APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2023 308

Neutral Citation Number [2024] IECA 166

Power J.

Allen J.

O'Moore J.

BETWEEN/

MUHAMMAD NASIR YAQUB

APPLICANT/APPELLANT

- AND –

THE MINISTER FOR JUSTICE

RESPONDENT/RESPONDENT

JUDGMENT of Mr. Justice Allen delivered on the 27th day of June, 2024

Introduction

1. This is an appeal against the judgment of the High Court (Barr J.) delivered on 15th August, 2023 ([2023] IEHC 500) and consequent order made on 13th October, 2023, refusing an application by the appellant for orders of *certiorari* quashing the decisions of the respondent Minister *("the Minister")* revoking the appellant's residence card and proposing to deport the appellant from the State pursuant to s. 3 of the Immigration Act, 1999.

2. The appellant accepts that he has no right to remain in the State but contends that because – as he suggests – he was at one time entitled to exercise derived EU treaty rights in the State, he may not be deported by a deportation order made under s. 3 of the Act of 1999. Rather, he contends, the Minister must use the removal process provided for by Directive 2004/38/EC – the Citizens' Directive – which was transposed into Irish law by the European Communities (Free Movement of Persons) Regulations, 2015.

3. The procedure under s. 3 of the Act of 1999 for the making of deportation orders is different to the procedure under the Regulations of 2015 for the making of removal orders. If the Minister may not necessarily agree that the removal process would be more favourable to the appellant that the deportation process, she does not contest his submission that it would be.

4. It is common case that the appellant has no right to remain in the State. It is common case – on the authority of the judgment of the Court of Justice of the European Union in Case C 94/18 *Chenchooliah v. Minister for Justice* – that if the appellant is a person who was previously entitled to exercise derived EU treaty rights in the State, he may not be the subject of a deportation order.

5. It is common case that it is for the Minister to decide whether the appellant is or is not a person who was previously entitled to exercise derived EU treaty rights in the State.

6. On 20th July, 2020 the Minister granted the appellant's application under the Regulations of 2015 for a residence card. On 8th December, 2020 the Minister revoked the appellant's residence card on the ground that it had been obtained by fraud. It is common case that the appellant obtained the residence card by fraud. However, the appellant contends that along the way, the Minister found that he was, for a time entitled to exercise derived EU treaty rights: with the consequence that he is not liable to be deported. In essence, the appellant seeks to compartmentalise his fraud and the consequences of his fraud and makes

the case, variously, that the Minister – in revoking his residence card – either compartmentalised the fraud or, if she did not, that she should have: rather in the manner of the curate's egg.

The facts

7. The facts – or at least the unfolding story – are set out clearly and succinctly in the judgment of the High Court.

8. The appellant is a Pakistani citizen who was born in 1984. He has a brother, Mr. Muhammad Qasir Naveed, who was born in 1980 and who is a UK citizen.

9. On 25th August, 2015 the appellant applied to the Minister for a residence card on the basis that he was a *"permitted family member"* of his brother who was an EU citizen exercising his EU treaty rights in the State. The appellant claimed to have arrived in the State with his brother on 30th June, 2015 and to be living with his brother at an address in Dublin 15, from where Mr. Naveed was said to be carrying on a computer and IT business on his own account. The application was accompanied by the appellant's and Mr. Naveed's original passports; photographs of both; the appellant's original birth certificate; a TV licence in the name of Mr. Naveed; a letter from E-flow addressed to Mr. Naveed; a Bank of Ireland letter in respect of Mr. Naveed; a Vodafone application in respect of the appellant; and a certificate of registration of a business name by – or at least in the name of – Mr. Naveed. The information given was declared by both to be true and complete.

10. On 27th November, 2015 the appellant submitted a bundle of 31 copy letters and documents which were said to evidence his dependency on Mr. Naveed and on 28th April, 2016 a bundle of copy documents – including correspondence from Revenue, bank statements and business documents – which were said to evidence the current activities of Mr. Naveed in the State. Included in this bundle was a certificate of incorporation of a company called Gourmet Pizza Limited; a letting agreement for business premises in

Clonsilla in the name of Mr. Naveed and another man; a Revenue letter confirming that Gourmet Pizza Limited was registered for tax; and some copy invoices.

11. On 2nd July, 2016 the appellant was informed that the Minister had decided to refuse his application on the ground that she was not satisfied that he was a permitted family member of Mr. Naveed. Specifically, it was said, the appellant had failed to submit satisfactory evidence of dependence on the EU citizen, including dependence prior to residing in the State, or evidence of membership of the EU citizen's household prior to residing in the State. The appellant was advised of his right to request a review of the decision and availed of that right.

