim with the instruction is to reduce fear of cooperating in the criminal prosecution of traffickers (GI-31/2010, 2). The instruction pertains to the Immigration Regulation § 8-4, and according to the first subsection, permanent residency *shall* be granted those having given testimony as victims of trafficking in a court of law, unless specific reasons speak against it (GI-31/2010, 4). Permanent residency *can* be obtained according to the Immigration Regulation § 8-4, second subsection, but is dependent on the discretionary powers of the immigration authorities. However, relatively few victims of trafficking obtain residency through the criminal justice track, and many end up changing track altogether, asking the authorities to reopen their asylum case, or seeking asylum if they had not done so beforehand (Brunovskis, Skilbrei and Tveit 2010, 91; Gundersrud 2020, 37). According to the national Action Plan, the aim is to have as many victims of trafficking as possible return to their countries of origin (Ministry of Justice and Security 2016, 15).

A recent study of trafficking in the Norwegian context (Brunovskis, 2019) concluded that on the one hand “rights to assistance for trafficked persons in Norway are presented in official documents as a cohesive set of special rights for one particular group.” On the other hand, Anette Brunovskis writes, “actual access in fact rests on other statuses, most notably

migration status and the ability to document identity” (2019, 3). Brunovskis concludes that special rights for particular groups do not fit well with a universal welfare state context like the Norwegian one and that “the ‘trafficking victim’ category thus blinds to the greater importance, in practice, of general legislation in the fields of migration, welfare and health services” (2019, 3).

This is neither unique for Norway, nor for victims of trafficking. In contrast, the negative and oppressive effects on groups that are constructed as vulnerable and who are targeted with special measures have been found to be a general aspect of policies based on this kind of disciplining logic, for different groups and across national contexts (Brown, 2017; Brown, Ecclestone, and Emmel, 2017; Harrison and Sanders, 2006).

Moreover, the amalgam of protection with criminal justice that applies for trafficking victims may have negative or detrimental effects on the individuals in question as discussed by Brunovskis and May-Len Skilbrei, using Norway as an example (2016). One negative consequence is the extremely unequal distribution of protection in Norway. Some women have information that the police consider useful, while others do not. In the latter case, their chance of protection is usually nil (*ibid.*, 20). Some women fear, or suffer, acts of vengeance when traffickers find out they have cooperated with the Norwegian authorities (*ibid.*, 21). Further, the combined effects of restrictive migration policies and crime prevention may effectively block possible trafficking victims’ entry to the country.

One way of reducing trafficking is, namely, to refuse foreign women a visa if one suspects that they are potential victims of trafficking (Jahnsen and Skilbrei 2018, 268). According to a report from the National Criminal Investigation Service (KRIPOS), Norwegian police frequently prohibit admittance to foreign women if they lack economic assets, and / or the reason for their visit to Norway is unclear (KRIPOS, 2017, 21-22). However, while turning some foreign women away at the border may prevent crime on Norwegian soil, this practice will not safeguard potential victims of trafficking and the freedom and integrity of the individual, which are among the goals stated in the abovementioned report. Fitzgerald (2016), similarly argues that in the UK, protecting presumed victims of trafficking often takes the form of denying them entry to the country. The *de facto* effect is that rather than protecting alleged vulnerable victims of trafficking, one protects the UK against undesirable individuals,

and British men from the advances of foreign women selling sex (see Heber, 2018 for a similar analysis in a Swedish context).

As for Norway's restrictive immigration policies, the signing of the Schengen agreement in 1996 and the Dublin Regulation in 2001 – the year that Norway was operationally integrated in the Schengen cooperation – has had a considerable impact. Norway is also part of Eurodac, a system for fingerprinting persons to keep track of whether or not they have applied for asylum in another member state. Control of the outer borders increased in order to allow free movement for citizens belonging inside Schengen, a 'territory' consisting of most EU countries as well as Island, Lichtenstein, Switzerland and Norway.<sup>2</sup> The Dublin Regulation (currently Dublin III), establishes that asylum seekers may have their applications dealt with in one of the member States, usually the one where they first arrive. However, even though not obliged to do so, according to the Dublin regulation, any state may perform a *reality check*<sup>3</sup> of an asylum case.

In Norway, the prevention of prostitution is also part of the picture. Despite the fact that selling sex is legal, buying sex is not. Accordingly, reducing the number of women, most importantly foreign women, who sell sex, can be regarded as a strategy to get rid of the sex-buying crime (Jahnsen and Skilbrei 2017, 267).

