**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

**Case Nos:**
**Appeal No: UI-2023-000128**
**HU/51584/2022**
**IA/02709/2022**

**THE IMMIGRATION ACTS**

**Decision Promulgated**
**On the 22 February 2024**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT**
**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**ONYEKA KINGSLEY MENUBA**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr S. Winter, instructed by Drummond Miller Solicitors.
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer.

**Heard at Edinburgh on 30 November 2023**

**DECISION AND REASONS**

1. The appellant, a national of Nigeria, appeals, with permission, against the decision of the First-tier Tribunal (Judge Connal) dismissing his appeal against the decision of the Respondent on 2 March 2022 refusing him indefinite leave to remain on human rights grounds.

2. The basis of the appellant's claim is that it is disproportionate not to grant him leave, primarily because by September 2019 he had accumulated ten years' lawful residence in the United Kingdom, which entitled him to be granted leave by virtue of paragraph 276B of the Statement of Changes in Immigration Rules, HC 395 (as amended). If that argument fails, the appellant asserts that his personal circumstances are such as to establish that the Rules do not apply to him and his family, and he should be

granted leave anyway. He also raises an argument based on a judicial decision in a different case, which he says was materially identical and requires that his appeal be determined in the same way.

3. The obvious starting-point is the claim to have met the requirements of the Rules. That requires an examination of the chronology of the appellant's presence in the United Kingdom. Apart from the contested status of one communication or group of communications, there is no disagreement about this. The appellant arrived in the United Kingdom on 20 September 2009. He had a number of grants of leave to remain, the last being on 10 November 2014, granting leave until 10 November 2017. The Secretary of State issued decisions curtailing that leave in October 2015, June 2017 and May 2020. Each of those curtailments was quashed following process in the Court of Session. (The latter was quashed because it had incorrectly sought to maintain the decision of 2015: the 2020 decision does not imply that the respondent considered in 2020 that the appellant had leave at that date.) As a result of the 2015 decision, the appellant was detained on 13 October 2015 with a view to his removal. He was subsequently released on bail, but was still in detention on 15 and 16 October. He has had no grant of leave since that of November 2014.

4. The effect of the facts set out in the previous paragraph is that the appellant's leave appears to have terminated on the date originally fixed for that event, 10 November 2017, the respondent's attempts to curtail it having failed. The period of time for which he had leave and so was lawfully resident for the purpose of para 276B would therefore be eight years and just under two months, not long enough for the benefits available under that paragraph.

5. The appellant's case, however, is that he made an application for further leave during the currency of that leave and before it had expired, which was not decided before 20 September 2019 (and has indeed never been determined). If that is right, the appellant has the benefit of section 3C of the Immigration Act 2009, which would extend his existing leave for the period during which the application for variation of that leave was pending before the Secretary of State and until it was decided.

6. The question therefore is the factual one of whether such an application for variation of leave was made. This brings into issue the status of one communication or group of communications, to which we referred above. The respondent issued a section 120 Notice in conjunction with the curtailment decision, inviting the appellant to give any reason why he should not be removed in pursuance of that decision. The claimant and his solicitors responded, it is said, on 15 and 16 October. Both responses are said to have been "in effect" human rights claims. The response of 15 October has not been produced. That of 16 October, a letter to the respondent from Drummond Miller and Company, is said to be identical in all material respects and to constitute either a human rights claim, or an application for variation of the appellant's existing leave, or perhaps both. Although there are formal requirements for such applications, the effect of the relevant rules was that those requirements were waived if the

applicant was in detention, so the letters could formally constitute the claim or application. The question is whether they did.

7. Judge Connal set out the passages of the letter on which the appellant relied. There are certain references to the appellant's history and an assertion that 'his detention and removal from the UK will disproportionately interfere with his article 8 right to private life in the UK'. The writer "therefore" requests that the appellant be released from detention. The judge concluded that those words could not be read as an application for the variation or extension of the appellant's existing leave (as an entrepreneur). The judge noted that a further letter, of 17 March 2017, likewise made no suggestion that there was at that time an application for variation that had been made but not yet determined; and further letters in 2019 and 2021 took the same position, the latter indeed being in terms inconsistent with a view that an application for variation had been made in 2015.

8. The arguments that the judge made an error of law in that conclusion are wholly unspecific. They fail to identify any feature of the wording of the 2015 communications that could constitute or be read as an application for the variation of the appellant's existing leave. In our view, the judge was correct beyond any possible shadow of doubt. There was no application for variation of leave at that time.

9. Further, as the judge understood, even if the wording set out in the last paragraph did constitute a "human rights claim" within the meaning of s 113, that would not be an application for a variation of existing entrepreneur leave, for the two concepts are different: see MY (Pakistan) v SSHD [2021] EWCA Civ 1500 at [39], to which Mr Lindsay drew our attention. And in addition, it is clear, as the judge found, that there was no other occasion before the expiry of his leave in November 2017, when the appellant did anything that might have been an application for variation or extension of it.

10. It follows that the judge was correct to conclude as she did that s 3C was not engaged and the appellant's leave expired on 10 November 2017. The appellant did not and does not meet the requirements of paragraph 276B.

11. There is nothing in what was called "the equality argument". The case of JO, to which the judge was referred, was different, and even if it had not been, the judge's task was to determine correctly the appellant's case on the facts (including the documents) before her, not to make what might have been a legally incorrect decision by transferring to this case a decision made in a different case. There is no principle of legal determination that in a case where the doctrine of precedent does not apply a decision in another case should be followed regardless of its correctness.

12. So far as the general balance of proportionality is concerned, the appellant had had, at the time of the First-tier Judge's decision a period of leave followed by a period of remaining without leave, and had, as the judge found, not attempted to extend his leave when it expired in 2017. He had

no family in the United Kingdom, although he continued while remaining without leave to run a business, and no doubt had friends here. There was not the beginning of a viable claim that the balance of the public interest expressed in the Immigration Acts and the Rules should not be applied to him. The assertion to the contrary in the grounds, again expressed in entirely unspecific terms, is wholly unarguable.

13. For the foregoing reasons we dismiss the appellant's appeal.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 22 February 2024