12. On 20th July, 2016 the appellant, by his then solicitor, filed the appropriate form of request for review, accompanied by a detailed written submission. The documentation previously submitted was supplemented by copy correspondence from the UK Revenue. On 27th September, 2016 the material was further supplemented by a copy contract of employment and payslips said to be in respect of Mr. Naveed; a tax clearance certificate said to be for Mr. Naveed; and a further UK Revenue letter in respect of the appellant. These documents were said to have been submitted to keep the Minister updated on a change of employment by the EU citizen. The copy contract of employment was a contract dated 19th September, 2016 purportedly between Mr. Naveed and a company called Kerzak Limited T/A Londis by which Kerzak Limited agreed to employ Mr. Naveed for twelve months as a shop assistant at a Londis shop in Dublin 8.

13. By letter dated 13th July, 2017 the appellant was advised that the decision to refuse his application had been affirmed on the same grounds, namely, that the documentation submitted failed to demonstrate that he has been residing in Mr. Naveed's household in the UK or that he had been financially dependent on Mr. Naveed in the UK.

14. A challenge by way of judicial review to the Minister's decision of 13th July, 2017 was compromised on terms that the Minister would conduct a further review.

15. On 20th February, 2020 a new Form EU4 was filed, with a comprehensive written submission prepared by the appellant's former solicitor, which was largely based on the previous such submission but included some additional documents – not least 23 payslips purporting to evidence Mr. Naveed's earnings from his employment in Londis and copy AIB Bank statements in the name of Mr. Naveed which were said to show regular payments by Mr. Naveed to the appellant. Again, the information was declared by the appellant and Mr. Naveed to be true and complete.

16. In the written submission made in support of each of the reviews, the appellant and Mr. Naveed were said to have been members of the same household in the UK and to continue to be members of the same household in Ireland. Mr. Naveed was said in the written submission to be self-employed but on the form to be employed in the Londis shop in Dublin 8 since 1st August, 2016. *"All of the above",* it was said, *"can be verified by way of documentation already provided to your office. An outline of the relevant documents can be seen below."*

17. In the submission in support of the review, the Minister was said to have erred in fact and in law in reaching the decision of 2nd July, 2016. The appellant, it was said, had been a member of Mr. Naveed's household for eight years prior to entering the State and continued to be dependent on him and a member of his household in Ireland. The appellant, it was said, had provided bank accounts which showed a continuous financial support from his brother while they resided in the UK and that financial and emotional support continued in Ireland. It was – it was said – clear from the evidence provided that the appellant was a permitted family member of an EU citizen within the meaning of the Regulations and the continued denial of a residence card was in breach of their rights under the Directive. The submission listed the

supporting documents already provided, as well as additional supporting documents including, as I have said, 23 payslips for Mr. Naveed.

18. By letter dated 20th July, 2020 the appellant was informed that his review had been successful as he satisfied the conditions set out in the Regulations and that his permission to remain started on the date of that letter. The appellant was invited to make an appointment at the Garda National Immigration Bureau registration office – at which he should be accompanied by his brother – to obtain his residence card.

19. The appellant attended by appointment at the registration office on 21st September, 2020 but his brother did not. Over the following fortnight or so there was a certain amount of to-ing and fro-ing in relation to the whereabouts of Mr. Naveed which prompted a visit by the Gardaí to the Londis shop on 5th October, 2020. The appellant was due to return to the registration office on 9th October, 2020 but failed to appear. In the meantime, the Gardaí reported back to the Immigration Service which wrote to the appellant – copying his then solicitors – on 12th October, 2020.

20. The Minister's letter of 12th October, 2020 recalled that the appellant's residence application had been refused on 2nd July, 2016 but granted on 20th July, 2020. She recalled that the appellant, in support of his review application, had submitted documentation to evidence the exercise of rights by his brother through employment with Griffin Londis since 19th September, 2016. The letter summarised the engagement between the appellant and the Garda National Immigration Bureau on 21st September, 2020 and thereafter and continued:-

> *"On 05/10/20, Gardaí from the Garda National Immigration Bureau attended the Londis Store at Fonthill Industrial Estate. Gardaí observed you working in this shop. Upon making enquiries Gardaí were informed that your name is Muhammad Qasir Naveed with a date of birth of 02/12/1980 and that you are a British citizen in the employment of Londis for the previous five years.*

When approached by Gardaí you gave your name as Muhammad Qasir Naveed, a British citizen. You provided a U.K. driving licence, a PPSN card and a number of bank cards in the name of Muhammad Qasir Naveed.