Some foreign women – in our case predominantly women from the global south with no permanent legal status in Norway – who sell sex, may have chosen, albeit from an often limited and unattractive list of choices, to leave their country of origin more or less permanently. These women might not necessarily consider themselves 'victims' (Brunovskis and Skilbrei 2018, 310, 314, Foulavad and Ward, 2019, 40, Serughetti, 2018, 20). Still, categorisation of migrants is used to "separate between those deemed as deserving of protection and others to be deported" (Serughetti 2018, 18), blinding us to structural problems and experiences that overlap and make such categorisation meaningless. While being trafficked is likely to be considered as tantamount to having been forced, threatened and / or deceived, into a life of selling sex, being "smuggled" to Europe and sell sex there, would

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<sup>2</sup> [Schengen- og justissamarbeid - regjeringen.no](https://www.regjeringen.no)

<sup>3</sup> By *reality check* we understand a concrete consideration of all practical aspects of the situation of each asylum seeker, among other things looking at available economic, social and health assistance schemes in the country where asylum has been granted. The question of a reality check is, as the reader will see, very relevant for the case we analyse, as the investigation of the case by the Norwegian authorities showed that the woman had obtained asylum in Hungary.

mostly be regarded as taking part in a voluntary action. Although their life situations may be similar in most ways, persons in the first category would probably be categorised as “worthy”, the other as “unworthy”, of protection in Europe.

Moreover, the category ‘trafficking victim’ has been criticized for representing an idealized picture of victims of trafficking which does not necessarily match the more ambiguous and complex life situations of persons who sell sex, some of whom may be exploited in trafficking (Heber, 2018; Brunovskis, 2019). Nevertheless, in a Nordic context, such an idealized picture seems to have been pivotal in prompting both politicians’ and activists’ engagement against trafficking. In the autumn of 2002, Swedish director Lukas Moodysson released the fictional film *Lilja 4ever*. The film script is based on the story of a 15 year old Lithuanian girl, betrayed and abandoned by people one would expect to love and care for her. Lured by a boyfriend and the prospect of a job in Sweden, “Lilja” was sold to a man who lived off forcing young girls to sell sex. She eventually died after throwing herself from a road bridge in the south of Sweden. Her gender, age and precarious situation, combined with the seemingly ruthless male trafficker, elicited strong feelings among politicians and activists. In Norway, criminologist Astrid Renland has claimed that the film was central to Odd Einar Dørum’s, then Norwegian Minister of Justice, criminal justice prioritisations regarding trafficking (Renland, 2015). “Lilja” appeared as “the ideal,” and thereby credible, victim according to Norwegian criminologist Nils Christie’s typology (Christie, 1986). In Christie’s words: “By ‘ideal victim’ I have (...) in mind a person or a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim” (1986, 18). The film was frequently employed in campaigns against trafficking initiated by the Nordic Council of Ministers, and the Council used it extensively in seminars as well as in schools in the Nordic and Baltic countries (Ekberg, 2002). Representatives of non-governmental organisations (NGO’s) criticising the Norwegian immigration authorities of failing to protect victims of trafficking also made use of it (Austbø and Tjessem 2002).

In this chapter, we study how a woman, who seems to fit with the model victim that informed Norwegian policies and engagement against trafficking, was received by the Norwegian state. We discuss how we should understand the Norwegian response to this particular case in view of the comprehensive obligations that Norway has assumed to protect migrant women subject to gender-based violence, and victims of trafficking and violence in particular. Important to note, is that Norway is both seen, and presents itself internationally, as a champion of gender

equality and human rights. Symptomatic of Norway's good reputation in this regard, is that the European Court of Human Rights actually refused to litigate the case we have analysed and studied in this chapter, with reference to Norway's high ranking as a protector of human rights.

In the following, we first introduce two theoretical approaches that act as a sensitising framework for our analysis, before describing the materials and methods we use to construct the case. Next, we briefly present the background story of exploitation and trafficking, before analysing in more detail the prolonged process of obtaining protection in Norway. Finally, we discuss how we should understand and assess the Norwegian state's response to this case.

