THE HIGH COURT

[2023] IEHC 500

Record No. 2021/723 JR

BETWEEN:-

MUHAMMAD NASIR YAQUB

APPLICANT

-AND-

THE MINISTER FOR JUSTICE

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on 15th day of August, 2023.

Introduction.

1. The applicant is a Pakistani citizen. He arrived in the State in 2015. In this application, he seeks an order of *certiorari* quashing a decision of the Minister made on 31st May 2021 pursuant to s. 3 of the Immigration Act 1999, as amended, (hereafter, "the 1999 Act"), proposing to deport the applicant from the State, and a further order quashing the decision of the Minister made on 27th May 2021, confirming an earlier decision of the Minister to revoke the residency card of the applicant. The date of 27th May 2021 is a matter in dispute between the parties, which is discussed later in the judgment.

2. While it will be necessary to set out the somewhat convoluted background facts in more detail later in the judgment, the key elements in the applicant's case can be stated as follows: the applicant accepts that he no longer enjoys EU Treaty Rights in the State. However, he claims that he was, at one point in time, exercising legitimate EU Treaty rights in the State, such that it is unlawful for the Minister to make a deportation order pursuant to s. 3 of the 1999 Act, but instead she must use the removal process as set out in Directive 2004/38/EC, known as the "Citizens Directive".

Background.

3. The applicant is 38 years old. Prior to his arrival in the State, he was living in the UK with his brother, Mr. Muhammad Qasir Naveed. His brother is a UK citizen.

4. The applicant arrived in the State on 30th June 2015. On 25th August 2015, the applicant applied to the Minister for a residence card on the basis that he was a "permitted family member" of an EU citizen, being his brother, who was exercising his EU Treaty Rights in the State. The basis for the applicant's application was that he was dependent on his brother and was a member of his brother's household in the UK.

5. In support of his application, the applicant submitted a large volume of documentation. This included: passports and birth certificates for both the applicant and Mr. Naveed; a family registration certificate; a TV license in respect of Mr. Naveed; a letter from E-Flow addressed to Mr. Naveed; several bank statements from Bank of Ireland addressed to Mr. Naveed; a letter from Vodafone addressed to the applicant; and a Business Name Certificate in respect of a business named Qasir Computer and IT Services, registered by Mr. Naveed.

6. On 26th April 2016, the solicitors then on record for the applicant, submitted further documentation in support of the application for a residence card, detailing the incorporation of another company by Mr. Naveed, called Gourmet Pizza Ltd. That documentation included: a Certificate of Incorporation of the company; the sub-lease agreement for premises from which Gourmet Pizza Ltd operated; evidence of Revenue Corporation Tax registration; invoices in respect of Gourmet Pizza Ltd; a letter from an accountant company in respect of Gourmet Pizza Ltd; and documentation from the Companies Registration Office.

7. That application was refused by the Minister on 2nd July 2016. In the refusal letter, the Minister accepted that Mr. Naveed was exercising his EU Treaty rights in the State in conformity with the regulations, but found that the applicant had submitted insufficient evidence to establish that he was a permitted family member of Mr. Naveed.

8. The applicant applied to the Minister to review that decision on 20th July 2016. On 13th July 2017, the Minister affirmed her decision to refuse the applicant a residence card. On the same date, the Minister wrote to the applicant, informing him that she proposed to deport him in accordance with s. 3 of the 1999 Act.

9. The applicant instituted judicial review proceedings against the Minister with respect to the 13th July 2017 decision, bearing record number 2017/ 786 JR; which proceedings were subsequently compromised. The applicant applied for a further review of the 2nd July 2016 decision of the Minister on 19th February 2020. In support of the second review application, the applicant again submitted a large volume of documentation. Included in that, was a contract of employment, bearing Mr. Naveed's details, concerning his employment in a Londis shop. This document was fraudulent, as conceded by Mr. Power SC on behalf of the applicant, in that it was not Mr. Naveed who was employed at the Londis shop, but rather, it was the applicant, who had been impersonating his brother. Several payslips, addressed to Mr. Naveed, but actually referencing work done by the applicant in the Londis shop, were also submitted to the Minister.

10. The second review application was successful. On 20th July 2020 the Minister granted the applicant permission to remain in the State on the basis that he was a permitted family member of his brother, who was a UK citizen exercising his EU treaty rights in the State. In that letter, the Minister noted that the initial application had been refused on the basis that the applicant had failed to submit sufficient evidence of his dependence on his brother, particularly prior to his arrival in the State. The review decision also noted that the Minister was satisfied that Mr. Naveed was exercising his EU treaty rights in the State on the basis of the contract of employment with Londis and the payslips provided (which were fraudulent in nature, in that it was the applicant working at the shop, rather than his brother).

11. On 21st September 2020, the applicant attended the Garda National Immigration Bureau (hereafter "GNIB") and spoke with Immigration Officers. He informed the officers that his brother was not in attendance at the GNIB, as he was feeling unwell. He also informed them of a trip that his brother had taken to the UK on 15th September 2020, from which he had returned on the evening of 15th September 2020. He then informed the Officers that his brother had attended work in the Londis shop on 16th – 19th September 2020, and further indicated that he had not self-isolated on his return from the UK, despite Public Health requirements dictating that such a course of action be taken.

