Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/26556/2015**
IA/29484/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 July 2017	**On 5 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SABINA MULLAYEVA
LIANA MOLLAYEVA
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:

For the Appellant: Mr P Naith (Senior Home Office Presenting Officer)
For the Respondents: Ms J Norman (counsel instructed by Sterling and Law Associates)

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal to allow the appeals of Sabina and Liana Mollayeva, a mother and her daughter respectively, and both citizens of Turkmenistan (born 6 November 1976 and 23 February 1999), against the decisions of the Respondent of 15 July 2015 and 23 February 2016 to refuse Sabina's applications as an unmarried partner and on the basis of ten years' lawful residence; Liana, who entered the UK as a student dependent of her mother, was once again a dependent, on each application.

2. Sabina entered the UK as a student, and then applied for further leave as the unmarried partner of a British citizen, Ali Reza Samani, on 20 March 2015, with whom she had by then been in a relationship for over nine years. Her partner application was refused because the English language test provider (ETS) had reported, some time after the event, that their testing processes had shown that the Appellant's English language test of 22 February 2012 at the European College of Higher Education appeared to have been taken by a proxy on her behalf. The long residence application was unsurprisingly refused for the same reason. Considering the applications outside the Rules, the Respondent considered that there were no exceptional circumstances present given the family unit could relocate to Turkmenistan together.

3. The First-tier Tribunal heard the appeals and allowed them, accepting the evidence of the First Respondent because

   a. She was self-evidently highly proficient in English, and had passed her exams with a First Class Honours Degree and there was no reason to think she would need to resort to deception;
   b. She had volunteered the information that, despite the appearance to the contrary given by the Home Office paperwork, her daughter had not spent seven consecutive years in the UK as she had had a two-year spell back in Turkmenistan studying: accordingly it would be wrong to afford Liana the benefit of being treated as a seven year resident child;
   c. She had provided information regarding the details and methods used in the testing process, and of her recollection of surrounding events such as her journey there on each of the two days;
   d. The Secretary of State had produced spreadsheets showing the basis for her conclusion on proxy testing only after repeated prompting from the Respondents, and the Home Office evidence was generic, Professor French having accepted the existence of false positives.

4. The Secretary of State appealed on the basis that the three-stage exercise in evaluating whether the burden of proof had been discharged had not been adequately carried out, as was shown by the judge's reference to the witness statements being generic. On 15 May 2017 the First-tier Tribunal granted permission to appeal on the basis it was arguable this asserted error had indeed been made.

5. Mr Naith submitted that the essential three-stage test had not been followed through, leading to the First-tier Tribunal giving inadequate reasons for finding that the Home Office case failed to carry the day when evaluated against the evidence of Sabina.

6. Ms Norman replied that the substance of the appropriate test had been applied, and the First-tier Tribunal's thinking was perfectly clear: the burden of proof lay on the Secretary of State, who had failed to discharge it, given the cogent case put forward by the Respondents.

Findings and reasons

7. The Upper Tribunal cites expert evidence deployed by a litigant seeking to cast doubt upon the validity testing process used by ETS in *Gazi* (IJR) [2015] UKUT 327 (IAC):

> "Dr Harrison also examines, with accompanying critique and commentary, the discrete issues of factors affecting performance; the typical performance of human verification; the definition of thresholds; the explicit acknowledgement of human errors; the lack of testing of the performance of analysts; the dubious touchstone of "confidence" (see Mr Millington's witness statement); the dearth of information about the actual analysis methodology; the lack of detail about the experience and knowledge of both the recruited analysts and their supervisors; the indication that any training of the newly recruited analysts was hurried; the shortcomings in Mr Millington's speech recognition averments; and the clear acknowledgement on the part of ETS that false identifications (viz false positive results) have occurred. One passage relating to the human verification process is especially noteworthy:
>
> > "… although the analysts only verified matches where they had no doubt about their validity – ie where they were certain about their judgments – this should not be taken as a reliable indicator of the accuracy of those judgments. This approach does not remove the risk of false positive results."
>
> Dr Harrison also highlights that both the automatic system and the human analysts are capable of false positive errors. The Secretary of State's evidence does not disclose either the percentage or the volume of such errors."