### **Human vulnerability, citizenship and rights**

To guide our analysis, we draw on two apparently oppositional theoretical approaches. They are on one hand, Martha Fineman's universalistic and critical vulnerability approach (2008, 2010, 2017, Bjørnholt, Reilly, and Tastsoglou, this volume) and on the other hand, Hannah Arendt's critique of the idea of human rights as inalienable – and inborn per se – and her focus on the political sphere and citizenship (1958, 1966).

Challenging the idea of vulnerability as pertaining only to some groups, in contrast to a presumed independent, liberal, and invulnerable subject, Fineman (2008, 2010, 2017) and others – emphasising the *human*, rather than the *rights part* of the human rights trope – argue that vulnerability is a universally shared human condition, legitimating the need for a responsive state. Despite starting with what may be seen as an essentialist assumption of human life, the implications of Fineman's theory are social, as she draws attention to the role of institutions in creating as well as modifying inequality, and to states' responsibilities to establish and monitor their institutions to make them work for all. This includes preventing institutions from becoming corrupted, as both people and institutions are vulnerable to decay and corruption. The role of institutions in maintaining inequality is Fineman's argument for a responsive state: "The fact that societal institutions play a significant role in maintaining and extending inequality is the very reason that we need a more active state, one that is responsive to that reality" (Fineman, 2008, 2). A vulnerability analysis, Fineman argues, starts with the state and its institutions:

A vulnerability analysis begins by first considering how the state has responded to, shaped, enabled, or curtailed its institutions. Has it acted

toward those institutions in ways that are consistent with its obligation to support the implementation and maintenance of a vital and robust equality regime – a regime in which individuals have a true opportunity to develop the range of assets they need to give them resilience in the face of their vulnerabilities? (Fineman 2008, 20).

Although Fineman developed her vulnerability theory in an American context, it has been relevant and useful in a European (Truscan, 2013) and a Nordic context (Bjørnholt, 2013a), and has functioned as an analytical tool for studying gender equality policies (Bjørnholt, 2013b), domestic violence (Bjørnholt, 2019), and victims of trafficking (Gundersrud, 2020).

Arendt (1958; 1966), in contrast, was sceptical about human rights, as she denied the political relevance of human existence in itself as a basis for rights. The problem with the idea of human rights, she argued, is that assumed inborn human dignity cannot be shown to exist in any politically meaningful way. On the contrary, rights are only conceivable in the context of a human being belonging to a political community, and are dependent on a public political realm. “Equality”, Arendt wrote, “in contrast to all that is involved in mere existence, is not given to us, but is the result of human organization ... We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights” (1966, 301). For Arendt, citizenship was the key to rights. As she saw it, abstract human rights “proved to be unenforceable – even in countries whose constitutions were based on them – whenever people appeared who were no longer citizens of any sovereign state” (1966, 293).

We use these two theoretical lenses to ask whether the Norwegian state via its institutions, may be said to have acted responsively towards ‘Yasmin’<sup>4</sup> as a fellow human being in a particularly vulnerable situation. We also address how the position of not belonging and lacking formal rights, in practice makes it hard to obtain the protection and support that each human being requires (need), given her situation.

## **Method, material and analysis**

To explore the meeting between the Norwegian state and victims of trafficking, we have chosen to analyse one case that has figured in Norwegian media. Studying one case in detail is of particular interest and relevance when aiming to highlight how policies and institutional

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<sup>4</sup> A pseudonym she herself chose for a documentary from the Norwegian Broadcasting Corporation.

dynamics affect people in their real lives. It allows an analysis of how institutional logics may both facilitate and lead to harm, as well as modify and remedy consequences of harm (see Bjørnholt, 2019 for an analysis of re-victimization in this perspective), and is useful to explore how good intentions must often yield to other interests (see also Bjørnholt 2019, 94-95).

For this study, we have predominantly relied on existing visual and written materials – what some researchers call “secondary material” – in this instance meaning material that originally served other purposes than this research project (Hughes and Tarrant 2019). We argue that such materials are particularly fit for the kind of analysis that we do here. By studying media reports, a TV documentary, court documents and material from social media, we get access to different voices from a number of actors with different positions and roles in the story, including that of the protagonist. Together, these materials provide a rich and multifaceted picture of the case. In addition to these more pragmatic considerations, there is an ethical consideration, as relying on pre-existing material may also lessen the pressure on research participants, an argument that we found particularly important in this instance, as it is clear from the materials that we have access to, that Yasmin had already gone through a lot.