Gardaí put it to you that you were using another person's PPSN and identity, you were requested to provide your correct identity. At this point you gave your name as Muhammad Qasir Yaqub with a DOB of 27/11/84. You admitted using your brother's PPSN for the last five years. You also admitted your brother resides in the United Kingdom and he is not exercising EU treaty rights in Ireland. …

You were taken to Ronanstown Garda Station, where you were charged with two offences and bailed to appear before Blanchardstown District Court on 03/11/2020.

This demonstrates that your brother U.K. national Muhammad Qasir Naveed, was not, in fact, residing in the State in exercise of rights at the time of your applications and also demonstrates that the documents you provided as evidence of Mr. Naveed's residence and exercise of rights at the time of your applications are false and misleading as to a material fact. An examination of the Companies House' documentation informs, your brother Mr. Muhammad Qasir Naveed is residing in the United Kingdom where he operates his business 'Green Star IT Solutions Limited' and is employed as an IT technical support specialist with 'Syneos Health.'

It is noted that you did not attend the registration office on 09/10/2020. In light of this information, the Minister has decided in exercising power under Article 35 of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, to defer registration of your residence permission.

Based on the above, the Minister is of the opinion that the information you provided in support of your application to evidence the residence of you and your brother in

this State is false and misleading as to a material fact. The Minister is also of the opinion that the information you provided to evidence the exercise of rights by your brother in this State is also false and misleading as to a material fact. You knowingly submitted this information in order to obtain a right of residence, which you otherwise would not enjoy. This constitutes a fraudulent act within the meaning of the Regulations and Directive, which provides that Member States may refuse, terminate or withdraw any rights conferred under the Directive 'in the case of an abuse of rights or fraud.' ***This constitutes fraud within the meaning of Regulation 27(1) as the Minister is of the opinion you obtained your status as a permitted family member artificially. If this is found to be the case the Minister will revoke your status as a permitted family member which was approved in accordance with Regulation 5 in accordance with Regulation 27(1).***

In addition based on an assessment of your application, the Minister is of the opinion you engaged in a contrived activity and your application was brought about with the sole objective of obtaining permission to remain in the State under EU law as a person who would not otherwise have such a right. ***If this is found to be the case, the Minister will proceed to revoke your permission to remain in accordance with the provisions of Regulation 27(1) of the Regulations.***

You are required to provide representations to the Minister within 21 days of the date of this letter, stating why your status as a Permitted Family Member should not be revoked, to dismiss concerns you engaged in a contrived activity in order to obtain a residence permission and to address the issue of your submission of false and misleading information to this office.

Any representations should include a detailed immigration history of the EU citizen including dates of travel to and from the State in the period from 2015 to present

and declare the purpose of such travel. You may provide any other information / documentary evidence you wish to submit as to why your permission to remain should not be revoked." [Emphasis original.]

21. I pause here to emphasise that the Minister's expressed concern was not limited to any particular element or stage of the application, or to any particular document; and that the requirement that any representations should include a detailed immigration history from 2015 clearly conveyed that the Minister regarded the whole process, from start to finish, as tainted. The appellant did not respond.

22. On 8th December, 2020 the Minister wrote to the appellant again. She repeated the substance of the earlier letter and noted that there had been no response. The Minister expressed herself as satisfied that the documentation which had been provided to evidence his and his brother's residence was false and misleading as to a material fact and that the documentation which had been provided to evidence the exercise by the appellant's family member in the State was also false and misleading as to a material fact, and continued:-.

"Therefore, the Minister has decided to revoke your permission to remain in accordance with the provisions of Regulation 27 of the Regulations and Article 35 of the Directive.

As it has been determined that the permission to remain (Stamp 4EUFam) granted to you on 20/07/2020 was obtained through your fraud, that immigration permission is deemed never to have been valid." [Emphasis original.]

23. The letter concluded by saying that if the appellant considered that the Minister had erred in fact or in law in making the decision to revoke his permission to remain, he might request a review of the decision under regulation 25 of the Regulations. The appellant was advised that if he did not submit a request for review, he would be issued with a notification of the Minister's proposal to make a deportation order under s. 3 of the Act of 1999 and his

file transferred to the Repatriation Division. There was no such request and there was – and is – no challenge to the decision of 8th December, 2020.

