**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: HU/10275/2019
HU/03321/2019

**THE IMMIGRATION ACTS**

| **Heard at Manchester CJC** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21 January 2020** | **On 31 January 2020** |

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**SULEMAN SHARIF (A1)**
**ASMA RASHEED (A2)**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr R Ahmed instructed by Fawad Law Associates
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Buckley promulgated on 16 August 2019, dismissing on all grounds their linked appeals against the decisions of the Secretary of State dated 5 February 2019 and 31 May 2019 to refuse their applications for leave to remain outside the Rules.

2. Designated First-tier Tribunal Judge Woodcraft refused permission to appeal to the Upper Tribunal on 7 November 2019. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Allen granted permission on 11 December 2019.

*Error of Law*

3. For the reasons set out below I find there is no error of law in the making of the decision in the First-tier Tribunal.

4. The appellants are husband and wife, married in Pakistan in 2014, and have a son born in the UK in 2016. The first appellant (A1) has had leave to remain in various capacities, beginning as a student in 2008 and later as a Tier 1 Entrepreneur. However, his last valid leave expired in 2016. The second appellant (A2) joined him as a dependant in 2014. A further application for leave to remain made in 2016 was not refused until May of 2018. That decision was maintained following an Administrative Review in July 2018. Shortly thereafter, still in July 2018, the appellants applied for indefinite leave to remain outside the Rules, which was refused with an out of country only right of appeal on 20 February 2019. The respondent subsequently agreed to reconsider the application, resulting in the further refusal decision of 31 May 2019, which is the subject matter of the appeal to the First-tier Tribunal, dismissed by Judge Buckley in August 2019.

5. In granting permission, Judge Allen stated only that it was arguable that the First-tier Tribunal Judge erred in considering the matter essentially on the basis of it being an application for indefinite leave to remain, "Whether or not there is any materiality to the apparent error in this regard will be a matter for the Tribunal at the hearing."

6. I am not satisfied that there was any mistake or misunderstanding by the First-tier Tribunal Judge at the nature of the applications being made by the appellants, as can be seen from the refusal decision in respect of A1, "You made a human rights claim in an application for indefinite leave to remain in the UK on the basis of your length of residence and on the basis of your family life with your partner ... and your child." On the same page of the decision, it also notes that the application was for indefinite leave to remain outside the Rules but added that as he had "Not specifically stated that you are applying for indefinite leave to remain under the Immigration Rules relating to long residence, we would draw your attention to the requirements of paragraph 276B." The refusal decision then went on to consider the long residence requirement, noting that the appellant does not qualify.

7. Further, the application made by A1 on form SET(O) was accompanied by his representative's letter of 13 July 2018 stating the application was for "Indefinite leave to remain on the basis of his private life in the UK under the ECHR." Within the form, A1 stated that he was in the tenth year of completing his ten years of lawful residence in the UK he also claimed to

have formed private and family life in the UK and stated, "My private life will be disturbed as I have spent the last ten years in UK."

8. The application form signed by A2 states at section 3,

> "My spouse Mr Suleman Sharif on completion of his ten years' lawful residence in the UK has submitted his application for indefinite leave to remain. It is humbly requested that my application be considered and decided in line with my spouse's application."

9. It is clear from the above that at the time of application, both appellants were seeking indefinite leave to remain and that ten years' lawful residence was being relied upon in addition to private and family life. It was for that reason the respondent gave consideration to the ten years' long residence route. It is not surprising, therefore, that the judge also considered whether the appellants could meet the ten years' continuous lawful residence requirements. However, it was conceded at the First-tier Tribunal, and again today before me by Mr Ahmed, that they cannot meet the Rules. Mr Ahmed concedes that they are not entitled to indefinite leave to remain on the application they made.

10. Curiously, the grounds of application for permission to appeal to the Upper Tribunal state that A1 "Did not make an application for ILR under para 276B (as at the date of application he had not had ten years' continuous lawful residence in the UK). Therefore, he was not able to satisfy the Rule of 276B ... he was not seeking ILR etc." At paragraph 7 of the grounds, it is again repeated that it was not A1's case that he was entitled to ILR. As stated above, that is inconsistent with the application made in which both appellants refer to A1's application being for indefinite leave to remain.

11. In any event, there is no merit in the grounds which are entirely misconceived in law. At some length, the grounds argue that A1 was relying on paragraph 39E for the purposes of his leave but not in conjunction with paragraph 276B. It is difficult to follow the logic of the grounds, but the argument appears to be that A1 should be regarded as having lawful immigration status from the moment his last Administrative Review of the refusal decision of May 2018 was refused and the gap that followed of thirteen days between the refusal being maintained on Administrative Review, and his most recent application for leave to remain made on 13 July 2018, should be treated as lawful leave. However, for what purpose the immigration status is argued to be lawful is not clear, given that it is conceded that A1 cannot meet the long residence requirements of the Rules. Ahmed makes clear that the period of time under which a person has Section 3C leave pending the outcome of appeal or request for administrative review cannot convert that period into lawful leave. Once the Administrative Review maintained the refusal decision, A1 could only be regarded as having continuous lawful leave until the expiry of his leave in 2016. Paragraph 39E only provides that an application made within the conditions there set out should not be regarded as having been made out of time. The argument in the grounds

is peculiar, suggesting that in an application for discretionary leave outside the Rules, A1 should be regarded as having had continuous lawful leave throughout. Even if that were the case, in my view, it affords the appellant no real assistance.

12. As became clear from Mr Ahmed's submissions, it was not necessary for the appellant to rely upon paragraph 39E. The most that these matters can be regarded as relevant and not a red herring is that the appellant has not been an illegal overstayer in the sense of having simply allowed his leave to lapse and not making a prompt application or appeal. The fact that there was also a delay between 2016 and 2018 before his previous application was decided is potentially relevant, as it means he has been in the UK a further period of time, in which he has developed further his private and family life. However, it is clear that the First-tier Tribunal Judge took all of that into consideration in the assessment under Article 8 and, as Mr Tan pointed out, there has been no appeal against the judge's assessment and findings under Article 8. In any event, neither appellant can meet the requirements of the Rules and on consideration of their circumstances outside the Rules under Article 8 the judge found no basis to allow an appeal.

13. The grounds do not assist the appellants, and the arguments about 39E leave and whether residence should be regarded as lawful were of only marginal relevance and fully taken into account in any event by the First-tier Tribunal. Nothing in the grounds demonstrates any error of law in the decision of the First-tier Tribunal. It follows that the appellants' appeal must be dismissed.

*Decision*

14. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed on all grounds.

No anonymity direction is made.

**Signed**

**Upper Tribunal Judge Pickup**

**Dated** 29 January 2020

**To the Respondent**
**Fee Award**

I have dismissed the appeal and therefore there can be no fee award.

**Signed**

**Upper Tribunal Judge Pickup**

**Dated** 29 January 2020