The case came to our attention via the media, where it was the object of rather extensive coverage in the years 2014 through 2016. A documentary made by the Norwegian Broadcasting Corporation (NRK<sup>5</sup>) seems to have been pivotal in sparking interest in both national and local, as well as in social, media. The documentary takes the form of a critical comment on the Norwegian trafficking and immigration policies, and features interviews with employees from NGOs and women’s shelters, as well as with the police and the immigration authorities.

Given that the case went to court, we also obtained rulings from the District Court, the Court of Appeal and the Supreme Court. The rulings provide insight into the manner in which the Norwegian authorities dealt with Yasmin’s situation. The ruling by the Supreme Court is publicly available in an anonymised version, while the rulings by the District Court and the Court of Appeal were obtained from the respective court administrations.<sup>6</sup> Although the case

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<sup>5</sup> The Norwegian abbreviation of Norsk Rikskringkasting.

<sup>6</sup> We anonymised these two rulings for this chapter.

is known from the media, we have chosen to omit all references to the rulings in our text, even when citing them, for reasons of privacy protection.

Moreover, in order to broaden our understanding of certain aspects regarding the handling of the case by Norwegian authorities, we conducted two interviews with persons who have supported Yasmin in various ways. The former general manager of the women's shelter where Yasmin has lived for most of her time in Norway has been involved in her situation to this day, and she was pivotal in organising national and local support, including raising financial support for the court cases. A lawyer was interviewed in the capacity of representing Yasmin in the Supreme Court.

In addition, we have studied various documents, reports and papers regarding legal- and other principles that are central to the handling of trafficking cases by Norwegian authorities. Documents studied also include the Trafficking Convention and protocol, as well as conventions on human rights and violence against women. These documents provide a general background for our analysis.

We have pieced Yasmin's case together, using the media coverage, the court rulings and the two interviews. By drawing on different sources, our material provides a multifaceted picture of the case. On the other hand, we must keep in mind that the different versions of Yasmin's story, have been produced and shaped in particular contexts with their own specific logics. There is the legal system with the aim of establishing facts and separating truths from lies, with its tendency towards reductionism, leaving out what is not relevant for the legal proceedings. There is the media with its tendency to dramatize and simplify to engage the feelings of the audience. The helpers often follow a humanitarian logic where demonstrating suffering and injustice matters in mobilising sympathy and support. Finally, we need to take into consideration that the protagonist tells her story in these contexts with the hope of obtaining protection in Norway.

Nevertheless, the story is not very different from other stories that we as researchers may elicit with various methods, including research interviews. Regardless of the setting in which people talk about life and experiences; their stories "draw selectively on lived experience" (Presser 2009, 178-179). Moreover, people tell stories according to cultural conventions of storytelling in their particular society and in relation to a particular public and context

(Bruner, 1986). Accordingly, life stories are not exact representations of reality. However, researchers have also criticized leaning too strongly on narrations and text, both from an ethical and an epistemological point of view. Roos writes “if we emphasize narrativity too much, we shall lose sight of the relationship between life and society. In the final analysis, what we as sociologists are interested in are the social implications of life stories. And these are not only narrative constructions” (1991, 101).

Although we do not claim to be presenting the full or “true” story, the elements of the story that were prominent in the courts are important for our analysis of the Norwegian state’s response, as it allows us to ask: Given what the state considers as established facts, how should we evaluate the response to this particular case?

### **Yasmin – an ideal victim of trafficking?**

Yasmin’s story of abuse began when she was still a small child, recently orphaned. An unknown man picked her up in the refugee camp where she had lived with her mother, and this was the beginning of violence, exploitation and of her being sold as a prostitute in several countries, first in the Middle East, then in Europe. Yasmin talked about her fear when the trafficker raped her for the first time, before she had reached her teens. In addition to being kept captive and subject to sexual violence involved in forced prostitution, she was also subject to severe violence from the trafficker, such as being beaten, burnt with cigarettes and cut with knives. One of the times she tried to escape, the trafficker hit her with a car. She related getting pregnant five times, and that violence made her abort three times. The destiny of the two children she gave birth to was unknown to her, but the trafficker often threatened her that they would fare badly if she did not comply with his wishes. It is undisputed that Yasmin is traumatised both physically and mentally to such an extent that she needs daily support and care. Her story seems to depict someone who, in Christie’s wording, would readily “be given the complete and legitimate status of being a victim” (1986, 18). However, as we shall see, telling exactly what it means to be a victim of trafficking, does not seem completely straightforward.

