

IS THERE A DESIRABLE MIGRANT?

A reflection on human rights violations at the border: The case of 'virginity testing'

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This article aims to bring to a wider audience the case of gynaecological examinations performed on women who sought to migrate legally to Britain in the 1970s from the Indian sub-continent. These examinations were soon dubbed as 'virginity testing' in the British press at the time, and in the subsequent literature.¹ This episode in British immigration history should encourage the British as well as the Australian public to consider the gross violations of human rights that can occur at the border and which may be normalised as ways of selecting migrants. It is acknowledged that the 'virginity testing' arose in specific circumstances which, we hope, would not occur again. However, this case study provides us a shocking reminder to resist complacency about the severe infringements of human rights that can take place at the border, and can become interiorised, accepted, supported or even imposed by the executive.

We focus on how the story unfolded through the internal lens of official and undisclosed documents, which have recently been opened to the public. Based on this evidence, it is argued that minimal level accountability of immigration officers, combined with prejudiced assumptions and degrees of pressure from upper governmental offices, can produce gross violations of human rights and social injustice. As highlighted at the end of the article, accountability of immigration officials, possible prejudicial beliefs and pressure to perform according to immigration policy objectives are still debated topics nowadays. For this reason, the 'virginity testing' case is resonant with recent cases in the UK, and hence its relevance for understanding current public policies in the area of immigration control.

The 'virginity testing' controversy

In February 1979, the 'virginity testing' controversy unfolded in the pages of *The Guardian* and within the House of Commons, and quickly spread to protests on the streets of London and Delhi. On 1 February 1979, Melanie Phillips' front-page article proclaimed:

Immigrant women are being subjected to intimate gynaecological examination on entry to Britain. The Home Office claims that this helps them to identify women attempting to enter the country illegally.²

Details quickly emerged that a week earlier an Indian woman attempting to enter Britain as the fiancée of a British resident of Indian descent was questioned by immigration officers at Heathrow and physically examined to determine whether she had given birth to

children or had sexual intercourse. The basis for this examination was that immigration officers disbelieved the woman's claimed intentions to enter the country and considered her to be too old to be a genuine fiancée. The woman contacted the Indian Workers Association ('IWA') in Southall and the Joint Council for the Welfare of Immigrants ('JCWI'), who reported to *The Guardian*.

The woman's version of events, as reported by *The Guardian*, described how she was told, in Hindi, 'to take off all her clothes' and 'was given nothing with which to cover herself', before the internal examination took place.³ The Home Office reacted to the story by stating that the woman 'had not been required to remove all her clothes' and was then 'given only a cursory examination that was not internal'.⁴ Phillips wrote that this was not just a single incident and cited Mary Dines, the former General Secretary of the JCWI, as stating that the practice had been occurring since 1968.⁵ The Government attempted to deny that this 'testing' had occurred, but over the following days, it had to increasingly concede that the Home Office had prior knowledge of these procedures, but refused to give much detail of what was actually known or how widespread the practice was. Over the next month, it emerged that several cases had occurred at British High Commissions in South Asia. David Stephen, a Special Advisor to the Foreign and Commonwealth Office ('FCO'), explained the assumptions and attitudes of British immigration officials that informed the practice in a report to the FCO:

There is a logic in the use of these procedures since the immigration rules require dependent girls [as children, not wives] to be unmarried, and fiancées do not need entry certificates while wives do. If immigration or entry certificate officers suspect that a girl claiming to be an unmarried dependent is in fact married, or if a woman arriving at London Airport and claiming to be a fiancée of a man resident here is in fact a wife seeking to join her husband and avoid the 'queue' for an entry certificate, they have on occasion sought a medical view on whether or not the woman concerned had borne children, it being a reasonable assumption that an unmarried woman in the sub continent would be a virgin.⁶

As questioning continued in Parliament and activist groups, such as AWAZ (the Hindi word for 'voice'), OWAAD (Organization of Women of Asian and African Descent) and the Southall Black Sisters, protested at Heathrow and Central London, the Labour Government acquiesced somewhat in the face of mounting criticism, and announced an investigation

