Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/06827/2014**

THE IMMIGRATION ACTS

Heard at Field House
Determination promulgated
On 21 January 2015 **On 30 January 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL DIGNEY

Between

ISHRAT PARVEEN (MRS)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the respondent: Ms Everett, Home Office Presenting Officer
For the appellant: Ms Heybroek

DETERMINATION AND REASONS

1. On 23 August 2013 the appellant, a citizen of Pakistan, applied for indefinite leave to remain in this country as the spouse of a person present and settled here and that application was refused on 16 January 2014. An appeal against the decision was heard on 30 September 2014 and the appeal was dismissed both under the Immigration Rules and the ECHR.

2. Permission to appeal was sought. The grant of permission contains the following (these are the only points at issue):

2. The grounds on which permission to appeal is sought submit that the judge erred in law in that she followed *Gulshan* notwithstanding that the "intermediary test" was disapproved in *MM* and it was held that where the appellant could not satisfy the Immigration Rules it was necessary to decide whether there is or is not a further article 8 claim. This is arguable. The judge stated at paragraph 23 of the determination that the appellant had not shown arguably good grounds for granting leave to remain outside the rules and therefore "I do not go on to consider whether there are compelling circumstances not sufficiently recognised under them". It is arguable that it was essential that the judge should decide whether there were such circumstances.

3. The grounds make further submissions concerning the burden of proof on the issue of whether the appellant's sponsor was present and settled in the UK. These submissions appear to have no merit but permission to argue them is not refused.

3. Assuming that "not refused" is to be interpreted as meaning "granted" I deal with the second point first. Ms Heybroek's first point is that the sponsor is to stand trial for fraudulently obtaining a passport later this year. The conclusion, by the respondent, that the sponsor was not present and settled here was based on the fact that his passport, the only evidence that he was present and settled here, had been fraudulently obtained. She argued that this hearing should be adjourned until that trial has taken place when the matter will be clarified. As I said at the hearing, that is not the case. The fact that there has been a prosecution suggests that there is a prima facie case that the passport was fraudulently obtained. If the sponsor is convicted the fact will not be in doubt. If, however, he is acquitted that simply means that the criminal standard has not been satisfied, not that he is innocent. It follows that an adjournment will not help the appellant's case in any way and I therefore refused the adjournment.

4. The way the point is put in the skeleton argument is that, as the question of the revocation of the sponsor's passport has not formally happened, it is in existence and the sponsor should be treated as a United Kingdom citizen. That begs a number of questions. A passport is not proof of citizenship, though it may be evidence. Furthermore if a passport is fraudulently obtained, it does not necessarily have to be revoked. That would depend on the circumstances of the obtaining. The legal position is that it is for the appellant to prove that the sponsor was present and settled in this country. Once doubts as to the authenticity of the passport have been raised it is for the appellant to prove that the passport can be relied on as evidence of citizenship. The case is either a classic example of the principle of *Tanveer Ahmed*, as I believe it to be as the genuineness or reliability of a document is at issue, or it is covered by a closely analogous principle. The judge approached the question of the

burden of proof on this issue in a totally proper way and her approach is not vitiated by any error of law.

5. The skeleton argument states that the approach taken by the respondent was conspicuously unfair but I can see nothing affair in strictly applying the relevant legal principles.

6. The first ground, on which permission was granted with rather more enthusiasm, was that the judge was wrong to approach article 8 as suggested by the case of *Gulhshan.* The cases of MM v SSHD [2014] EWCA Civ 985 is relied on: this states:

> If the applicant cannot satisfy the rules then there either is, or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.

7. The case of R (Ganesabalan) v SSHD [2104] EWHC 2712 (Admin) is also relied on; there Michael Fordham QC sitting as a High Court Judge states at paragraph 21 that there does not need to be a threshold before article 8 can be considered.

8. These cases throw doubts on the principle set out in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC), that there must be some sort of a threshold before article 8 is considered. My preference is for the approach set out in MM, and I shall for the purpose of this decision assume, without deciding, that that is the correct approach.

9. If, however, this is an error of law, it will be rare that such an error will be material. That is because the procedure that the judge will carry out in deciding whether the threshold to consider article 8 has been crossed will, in most cases, be entirely the same as will be the exercise that has to be carried out when the proportionality exercise were reached, had there been an article 8 consideration. There may be cases (I suspect that they will be rare) where a factor was not before the judge when the threshold exercise was carried out, that might have led to a different conclusion with regard to proportionality. Here all the relevant facts were before the judge and an article 8 (family life) claim would have had no chance of success based on the simple reason that the sponsor has no right to remain in this country. There is no evidence to suggest that the appellant's private life in this country would engage article 8.

10. It follows that if there were here an error of law it is not in any way material.

11. Ms Heybroek made a number of hypothetical submissions based on the fact that the sponsor was a United Kingdom citizen, but they were that, and no more. Should it become apparent that that is the case different considerations may well apply, but at the present time they clearly do not.

12. It follows that the original determination did not contain an error of law and the original decision shall stand.

The appeal is accordingly dismissed

Designated Judge Digney
Judge of the Upper Tribunal
23 January 2015