Despite several efforts to escape, Yasmin did not succeed until the trafficker brought her to Norway in the summer of 2009. Here, by chance allegedly, she met someone who spoke her language and helped her contact the police. When she applied for asylum, relating her story of trafficking and sexual violence, the police opened a criminal case. Doing just that constitutes

part of the international obligations of Norwegian authorities to combat trafficking, having ratified the Trafficking Protocol. In July 2010, Yasmin was granted the reflection period, about which UDI writes on its website: “(...) valid for six months. It is not renewable. You can be granted such a residence permit to get away from the people who have exploited you and to get back on your feet. You will get help to report the people who exploited you to the police”.<sup>7</sup> Yasmin reported her trafficker, but the police dismissed the case in November 2010, stating that they did not have sufficient evidence. When cooperating with the police does not lead to further temporary stays, or when a renewed temporary residence permit granted for the duration of the police investigation is ending without the prospect of a court case, many women seek asylum or, as did Yasmin, ask to have an asylum case reopened (Brunovskis, Skilbrei and Tveit 2010, 61-62).

The rejection of Yasmin’s application for asylum came approximately two years later, in August 2012, the reason being that she had already gotten asylum in Hungary and was in fact a so-called “Dubliner”. Consequently, the Norwegian state had no obligations towards her and the authorities in Hungary had confirmed that they would receive her.

Yasmin claimed to be unaware of having applied for asylum in Hungary where she had been hospitalised after being assaulted by her trafficker when trying to escape. Admittedly, she revealed to a nurse or doctor in the hospital that she was afraid and needed protection, and this led to transferral to a refugee reception centre, where her fingerprints were registered in Eurodac. By the time the Hungarian authorities granted asylum, however, the trafficker had already tracked her down, brought her to Sweden and subsequently to Norway.

### **Still hope of residency in Norway**

The former general manager of the women’s shelter where Yasmin has lived since 2009, stated that none of those who had come to know her through their professional roles, believed that she would survive, if returned to Hungary. UDI’s rejection of her application was appealed to the Immigration Appeals Board (hereinafter, UNE<sup>8</sup>), the appellate body for

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<sup>7</sup> <https://www.udi.no/en/word-definitions/human-trafficking/>

<sup>8</sup> The Norwegian abbreviation for Utlendingsnemnda.

immigration and citizenship cases. However, UNE dismissed both of the appeals made on behalf of Yasmin, the last one in February 2014.

While asylum cases rarely end in Norwegian courts (Humlen and Myhre 2014, 7–9), her supporters brought civil action against UNE on behalf of Yasmin, in 2014. The case was tried by the District court in August that year. Having the funds to go to court was largely due to ‘The support group for Yasmin’, established on Facebook in the aftermath of the documentary, where people also raised money for her.

The District court ruled in her favour in the central question of *a reality check* of her situation. The judge contended that Yasmin was a victim of trafficking, thereby belonging to “a special, social group” in accordance with the Norwegian Immigration Act<sup>9</sup> (hereinafter, the IA). According to the judge, being subject to physical, psychological or sexual violence because of one’s gender and – in Yasmin’s case – also being subject to forced prostitution, is tantamount to persecution (IA, Section 29, second paragraph, letter (a)). Given, inter alia, that the Hungarian refugee reception centre did not function as a safe refuge for Yasmin in 2009, the judge stated, that “the court assumes that Hungarian authorities did not succeed in preventing persecution according to section 29, third paragraph, letter (c), in this case”.

However, the ruling did not entail a closure; in fact, Yasmin’s case ended in the Superior Court. In a Court of Appeal trial in June 2015, UNE demanded a reversal of the District Court ruling. According to UNE’s legal representative, the evidence presented at the trial in the District Court had not been substantiated, nor had the District Court judge employed a correct understanding of the applied sections of the IA.

In the proceedings in the Supreme Court after losing in the Court of Appeal, Yasmin’s legal representative contended that the Court of Appeal had failed to take into account her critical health situation and the fact that she had been subject to trafficking. Moreover, the same court had not considered the need for a special reassurance from the Hungarian authorities that her situation would not be at variance with article 3 in the *European Convention on Human Rights* (ECHR), which prohibits torture and inhuman treatment, should she be returned to Hungary.

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<sup>9</sup> <https://lovdata.no/dokument/NLE/lov/2008-05-15-35>.