REFERENCES

1. A theoretical discussion of the 'virginity testing' case can be found in: Evan Smith & Marinella Marmo, 'Uncovering the "Virginité Testing" Controversy in the National Archives: The Intersectionality of Discrimination in British Immigration History', *Gender & History* (2011) 23/1.
2. *The Guardian* (UK), 1 February 1979, 1.
3. *Ibid.*
4. *Ibid.*
5. *Ibid.* 28.
6. David Stephen, 'Immigration Control Procedures at Delhi and Dacca: Report on my Visit', 9 March 1979, 9, FCO 50/662, National Archives, London (hereafter 'NA').

would be conducted by the Chief Medical Officer, Sir Henry Yellowlees.⁷ However, many in parliament, in the press and among activists within the Asian community felt that any internal investigation by Yellowlees would be an attempt to stem further discussion of the subject and to deflect further criticism of the government in the lead up to the 1979 general election. In response, the Commission for Racial Equality ('CRE') called on the Home Secretary to publish all documents relating to 'virginity testing' and all instructions given to immigration officers for enforcing immigration control guidelines, and pushed for 'an independent public inquiry into the application of the Immigration Act and Rules to individuals, especially members of the non-white ethnic minorities'.⁸ For the CRE, the promotion of good race relations in Britain depended upon 'the fair and sensitive administration of the immigration control',⁹ and believed that it was duty bound to conduct an investigation into immigration control procedure because the possibility of discrimination would hinder the promotion of good race relations. However, both the out-going Labour Government and the in-coming Conservative Government attempted to dissuade and obstruct the CRE from conducting an investigation.

Despite the opposition from the Home Office, which included a High Court challenge in 1980, the Commission conducted the investigation, and published a report in 1985. The files were released by the National Archives in 2004 and contain a wealth of documents relating to the conducting of the immigration control system and correspondence between Home Office officials and the Commission for Racial Equality. Documents relating to the functions of the Foreign and Commonwealth Office during this period were opened by the National Archives in February 2009.

'Let us not pretend we are not "discriminating"': Off-shore discriminatory practices

The practice of 'virginity testing' took place on-shore and off-shore across the Indian sub-continent. By processing potential migrants off-shore, the British authorities made an explicit division between the migrant and the destination society. The off-shore practice allowed the British Government to filter out 'undesirable' migrants in the country of origin. Consequently, when the 'virginity testing' case unfolded, the British Government first attempted to hide its responsibility by claiming lack of knowledge. Failing that, the government minimised its role in the off-shore examinations, by asserting that the low ranked border agents had acted independently. However, the archival documents disclose a different version of the story.

Former Labour Minister Alex Lyons admitted in *The Guardian* to knowledge of 'virginity testing' occurring at British High Commissions in South Asia.¹⁰ Labour MP Jo Richardson pressed Home Secretary Merlyn Rees for more details, claiming that it had been divulged in Indian Parliament that 'at least 34 cases of virginity testing' had been undertaken at the British High Commission

in New Delhi.¹¹ In a letter from the Foreign and Commonwealth Office to 10 Downing Street staff, Private Secretary JS Wall stated that '[t]he facts, as far as India is concerned, are that since October 1975 ... there appear to have been nine cases in Bombay and 73 in New Delhi'.¹² While it is unclear how many women were subjected to these examinations in other places on the sub-continent outside of India or how these numbers compare to the total number of women migrants processed in these locations, it still emerges that 'virginity testing' is more than an odd circumstance. It is also clear that by early 1979, the Home Office had knowledge of these examinations as a recurrent off-shore practice.

The records of the Foreign and Commonwealth Offices show the British High Commissions in New Delhi, Islamabad and Dacca, as well as elsewhere on the sub-continent, were frequently visited by FCO and Home Office officials from London and staff from the UK were sometimes brought to these High Commissions to ensure that Entry Clearance Officers were following the instructions of the Home Office. But, at the same time, the application of immigration policy in the High Commissions was explicitly influenced by regional and local concerns. As Donald Hawley from the Foreign and Commonwealth Office wrote:

[a]lthough immigration staff are carrying out policy and procedures laid down by Home Officer ministers, it is clearly right that responsibility for immigration work at a post ... should continue to be vested in the Head of Mission [the High Commissioner], who is in turn answerable to the Secretary of State for Foreign and Commonwealth Affairs.¹³