24. In late December, 2020 or early January, 2021 the appellant instructed his present solicitors. There was some confusion as to what was to happen next.

25. On 31st July, 2017 – following on the decision of 13th July, 2017 – the appellant had been notified of the Minister's proposal to make a deportation order under s. 3 of the Act of 1999. Although, as I have said, the appellant was advised on 8th December, 2020 to expect to be issued with notification of a proposal to make a deportation order, the appellant's new solicitors appear to have taken the view that the effect of that decision was to revive the earlier proposal and under cover of a letter dated 10th January, 2021 (but received by the Minister on 24th February, 2021) made a representation pursuant to s. 3 of the Act of 1999 as to why a deportation order ought not to be made. The solicitors' misunderstanding was initially confirmed by the Minister in an e-mail of 18th March, 2021 but quickly corrected by a letter of 22nd March, 2021 which confirmed that the notification of 31st July, 2017 had been overtaken by the grant of a right of residence and that the subsequent revocation of the grant did not reactivate the s. 3 notification of 31st July, 2017. The Minister's letter of 22nd March, 2021 suggested that the right of residence had been granted on 21st September, 2020 rather than 20th July, 2020 but this was obviously a mistake.

26. It appears to have been the Minister who raised the *Chenchooliah* hare. In her letter of 22nd March, 2021 the Minister advised the appellant's solicitors that it had not been decided whether the appellant's case was governed by s. 3 of the Act of 1999 or fell within *Chenchooliah* and that the position would be clarified as soon as possible. Not altogether surprisingly, the appellant's solicitors seized on the suggestion and submitted that the appellant's case was *"imminently impacted by … Chenchooliah…"*

27. On 27th May, 2021 – in the first of the decisions sought to be impugned – the Minister decided that the appellant's case did not come within *Chenchooliah*. The appellant, it was said, had provided false and misleading information such that the permission granted to him was deemed never to have been valid. The appellant was told to expect a notification under s. 3 in the coming days.

28. On 31st May, 2021 – in the second of the decisions sought to be impugned – the appellant was notified of the Minister's proposal to make a deportation order under section 3. In the ordinary way, the appellant was informed that he had three options: to leave the State before the Minister made a final decision; to consent to the making of a deportation order; or to submit written representations to the Minister under s. 3 of the Act of 1999.

29. The appellant did not exercise any of the options offered to him but on 29th July, 2021 made an *ex parte* application for judicial review.

The judicial review application

30. The appellant's statement of grounds was confused and confusing in a number of respects.

31. The first of the reliefs claimed by the appellant in his statement of grounds was an order of *certiorari* quashing the decision of the Minister of 27th May, 2021. According to the statement of grounds, that was a decision made pursuant to regulation 27(1) of the 2015 Regulations revoking the appellant's residence card. It was not. Strictly speaking, the appellant never obtained a residence card. The decision to revoke the appellant's permission to remain was made on 8th December, 2020. On its face, the decision of 27th May, 2021 was simply that the appellant's case was not one to which *Chenchooliah* applied. Fairly startlingly, there was no reference whatsoever in the statement of grounds to the decision of 8th December, 2020 or to the Minister's letter of 12th October, 2020 which preceded it. In his verifying affidavit, the appellant referred to and exhibited a copy of the decision of 8th

December, 2020 – which he more or less correctly identified as having revoked his residence card – but he did not engage with the substance of that decision or even refer to the letter of 12th October, 2020. The appellant exhibited, in a bundle, his extensive correspondence with the Minister *"over the past 6 years or so"* but did not engage at all with the substance of it.

32. The affidavits sworn by the appellant and his brother in support of the judicial review application were at best careless. The appellant deposed that he had arrived in the State in 2015 – he did not say in what month – and that his brother had travelled to the State in 2016 – he did not say in what month – and that his brother *"was employed for a period therein."* He exhibited a payslip dated 25th January, 2016 which was said to show that Mr. Naveed was employed by a cleaning company that month. He made no reference to any alleged self-employment: specifically, he made no reference to the business of Gourmet Pizza Limited.

33. Mr. Naveed swore an affidavit in support of the appellant's application which he said was for the purpose of setting out the *"event"* (singular) preceding the institution of the proceedings but which did little more than set out – without comment – a list of some of the documents which had been submitted in support of the appellant's residency application. Variously, Mr. Naveed deposed that he arrived in Ireland in June, 2016 *(sic.)* and that he lived and worked in Ireland from around June, 2015 until in or around August, 2016. Mr. Naveed's list of documents included some in relation to Gourmet Pizza Limited but there was no narrative. If Mr. Naveed was in the slightest perturbed by the fact that his brother had assumed his identity for years, he did not say so.