The Dublin cooperation rests on the *presumption* that the first country of entry to Europe of an asylum seeker, will adhere to the duties that ensue from ratifying the Dublin Regulation and the ECHR by providing sufficient means of support. While acknowledging that a presumption may be refuted, the first voting Supreme Court judge concluded that the Court of Appeal had taken sufficient steps towards confirming the presumption in Yasmin’s case. Admitting that her living conditions would be harder in Hungary than in Norway, the Court of Appeal had concluded that there was not question of a system failure in Hungary, and consequently it would be wrong to assume that her life in Hungary would be tantamount to torture or inhuman treatment. According to the Supreme Court ruling, it was of no interest whether Yasmin had been subject to trafficking or not. The central issue was the treatment she would receive in Hungary. Although the seriousness of Yasmin’s health problems was not disputed, neither by the District Court nor by the Court of Appeal, the Supreme Court concluded as follows:

I also agree with the Court of Appeal that the threshold for breaching article 3 of the European Convention on human rights – compelling humanitarian circumstances in a “very exceptional case” – is not reached in the case of A<sup>10</sup>. A’s health situation is not life threatening in and of itself, and I understand from the Court of Appeal ruling that *at least some basic health services* would have been available to her in Hungary.

Testimonies by representatives from the largest Hungarian NGO working with Global South refugees in Hungary, and contact with the Hungarian Victim Support Service, showed that Hungary could not provide the type of support Yasmin needed. Moreover, foreigners from the Global South are rarely accommodated in the shelters for victims of trafficking in Hungary, and residence in such shelters is time-limited (GRETA 2015, 33-36). Additionally, at the time of the trial in the Supreme Court, the situation for migrants in Hungary had drastically worsened and Hungarian authorities were subject to extensive international criticism (Amnesty International 2015, 7<sup>11</sup>).

The court, however, ruled in favour of the immigration authorities. While in the opinion of doctors, women’s shelter workers and lawyers who were familiar with her situation, Yasmin

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<sup>10</sup> The court’s “identification” of Yasmin.

<sup>11</sup> <https://www.amnesty.org/download/Documents/EUR2726142015ENGLISH.pdf>

was in a particular and seemingly permanent vulnerable situation, which would put her at risk if returned to Hungary, the court emphasised that her health problems were not lethal as such. The need for special measures to protect her from inhuman treatment and future exploitation was not an issue.

Statements by the then leader of UNE in an interview with the NRK documentarist come to mind: “Identical cases must be treated in the same manner, and if we had accepted the ruling in her favour (from the District Court, authors’ commentary), it would have had consequences for *many, many* other cases” (authors’ translation and italics). And: “What is fundamental in this case, is the question of whether a person who has already been granted asylum in Europe should be able to choose another country, go there and ask for asylum there as well” (authors’ translation).

The sober language of the court and the state authorities stands in contrast to the vivid engagement raised by the film “Lilja” in all the Nordic countries some fifteen years earlier, as well as to the contention by, inter alia, politicians, immigration authorities and the police, that trafficking victims are particularly vulnerable. However, in 2020, Gundersrud writes: “this system is not adequately considering a victim of trafficking’s needs for protection from harm, for example protection from the potential risk of a person being re-trafficked if returned” (2020, 52). Rather there seems to be a belief that risk and vulnerability are issues of the past once the women in question have escaped or severed contact with the traffickers. The consequences of the gender-based violence that several of the women are subject to, seem to matter less. With referral to the UNE leader cited above, it becomes obvious that actions on the part of the authorities have more, and other, goals than providing resilience to trafficking victims. As stated in the Court of Appeal ruling: “It is obvious that, based on immigration regulatory considerations, clear restrictions must apply with regard to which reasons of reasonability can be considered sufficiently weighty to grant residence”.

For the majority of women subject to trafficking, it seems not to matter how particularly vulnerable they have become as long as they are not considered the responsibility of the Norwegian state. However, according to Yasmin’s lawyer in the Supreme Court, who has a long experience with asylum cases and trafficking, both as a lawyer and a researcher, the Trafficking Convention is above Norwegian law, and considerations regulating immigration

are not part of international law. He claimed that by failing to acknowledge these facts, the Norwegian state does not honour its human rights obligations.