8. No findings were made on that evidence in *Gazi*. However in the subsequent appeal of *Qadir* [2016] UKUT 229 (IAC) the UT concludes that the Home Office evidence had significant shortcomings, in particular at [63], a lack of qualifications or expertise of the officials who visited ETS and produced witness statements based on their visit to ETS, during which ETS was the sole arbiter of the information disclosed and assertions made, undue Home Office dependency on the information from ETS when ETS had put forward no witness or indeed any other evidence whatsoever of their own, the lack of any expert evidence backing up the opinion of the staff who visited ETS, and the fact that voice recording files had never been put forward pertaining to the appellants themselves. Accordingly the Tribunal accepted that the methods used by ETS were not necessarily guaranteed to avoid the occasional false positive whereby an innocent student is wrongly identified as having cheated in their test.

9. It would be perfectly open to the Secretary of State to put forward further evidence of the methods used by ETS in order to answer the critique of Dr Harrison, for example if their software was identified or the expertise of the ETS analysts was set out in greater detail. If she does not do so she runs the risk that fact-finders will employ similar reasoning to that in *Qadir* (subsequently upheld as lawful by the Court of Appeal), ie that the direct evidence of genuineness put forward by the migrant accused of

dishonesty outweighs the somewhat generalised material relied upon by the Home Office.

10. The President explains in *Muhandiramge* [2015] UKUT 675 (IAC), that decisions in these cases involve a "moderately complex exercise" in which "the evidential pendulum swings three times and in three different directions". To quote more of his evocative words directly:

> "(a) First, where the Secretary of State alleges that an applicant has practised dishonesty or deception in an application for leave to remain, there is an evidential burden on the Secretary of State. This requires that sufficient evidence be adduced to raise an issue as to the existence or non-existence of a fact in issue: for example, by producing the completed application which is prima facie deceitful in some material fashion.
> (b) The spotlight thereby switches to the applicant. If he discharges the burden - again, an evidential one - of raising an innocent explanation, namely an account which satisfies the minimum level of plausibility, a further transfer of the burden of proof occurs.
> (c) Where (b) is satisfied, the burden rests on the Secretary of State to establish, on the balance of probabilities, that the Appellant's prima facie innocent explanation is to be rejected.
> A veritable burden of proof boomerang!"

11. I do not consider that the First-tier Tribunal adopted an approach that was inconsistent with that summarised above. It properly directed itself to the fact that the burden of proof lay upon the Secretary of State, and then considered whether or not the first Respondent was a person of good character who had provided an innocent explanation such as to outweigh the material put forward by the Home Office. It identified several reasons for finding this to be the case. In the light of this finding, its conclusion permitted only one inference: bearing in mind the ultimate legal burden was on the Secretary of State, she had not discharged it.

12. True it is that the First-tier Tribunal's reasons are concisely expressed. However, as stated by the President in *Shizad (sufficiency of reasons: set aside)* [2013] UKUT 85 (IAC) §10: "reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge".

13. Detailed reasons are provided by the First-tier Tribunal in its decision. It seems to me that this is an appeal where the enjoinder in *Piglowska v Piglowski* [1999] 1 WLR 1360 (endorsed in the immigration context in *EA* [2017] EWCA Civ 10 §27) is relevant: "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account … [an] appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself".

14. I accordingly conclude that the reasoning of the First-tier Tribunal was properly open to it and I dismiss the appeal.

Decision:

The decision of the First-tier Tribunal did not contain a material error of law.
The appeal is dismissed.

Signed: Date: 3 July 2017
Deputy Upper Tribunal Judge Symes