34. The second relief claimed was a declaration that the appellant is a permitted family member of an EU citizen and therefore any proposal of removal of the appellant from the State must be done pursuant to regulation 5 of the 2015 Regulations and the decision of the Court of Justice of the European Union in Case C 94/18 *Chenchooliah*. This, it seems to me, at best, obscured the appellant's case. He was not inviting the court – or at least by the time

of the hearing did not invite the court – to declare that he was a permitted family member. Rather, his case was that he had been *"at some material time recognised as an EU citizen dependant."* That is to say, that he had been so recognised by the Minister.

35. At para. 12 of his statement of grounds, he appellant acknowledged that:-

> *"In or around the 5 October 2020 the [appellant] was caught impersonating his EU citizen brother and worked in his stead at Londis Store at Fonthill Industrial Estate and that at that time Mr. Naveed Qasir was in the UK operating his own business as Green Star I Solutions Limited and was employed as an IT technical support specialist with Syneos Health."*

36. This, it seems to me, fails fundamentally to recognise or acknowledge the nature and extent of the appellant's fraud. It was not simply a matter of impersonating his brother on a given day in a particular place. On the Minister's case, the appellant was not only masquerading as his brother on the day he was caught but admitted that he had been doing so for five years. As a matter of simple arithmetic, the admission covered the period from October, 2015 to October, 2020. Moreover, it was uncontested that the appellant had produced to the Gardaí a fake UK driving licence, a fake PPSN card and a number of fake bank cards, all in the name of his brother. The fake employment contract necessarily meant that the pay slips in respect of that employment were fake. The fake bank cards necessarily meant that the bank accounts to which they related were fake. The fake driving licence necessarily meant that the appellant had personated his brother in the UK as well as in Ireland.

37. The premise of the appellant's argument is that the visit by the Gardaí to his place of employment exposed only that the employment contract was fraudulent and that otherwise all that had been said in the course of his application and all of the documentation provided to the Minister before that employment commenced in September, 2016 was truthful and valid.

If, for the sake of argument, that view might have been taken, it was perfectly clear from the Minister's letter of 12th October, 2020 that the view she took was not only that the employment contract had been shown to have been fraudulent but that the appellant had been exposed as a fraudster.

38. Having issued the motion seeking judicial review, the appellant's solicitors made a data subject access request to the Minister under the General Data Protection Regulation, 2018 and on 30th June, 2022 they were provided with a schedule and about 208 pages of copy correspondence and documents. Included in the materials provided were the Minister's assessments – called Decision Submissions – dated 29th June, 2016, 10th July, 2017 and 20th July, 2020 of the information and documentation submitted by the appellant, on which the decisions of 2nd July, 2016, 13th July, 2017 and 20th July, 2020 were based. The appellant, of course, already had the decisions but he had not previously seen the assessments. The Decision Submissions confirmed that at the time of the initial decision on 2nd July, 2016 – on the basis of the material then before her – the Minister found that the appellant's brother was exercising his EU treaty rights in the State; and that at the time of the decision on 20th July, 2020 the Minister found – on the basis of the material then before her – that the appellant had been a member of his brother's household in the UK before he came to Ireland.

39. The discovery of these documents also prompted an application for an amendment of the statement of grounds to plead that the Minister failed, refused or neglected to provide an interview or an oral hearing to the appellant and his brother before making a finding on his application and subsequent proposal to deport, contrary to the appellant's constitutional and natural justice rights.

The High Court judgment

40. The High Court judge rejected the appellant's argument that his case came within the parameters of *Chenchooliah*. He found that, having regard to the numerous false statements

in the appellant's submissions and the documentation submitted to prop up those falsehoods, the Minister was entitled to hold that the permission that had issued on 20th July, 2020 had been procured by fraud. The judge focussed on the fact that the effect of the decision of 8th December, 2020 was to revoke the permission granted on 20th July, 2020 and noted that the appellant had not availed of his right to seek a review of that decision. Citing the judgment of Humphreys J. in *MA (Pakistan) v. Minister for Justice* [2018] IEHC 95 – in which the applicant sought to rely on *"rights"* procured by a marriage of convenience – the judge distinguished *Chenchooliah* on the ground that it did not apply to a case – such, he said, as this case was – of an absolute abuse of law and legal rights.