Both the lawyer and the former shelter manager stated that the immigration authorities must have realised quite early on, that Yasmin was too ill to be deported. However, instead of doing what appears inevitable in the aftermath of the Supreme Court proceedings, by granting her permanent residency on humanitarian grounds, she got several temporary permits until in January 2020. The lawyer's analysis of the reaction of the immigration authorities was that critical media coverage and the ensuing public support for Yasmin, might have strengthened the authorities' resolve not to "give in", and certainly not to public pressure.

The insecurity of a temporary residence permit entails the repeated demand on the part of the authorities for new health certificates, leaving the impression that they are waiting for Yasmin's health to improve, in order to return her to Hungary. Taking into account the growing trend in Europe, where ever more refugees and asylum seekers get temporary residency instead of asylum, thus finding themselves constantly at risk of being returned, what Anne Kari Drangslund (2021, 16) calls "the violence of waiting", the impression is not farfetched. Consequently, Yasmin's general situation is one of constant uncertainty. Moreover, she is still de facto stateless, and does not possess an ID card needed to make her a full member of the Norwegian society.

### **Not our citizen, not our problem**

Yasmin's case demonstrates that the rights claimed to be bestowed upon all of us in the capacity of being born as humans – the human rights established in declarations, conventions and national legislation – appear to be evasive for victims of trafficking, and asylum seekers. This supports Arendt's argument that human rights are not inalienable, but primarily available to those who have formal rights belonging to a particular group and jurisdiction; in practice citizenship, and not through abstract rights derived from an assumed shared humanity. Nevertheless, it is relevant to assess how states respond to persons who seek protection, and hold states to account according to the moral and legal standards of the shared human condition that states have assumed. With regard to Norway, the reputation of being a champion of gender equality, women's rights and human rights in general, oblige and create expectations.

By refusing to consider the realities of Yasmin's situation in the asylum process and the ensuing legal proceedings, the Norwegian state seems not to have acted as could be expected of a responsive state (Fineman 2010); a state having assumed wide responsibilities for protecting women in vulnerable situations like hers. On the other hand, the fact that the authorities did not return Yasmin to Hungary – although predominantly a result of recognising that she was too ill to travel, and therefore could not be returned – may be regarded as an admission of her particularly vulnerable situation. However, the state's piecemeal and reluctant response to her situation, providing only successive short term temporary residence permits on humanitarian grounds, kept Yasmin waiting for an uncertain future. This prolonged temporariness worsened, rather than remedied her health problems. Putting her life on hold also hampered her possibilities of accessing health services that could have ameliorated her life quality. One example is psychiatrists refusing to initiate treatment before knowing whether Yasmin would be staying long enough to complete such treatment, claiming that not completing could put her at risk of becoming even more vulnerable than she already is.

### **Institutional harm**

How should we assess the fact that the authorities have kept her in this state of insecurity for more than a decade? According to Arendt, state interests seem to precede the needs of individuals who are not citizens (1966, 299). Norwegian authorities – including politicians – can be seen to take more interest in protecting the Norwegian welfare state from being “exploited” by migrants, in particular those from the Global south, than in the structures that make exploitation of human beings possible (see also Fouladvand and Ward 2019, 40). Such temporariness has several well-known harmful consequences; it gravely compromises people's planning for the future and the building of social relations agency and voice that are necessary for human flourishing (Gerver 2019). Research also shows the severe effects of temporariness on people's general health (Brekke, Birkvad and Erdal 2019, 88). While actions leading to different forms of migration, trafficking in humans included, largely originates from structural problems, the solutions seem to revolve around the individual migrant complying with what is offered. Fighting for a secure future requires means that most migrants do not possess. Taking Yasmin's case to court would not have been possible without the financial aid of people who sympathised with her after learning about her story through the media.

Moreover, temporariness has become routine in the refugee systems in Europe in general (Brekke, Birkvad and Erdal 2019; Buxton 2020, Drangslund 2021). Buxton (2020) argues that besides harming those who are subject to it, prolonged temporariness constitutes an injustice by needlessly exacerbating original harms. However, temporariness is not inevitable, nor is it the only option:

Other countries<sup>12</sup> can and do offer more permanent status of forced migrants, with some offering permanent residence and the possibility of citizenship almost immediately. Temporary protection is therefore not the neutral policy option, but an active policy choice which prolongs the central harm of displacement for longer than is necessary (16).