Thus, the attitudes of the respective British High Commissioner in each nation, which may have varied greatly, must have played a key role in decision-making. But since they were appointed by the Foreign and Commonwealth Secretary, the Government in London could not feign ignorance over what was occurring in these High Commissions. During the controversy over 'virginity testing' and the other medical examinations of South Asian migrants, the British High Commissioner in Dacca, FS Miles, wrote to the Assistant Under-Secretary of the FCO, Donald Murray, stating 'it would be difficult to maintain that "discrimination" does not exist between the treatment of people entering Britain from the old and new Commonwealth', adding later in the same letter, '[i]t is just unfortunate that most of those trying to cheat their way into Britain are coloured'.¹⁴ Miles argued that if the Home Office eschewed discriminatory entry processes, it would be required to '[b]e as bloody to the white Commonwealth as we are to Asians', or '[a]llow Bangladeshis and people from the sub-continent to come in for working holidays without work permits'. This, he suggested, would mean that Britain 'would be saddled with hundreds of thousands of additional immigrants'. Since such an outcome was clearly out of the question, he added 'let us not pretend we are not "discriminating"'.¹⁵ Anecdotally, next to this final point, someone in the Foreign and Commonwealth Office has handwritten 'I agree!'

7. *Hansard*, 19 February 1979, col. 221–222.

8. 'Text of Resolution Passed by the Commission for Racial Equality on 7 March 1979', 8 March 1979, HO 418/30, NA.

9. Letter from David Lane to Merlyn Rees, 12 February 1979, HO 418/29, NA.

10. *The Guardian*, 1 February 1979, 1.

11. *Hansard*, 21 March 1979, col. 672w.

12. Letter from JS Wall to N Stephens, 5 March 1979, PREM 16/2000, NA.

13. Letter from Mr Hawley to AJE Brennan, nd, FCO 79/411, NA.

14. Letter from FS Miles to DF Murray, 17 July 1979, FCO 50/660, NA.

15. *Ibid.*

These internal documents ... demonstrate that the pressure to filter out undesirable migrants, which led to the 'virginity testing' practice, emanated from the top echelons of the immigration control system, and was not merely the result of overzealous officials at the lower levels.

These internal documents of the Home Office and the Foreign and Commonwealth Office demonstrate that the pressure to filter out undesirable migrants, which led to the 'virginity testing' practice, emanated from the top echelons of the immigration control system, and was not merely the result of overzealous officials at the lower levels. Furthermore, the Home Office portrayed the tests as an off-shore practice, despite the status of Foreign and Commonwealth Office officials as employees of the British Government. In fact, the internal documents attest that the practice of 'virginity testing' began onshore. David Stephen wrote in a report for the FCO, 'it is clear to me that the practice originated in immigration procedures in the UK'.¹⁶

A systemic problem

The Commission for Racial Equality published their investigation in the report titled *Immigration Control Procedures* in 1985. Most discussion of physical examinations was contained within a much more general review of the complete administration of immigration control in Britain. The practice of 'virginity testing' was referred to in the introduction as the catalyst for the wide-reaching investigation. The report queried the reasonableness of immigration officers' assumption that it was 'an acceptable procedure to ask [the Indian woman] to submit to an intimate physical examination in order to test whether a passenger was genuine in her claims'.¹⁷ The report declared that 'the so-called virginity test was not solely a matter of medical practice and ethics and could not be considered in isolation from immigration control procedures generally' and was indicative of 'a possible symptom of serious problems in the administration of immigration control'.¹⁸ What concerned the Commission were the conditions within the immigration control system that fostered these assumptions about race, gender and the parameters of reasonable scrutiny.