41. The High Court judge dealt shortly, but comprehensively, with the argument that the impugned decisions should be set aside on the ground that the appellant had not been offered an oral hearing. Pointing to the fact that the appellant had admitted that he had acted in a fraudulent manner; that he had not addressed the concerns expressed by the Minister in her letter of 12th October, 2020; that he has not sought a review of the decision of 8th December, 2020; that he had never requested oral hearing or interview; and that he had in fact had an interview on 5th October, 2020 with the Garda National Immigration Bureau, the judge found that there was no breach of fair procedures.

42. The judge rejected the appellant's submission that it had not been made clear to him in advance of the decision of 8th December, 2020 that the Minister had concerns that Mr. Naveed had never resided in the State at all. He found that the letter of 12th October, 2020 made it clear that the Minister had concerns about the entirety of the appellant's story and had clearly identified the appellant's effective admission that he had been impersonating his brother since in or about October, 2015; and that the appellant had not addressed those concerns. The judge held that the appellant could have made whatever representations he

wanted – including as to when he first commenced impersonating his brother – within twenty-one days of 12th October, 2020 but had failed to do so.

43. The judge found that the Minister was perfectly entitled to have found that the appellant's entire story was a fabrication and that his brother had never exercised his EU treaty rights to work in the State.

The appeal

44. The appellant appealed against the judgment and order of the High Court on seven numbered grounds. The grounds of appeal, like the grounds upon which judicial review was sought, are permeated by confusion.

45. For example, the judge is said to have erred in failing to afford adequate weight or consideration to *"the fact that the appellant had, from June, 2015 to August, 2016, been lawfully present in the State as a dependant of his EU citizen brother …".* This appears to assume that the appellant and Mr. Naveed were – as a matter of objective fact – lawfully present in the State in that time and does not engage with the Minister's decision of 8th December, 2020 or the High Court judge's consideration of that decision.

46. The judge is said to have erred in fact and in law in failing to consider whether the Minister acted unreasonably or irrationally in revoking the appellant's permission on the basis that his brother had never resided in the State and had never exercised his EU treaty rights to work in the State. But it was no part of the case made in the High Court that the Minister acted unreasonably or irrationally in revoking his permission.

47. On the hearing of the appeal it was unequivocally accepted – and it was no great concession – that the Minister was entitled to have revoked the permission granted on 20th July, 2020. The argument was that some of the findings on which the fraudulently obtained permission was based somehow survived the revocation.

Discussion and decision

48. The twin pillars of the appellant's case are that the Minister, in her initial decision of 2nd July, 2016 to refuse his application for a residence card, accepted that Mr. Naveed was legitimately exercising his EU treaty rights within the State as a self-employed person – specifically by his involvement with Gourmet Pizza Limited – and in her review decision of 20th July, 2020 accepted that the appellant had been a member of Mr. Naveed's household prior to his arrival in Ireland. In essence, the appellant's case is that in the time between his arrival in the State in June, 2015 and the commencement of his employment with Londis in September, 2016 he acquired EU treaty rights and that the Minister's conclusions on which those rights are based somehow survived the revocation on the permission granted on 20th July, 2020.

49. In the written submissions filed on behalf of the appellant it is asserted that the appellant's brother left the State in August, 2016 and that the appellant thereafter fraudulently took on his identity. If that was the case made to the High Court, it was never made to the Minister. From start to finish, the case made to the Minister was that the appellant and his brother had come to Ireland in June, 2015 and were at all times thereafter living together in Ireland. It was never suggested to the Minister that Mr. Naveed left the State in August, 2016 or that the appellant's personation of his brother first began in August, 2016.

50. By the way, the case made by the appellant in the representations which were filed in February, 2021 pursuant to s.3 of the Act of 1999 was that upon arriving in Ireland in 2015 he – the appellant – opened his own take-away business in Blanchardstown and when that business failed, he worked in Londis for five years. This statement, of course, post-dated the Minister's decision of 8th December, 2020 and was not referred to in the impugned decision of 27th May, 2021 but it goes to show that the appellant's impersonation of his brother was not necessarily co-extensive with his employment in Londis.

51. The appellant now submits that the Minister's proposal in her letter of 12th October, 2020 was to revoke that appellant's permission but not to *"deem that the residence was unlawful ab initio or deemed never valid."* I can see no ambiguity in the letter. It is true that specific reference was made to the Londis employment contract submitted to the Minister but the letter also referred to the false identification documentation produced by the appellant to the Gardaí and his admission that he had been using his brother's PPSN for five years.