Temporariness is thus a political choice and may illustrate how states not only fail to respond to vulnerability, but also more or less deliberately produce conditions that facilitate harm and injustice towards migrant victims of trafficking (Fouladvand and Ward 2019). Vis-a-vis victims of trafficking for prostitution, predominantly women, the restrictive immigration regime may be seen as a form of structural violence that compounds and exacerbates gendered harm (Canning 2017).

### **Institutional malfunctioning?**

Finally, using Fineman's vulnerability analysis (2008), we ask whether the state's response in this particular case is the result of state institutions functioning according to their mandate and objectives, including the responsibilities that Norway has assumed towards victims of trafficking/asylum seekers and victims of GBV. Or, should the particulars of this case on the contrary partly be seen as resulting from institutional vulnerability involving the malfunctioning and corruption of (some of) these institutions?

In particular, we raise this question regarding UNE, the appellate body for asylum and residence cases in Norway. UNE was established with the expectations of both lawmakers and immigration authorities, that it would function as a court like organ, providing applicants with the possibility to present their cases before the board (Humlen and Myhre 2014, 7). However, UNE's practice turned out differently, and in a special report on immigration law

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<sup>12</sup> Buxton reminds us of a different approach than the European migration regime, adopted by some non-Western refugee-hosting countries. "For instance, Tanzania granted citizenship to over 160,000 refugees from Burundi in 2014 (UNHCR, 2014)" (Buxton 2020, 3).

from the Norwegian Bar Association, Arild Humlen and Jonas Myhre express concern about what UNE has become. In the majority of cases, UNE confirms the decisions of UDI. Few asylum seekers obtain the right to contradiction by presenting their appeals before the board, and even fewer asylum cases are tried in court (Humlen and Myhre 2014, 7–9). In 2013 UNE handled 12 509 appeals in cases of asylum. Only 4.5 percent of the asylum seekers met with the board. The UNE leader decided in 46.5 percent and the secretariat in 47 percent of the appeals (Humlen and Myhre 2014, 20). The annual report from 2019<sup>13</sup> showed a significant increase in cases being decided unilaterally by the leader of UNE during the years 2017, 2018 and 2019 respectively; that part reached 70 percent in 2019 (UNE Annual Report, 54). In 2019, the board decided in eight percent of the appeals in asylum cases, and one percent of the residency cases. It should however be mentioned that restrictive immigration policies resulting, inter alia, from the so-called refugee crisis in 2015, has led to a substantial reduction in the number of refugees and asylum seekers in Norway, reducing the number of appeals to UNE. Consequently, a (slightly) larger part of the total number of appeals were treated with the applicants' participation in 2019, than in 2013 (UNE Annual report 2019, 11). Recently, Norwegian politicians have accused UNE of confusing protection under the law with political signals, demanding that UNE be exchanged for an administrative tribunal firmly established in legal principles (Andersland, Bergh and Gjerde, 2021). The Norwegian Bar Association on the other hand suggests a reform of UNE, transforming it into an organ providing real protection under the law by giving every asylum seeker the right to representation and contradiction (Humlen and Myhre, 2014, 69 ff).

## **Conclusion**

Using a vulnerability analysis, highlighting the role of institutions in both producing and redressing harm, we contend that the Norwegian state does not act as a responsive state towards women victims of trafficking who seek protection in Norway. By a legalistic and narrow interpretation of its human rights obligations, and a reluctant and piecemeal response even when apparently acknowledging that someone cannot be deported, Norwegian authorities unnecessarily contribute to prolonged suffering and exacerbate the consequences of the original harm. The successive temporary residence permits, and practices that underscores the temporariness and insecurity of the situation, hamper prospects of recovery,

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<sup>13</sup> <https://www.une.no/globalassets/om-une/arsrapporter-etc/arsrapport-une-2019.pdf>.

autonomy and human flourishing. Victims of trafficking for prostitution are predominantly women, and these practices may be seen as gendered institutional harm, partly as a deliberate result of policies that prioritize national immigration regulation over legally binding rights, and partly as the result of the corruption or malfunctioning of institutions originally established with the aim of correcting possible wrongs in the immigration system. This institutional callousness illustrates Arendt's argument that access to rights is in practice dependent on a legal status of belonging, in practice citizenship. By letting immigration regulations precede and replace a reality check of the specific future prospects of a woman in a vulnerable situation by referring to what appears to be elusive and hypothetical rights in another country, Norway not only evades its HR obligations, but also contributes to the brutalisation of contemporary international migration regimes of which Norway is part.

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