The CRE's report into immigration control procedures found that considerable latitude was given to individual Entry Clearance Officers to exercise discretion regarding immigrants' applications. These decisions, the CRE found, had 'too great an emphasis ... on the detection of bogus applicants', weighed against 'an unacceptable cost to genuine families and to race relations generally'.¹⁹ To counteract the broad powers held by immigration officers, the CRE recommended a mechanism be put in place for the 'continuous, objective review of immigration control procedures

and practices to ensure that they are, and remained, fair in all aspects'.²⁰ However these recommendations were not embraced wholeheartedly by the Conservative Government, which instead brought in further restrictions on immigration by introducing legislation such as the *British Nationality Act 1981*.²¹

Satvinder Juss argued in 1997 that historically there had been an 'absence of any effective system of political, administrative and legal accountability' regarding the discretionary decision making of immigration officers, which encouraged a 'culture of unaccountability' and 'an executive-led decision-making process'.²² The recent disclosure of the archival documents clearly concurs with this view. The CRE's report indicates that there was a low level of accountability and transparency over the decision-making processes of border control staff. It also shed light on a systemic problem rather than isolated factors or specific individuals. The safeguards in place, for instance the Immigration Appellate Authority (after April 2005, the Asylum and Immigration Tribunal), have traditionally not counter-balanced immigration policy targets.

Continuities in the modern era

In 2007, a new report on immigration control procedures was published by the National Centre for Social Research. It is disconcerting to see that this report highlights many of the same concerns as the 1985 CRE's report, mainly pressure to meet immigration policy objectives and minimal level of accountability.

The 2007 report focused on the decision making of immigration officers and found that these officers worked in a 'highly pressured and complex environment' and their decisions about the level of questioning directed at a potential migrant was based on a 'range of information, intelligence and personal judgements'.²³ This reliance upon 'personal judgements', which was subject to influence by racial and gendered stereotypes, was also raised in the 1985 CRE report. The decision-making process is also subject to influence from the pressures placed on immigration officers from the higher echelons of the immigration control administration. For example, the business plan for the UK Border Agency published in 2008 heavily emphasised reaching certain targets for rejecting and swiftly removing 'illegal' immigrants. The former Home Secretary Jacqui Smith emphasised in a business plan for UKBA for 2008–09 that the Government's ambition was to 'expel more illegal immigrants than last year', which, in the year 2007–08,

16. Stephen, above n 6, 9.

17. Commission for Racial Equality, *Immigration Control Procedures: Report of a Formal Investigation* (1985) 1.

18. *Ibid.* 1.

19. *Ibid.* 128.

20. *Ibid.* 132–3.

21. Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (1997) 131.

22. Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (1997) 2.

23. Kandy Woodfield et al, *Exploring the Decision Making of Immigration Officers: A Research Study Examining Non-EEA Passenger Stops and Refusals at UK Ports* (2007) vii.

had included the removal of over 4200 foreign prisoners, 13 000 failed asylum seekers and another 5000 suspected immigration offenders.²⁴ Business plan targets such as these put massive pressure on immigration officers to meet the targets set by the UK Border Agency, which in 2007–08 meant removing around 1400 'immigration offenders' every month.²⁵ This provides a further onus for immigration officers to interrogate suspected 'bogus' migrants.

The most important factor for immigration officers to consider, on paper at least, was the 'economic credibility' of a potential migrant, but the 2007 report by the National Centre for Social Research found that there was a 'relationship between ethnicity and economic status' in the investigations conducted by immigration officers.²⁶ The report stated that this focus on 'economic credibility' meant that 'non-White ethnic groups are often amongst the poorest people and consequently more likely to fall into the group of passengers expected to attract greater scrutiny'. However, the report could not conclusively determine whether racial/ethnic bias impacted upon the decision making of immigration officers.²⁷ The report reiterated its concern about the reliance upon the personal judgment of immigration officers and the report stated that the Border Control Agency was reviewing whether the variations found within the personal judgments made by officers were 'within accepted bounds of personal responsibility... or whether further guidance is needed'.²⁸

In February 2010, a former employee of the UK Border Agency in Cardiff, Louise Perrett, claimed that a culture of discrimination existed amongst UKBA staff, with Home Affairs Committee chairman Keith Vaz MP calling for an inquiry into Perrett's claims.²⁹ Perrett gave evidence to the Home Affairs Committee on the work of the UK Border Agency in March, and the Professional Standards Unit of the UKBA also conducted an investigation. In her evidence, Perrett claimed that a culture of offensiveness was 'generic throughout the office', that went 'from the team leaders to the Grade 7 [officers] to the other case owners'.³⁰ This culture included a stuffed toy 'grant monkey' amongst one team given to some employees. Perrett explained to the Committee:

I thought to have the grant monkey on your desk was a celebration that you helped somebody that day and to have the grant monkey was to be celebrated, but I quickly discovered no, it was not, it was ridicule, and that you had 'let one through', in a sense; you had not done your job quickly.³¹

The Professional Standards Unit's report declared that '[t]he investigation found no evidence to corroborate Ms Perrett's claims', although it acknowledged the existence of the 'grant monkey'.³² The report concluded that 'Ms Perrett misinterpreted its significance [although] it was accepted that her misconception of it could have been felt by others and as such it was unwelcome', with the toy being removed from the workplace.³³ The UK Border Agency welcomed the report's recommendation that no disciplinary proceedings would arise from

the investigation, but found that 'there is enough in the report to cause us significant concern', stating that new awareness sessions and training would be implemented in accordance with NGOs, such as the Wales Refugee Council.³⁴

In 2008, John Vine was appointed as the Independent Chief Inspector of the UK Border Agency to oversee the functions of the UKBA.³⁵ According to the Chief Inspector's website, the purpose of this position is '[t]o ensure independent scrutiny of the work of the UK Border Agency', as well as 'to see that the UK Border Agency delivers fair, consistent and respectful services'.³⁶ We will have to wait to ascertain whether this new body has been more successful than other bodies, such as the Asylum and Immigration Tribunal, in maintaining accountability within the border control system.

Conclusion

This article aimed to expose a highly discriminatory and abusive practice that took place at the British border and that has not been discussed widely before. This research has outlined a particular kind of human rights violations that can occur within the immigration control system when the system is heavily focused upon social control and keeping out 'undesirable' migrants. On the basis of the disclosed documents, it can be safely suggested that not only was there minimal accountability over the decision-makers at the border, but also that a level of prejudice existed within the system, and pressure was placed on immigration officers to over-scrutinise, which emanated from the highest levels of government administration. As underlined by the CRE's report, the 'virginity testing' came about due to over-emphasis on the detection of the illegal migrant, at a cost to human rights protection.

In light of recent developments in the UK, it has also been highlighted that similar concern is warranted about today's immigration procedures. As pressure for selection of desirable migrants at the border has intensified, we should remember that human rights violations can occur and normalise within the system. The shocking practice of the 'virginity testing' is a powerful reminder of how selection and scrutiny at the border can result in serious infringements of rights.

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24. Jacqui Smith, 'Foreword by the Home Secretary' in UK Border Agency, *Enforcing the Deal: Our Plans for Enforcing the Immigration Laws in the United Kingdom's Communities* (2008) 3 <<http://lacors.gov.uk/LACORS/upload/18644.pdf>>.

25. *Ibid.* 21.

26. Woodfield, above n 23, ix.

27. *Ibid.* 34.

28. *Ibid.* 35.

29. Cited in Diane Taylor and Hugh Muir, 'Border Staff Humiliate and Trick Asylum Seekers — Whistleblower', *The Guardian* (UK), 2 February, 2010 <guardian.co.uk/uk/2010/feb/02/border-staff-asylum-seekers-whistleblower> at 30 August 2010.

30. Evidence of Louise Perrett, 2 March 2010, in Home Affairs Committee, *UK Border Agency: Follow-Up on Asylum Cases and E-Borders Programme*, Twelfth Report of Session 2009–10, HC 406 (2010) Ev 1.

31. *Ibid.* Ev 2.

32. Professional Standards Unit, *An Investigation into the Allegations Made by Louise Perrett About Her Experiences Working for the UK Border Agency*, 27 July 2010, 2 <ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/investigation-louise-perrett/investigation-report.pdf?view=Binary> at 9 August 2010.

33. *Ibid.* 3.

34. UKBA, *Response to Professional Standards Unit Investigation into the Allegation Made by Louise Perrett About Her Experiences Working for the UK Border Agency*, 27 July 2010, 2 <ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/investigation-louise-perrett/response.pdf?view=Binary> at 9 August 2010.

35. Home Affairs Committee, *Monitoring of the UK Border Agency: First Report of Session 2008–09*, HC 77 (2009) 3.

36. Independent Chief Inspectorate of the UK Border Agency, *Purpose, Vision and Values* <<http://icinspector.independent.gov.uk/about/purpose-vision-and-values/>> at 1 September 2010.