52. What was clearly put to the appellant was that his brother was not in fact residing in the State in exercise of his EU treaty rights *"at the time of your applications"* and that *"the documents [which he had] provided as evidence of Mr. Naveed's residence and exercise of rights are false and misleading."* It is now said that there was only one application – which was twice reviewed – but if anyone wants to be pedantic, the fraudulent Londis contract was submitted as part of the first review, so that the reference to false and misleading documents submitted with *"the application"* would have been to those documents covering the period between July, 2015 and July, 2016. It is now suggested that the Minister failed to specifically identify the false and misleading documents but it seems to me that the reference to *"the documents"* clearly meant all of the documents. If there was any doubt or ambiguity, it was not expressed at the time and there was no request for clarification.

53. The procedure prescribed by the European Communities (Free Movement of Persons) Regulations 2015 provides for a right of review of any decision concerning an entitlement or claimed entitlement under the Regulations. In the ordinary way, the application for review will be focussed on the reasons for the refusal of the application and the decision on the review application will be directed to those reasons and thereby to what might be characterised in very broad terms as the issues on the review. However, in principle – as was accepted by counsel for the appellant – the review is a review of the application in its entirety. If, in any particular case, the officer carrying out the review might be disposed to

confirming the decision on other grounds, fair procedures might require that the applicant be so advised and afforded an opportunity to adduce further evidence or make further representations but, in principle, the reviewing officer is at large.

54. This, however, was no ordinary case.

55. Article 35 of the Citizens' Directive provides that:-

> *"Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."*

56. Article 35 was transposed into Irish law by regulation 27 of the 2015 Regulations, which was the power invoked by the Minister in her letter of 12th October, 2020 and exercised by the Minister in her decision of 8th December, 2020. As required by regulation 27(3)(a), the Minister gave notice in writing to the appellant of her proposal to exercise her power to revoke his status as a permitted family member and gave him twenty-one days within which to give reasons as to why that status should not be revoked.

57. As plainly as could have been done, the Minister set out her opinion that the documents which had been submitted as evidence of Mr. Naveed's residence and exercise of rights – all of them – were false and misleading; that the information provided to evidence the residence of the appellant and his brother – all of it – was false and misleading; that the information had been submitted knowingly in order to obtain a right of residence which the appellant would not otherwise be entitled to; and that the Minister proposed to revoke the appellant's status in accordance with regulation 27.

58. The appellant's admitted use his brother's PPSN number for five years predated his employment at Londis by most of a year so that the Minister's concerns could not sensibly have been understood to have been limited to that document or to that employment. The

requirement that any representations should list the dates of and declare the purpose of any travel by Mr. Naveed to and from the State in the period from 2015 clearly conveyed that the Minister was not satisfied that Mr. Naveed had been resident in the State at any time from 2015, whether for the purpose of exercising his EU treaty rights or otherwise. The proposition that the Minister's conclusion – implicit in the decision of 2nd July, 2016 and explicit in the Decision Submission of 29th June, 2016 – that Mr. Naveed was resident in the State and exercising his EU treaty rights – could have survived the exposure of the fact that the application was fraudulent is untenable.

59. It is submitted on behalf of the appellant that there was a lack of precision in the Minister's correspondence as to her view of the activities of Mr. Naveed in the State. I cannot agree. It is submitted that the appellant was entitled to have the allegations put to him. I agree. They were put. The appellant's oral argument as to the fairness of the process quickly became bogged down in an inability to differentiate between the requirement for precision and an insistence on irrelevant detail. It would have served no purpose that the Minister should have sent the appellant a list of the various documents which he had submitted, which the Minister was of the opinion were fraudulent.

60. It was submitted that the appellant's ability to have answered the allegations made by the letter of 12th October, 2020 or to have made submissions in response to the decision of 8th December, 2020 was constrained by the fact that he did not have the file. I disagree. With the exception only of the Recommendation Submissions, the file consisted exclusively of material provided by the appellant. If, contrary to the Minister's reassessment of the application in light of the appellant's fraud, any of the information or documents were true, there was no impediment to the appellant identifying what he claimed was true.

61. If the appellant wanted to make the case that his impersonation of his brother first commenced in September, 2016 he could have done so. He was expressly afforded the

opportunity to account for the entirety of the time in which he was in the State but did not avail of it.

62. The appellant never made the case to the Minister that he had acquired or exercised EU treaty rights limited to the period between June, 2015 and September, 2016. When, in March, 2021, the Minister raised the question of *Chenchooliah* rights, the appellant embraced the suggestion that they might apply to him but not for the reason that he and his brother had been found by the Minister to have been lawfully exercising their rights for some of the time, rather for the reason that he had been granted a residence card which had later been revoked.

63. So much of the appeal as concerned the absence of an oral hearing rather fell away in the course of the oral argument of the appeal. It was common case – as the High Court judge found – that the dictates of what constitutes a fair hearing vary depending on the nature of the investigation being undertaken and the issues that fall for determination. The judge recalled the well-known *dicta* of Costello P. in *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240 and of Fennelly J. in *Ezeani v. Minister for Justice* [2011] IESC 23.

64. In *Galvin,* Costello P. said that:-

> *"There are no hard and fast rules to guide an Appeals Officer or, on an application for judicial review, this court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."*

65. In *Ezeani* Fennelly J. said that:-

> *"The requirements of fair procedures are not set in stone. What is required is that the procedures be reasonably fair in the context of the nature of the decision and the*

facts which are relevant to it. The overriding requirement is that the person affected be given reasonable notice of matters which are of concern to the decision maker."

66. In the written submissions and in oral argument, reference was made to a number of previous cases in which it was found that there was a requirement for an oral hearing. Counsel emphasised the seriousness of an allegation of fraud and the seriousness of the consequences for the appellant of the decisions impugned but struggled – and ultimately failed – to identify the purpose of an oral hearing. It is clear on the authorities that an oral hearing will be required *"... in the event of a conflict on the facts or a personal credibility issue which can only fairly be resolved in this way"* – for example, *A.K.S. v. Minister for Justice* [2023] IEHC 1 – but in the instant case there was no conflict on the facts.

67. As Power J. put it in *Z.K. v. Minister for Justice* [2023] IECA 254:-

"The essence of the right to be heard in administrative decision-making involves providing a person concerned with a meaningful opportunity to take part on the process. It exists to ensure that decisions taken about an individual are made after having taken into account what that individual has to say and having weighed his or her account in the overall assessment. The natural and constitutional right to be heard does not mandate or require a right to an oral hearing in every case."

68. As counsel for the Minister submitted, this is a case, like *Z.K.*, in which the legal basis of the impugned decisions was clear and the procedural safeguards required by law were observed; the appellant was notified of the proposed decision, in writing, and in such a way as to have enabled him to comprehend its content and its implications; and the appellant could not but have known of the consequences that an adverse decision would entail. In that case, as in this, the appellant did not request an oral hearing and was unable to identify the evidence or matters which he would have raised at an oral hearing or interview but which he could not have addressed in writing.

Summary and conclusion

69. On 5th October, 2020 the appellant's application for a residence card was exposed by the Garda National Immigration Bureau as having been fraudulent. The appellant's fraud was not limited to the submission of a fraudulent employment contract. The appellant's admission that he had been using his brother's PPSN number for five years necessarily meant that the case which he had repeatedly made to the Minister was fraudulent and that much of the documentation submitted to prop up that lie was fraudulent.

70. The Minister was perfectly entitled to take the view that the entire application was tainted by fraud. The appellant was given due notice of the opinion formed by the Minister of the application and of the basis on which it had been formed. The appellant was afforded the opportunity to address the Minister's concerns but chose not to avail of it.

71. There was no challenge to the Minister's decision to revoke the appellant's residency status which had been procured by fraud.

72. The appellant's argument that the Minister's initial finding – that his brother was lawfully resident in Ireland and exercising his EU treaty rights – somehow survived her later finding that the application was fraudulent is untenable. For good measure, the proposition that the appellant's brother was exercising his EU treaty rights between June, 2015 and September, 2016 is irreconcilable with the appellant's admission that he, the appellant, was abusing his brother's PPSN from at least October, 2015.

73. I would dismiss the appeal and affirm the order of the High Court.

74. The Minister having been entirely successful in the appeal, it seems to me that she is entitled to an order for costs. If the appellant would contend for any other costs order, I would allow ten days from the date of delivery of this judgment for the filing and service of a short written submission – not exceeding 1,000 words – in which event the Minister will have the same time to file and serve a written submission in reply.

75. As this judgment is being delivered electronically Power and O'Moore JJ. have authorised me to say that they agree with it and with the orders proposed.