12. The officers requested that the applicant provide the GNIB with a letter from his brother's employer, indicating that they were aware of Mr. Naveed's trip to the UK, and his failure to self-isolate upon return to work. The officers indicated that once this was provided, the applicant and his brother would be given a date after 29th September 2020, on which they should attend the GNIB together.

13. The applicant sent the GNIB the results of a Covid-19 test allegedly taken by Mr. Naveed on 24th September 2020, with the result being "not detected". The applicant then requested a date to complete the registration of his permission to remain. The GNIB responded on 28th September 2020, again requesting production of a letter from Mr. Naveed's employer, stating that they were aware of the situation.

14. On 29th September 2020, the applicant sent the GNIB a copy of a boarding pass for a flight from Luton to Dublin on 15th September 2020. On 2nd October 2020, officers from the GNIB replied to the applicant's letter, requesting that the applicant attend the GNIB on 9th October 2020 with his passport, his brother's passport, and the requested letter from his brother's employer.

15. On 5th October 2020, Gardaí from the GNIB attended the Londis shop at which it was alleged that Mr. Naveed worked. When approached by the Gardaí, the applicant initially gave his name as that of his brother, providing the Gardaí with a UK driving license, a PPSN card and a number of Bank Cards, in his brother's name.

16. When it was put to him by the Gardaí that he was using another person's identity, the applicant admitted his true name and date of birth. He admitted to having used his brother's PPSN for the previous five years. The applicant admitted that his brother was then living in the UK and was not exercising his EU treaty rights in the State.

17. The applicant was taken to Ronanstown Garda Station, where he was charged with two offences and was granted bail to appear before Blanchardstown District Court on 3rd November 2020. The applicant was convicted of two offences on 12th April 2021 before Blanchardstown District Court. He was fined €400.

18. On 8th December 2020, the Minister revoked the applicant's permission to remain in the State on the basis that the permission which had been granted to the applicant, had been obtained through fraud, in that the applicant knowingly submitted documentation which he knew to be false and misleading, so as to obtain a right of residence, which he would not have otherwise enjoyed. This notification indicated that the applicant's immigration permission was deemed never to have been valid.

19. On 22nd March 2021, the Minister wrote to the applicant indicating that it remained to be decided whether the applicant's case was one which fell within the parameters of the CJEU ruling in *Chenchooliah v. Minister for Justice and Equality* (Case C-94/18), such that the applicant could be the subject of a deportation order.

20. Solicitors on behalf of the applicant sent a large volume of emails to the EU treaty rights division of the Minister's department, indicating that they were of the view that the applicant's case was one which came within the provisions of the decision of the CJEU in *Chenchooliah*, and therefore the applicant was not a suitable subject for a deportation order, but should benefit from the removal process, as set out in the Citizens Directive. Those emails were dated; 24th March 2021, 12th April 2021, 12th May 2021, and 18th May 2021.

21. On 27th May 2021, the Minister wrote to the applicant indicating that she was of the view that the applicant's case was not one which could be brought within the remit of the *Chenchooliah* decision, and that therefore, the process provided for under s. 3 of the 1999 Act, was appropriate.

22. On 31st May 2021, the Minister issued a notification to the applicant indicating the Minister's intention to deport him from the State in accordance with s. 3 of the 1999 Act, on the basis that such an order was conducive to the common good. On 29th July 2021, the applicant was given leave to proceed by way of judicial review to seek an order of *certiorari* of the Minister's decision of 31st May 2021. The deportation process has been stayed pending the outcome of these proceedings.

Statutory Provisions.

23. Before coming to the legal submissions made on behalf of the parties, it will be helpful to set out the main statutory and other provisions that are of relevance to this application. Section 3 of the Immigration Act 1999, as amended, is in the following terms:

> *3.—(1) Subject to the provisions of [section 3A], and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.*

24. Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States (the Citizens Directive), provides as follows at Arts. 7, 15, 30, 31 and 35:

> ***Article 7***
>
> *All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
>
> *(a) are workers or self-employed persons in the host Member State; or*
>
> *(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
>
> *(c) - are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and*
>
> *- have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not*

to become a burden on the social assistance system of the host Member State during their period of residence; or

[…]

2.The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

[…]

Article 15

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.

3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

[…]

Article 30

1. The persons concerned shall be notified in writing of any decision taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them.

2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security.

3. The notification shall specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory shall be not less than one month from the date of notification.

Article 31

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.

2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:

— where the expulsion decision is based on a previous judicial decision; or

— where the persons concerned have had previous access to judicial review; or

— where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

[…]

Article 35

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.

25. The relevant provisions of Reg. 27 of S.I. No. 548/2015 - European Communities (Free Movement of Persons) Regulations 2015 are as follows:

(1) The Minister may revoke, refuse to make or refuse to grant, as the case may be, any of the following where he or she decides, in accordance with this Regulation, that the right,

entitlement or status, as the case may be, concerned is being claimed on the basis of fraud or abuse of rights:

[…]

(b) a residence card, a permanent residence certificate or permanent residence card;

[….]

(2) Where the Minister suspects, on reasonable grounds, that a right, entitlement or status of being treated as a permitted family member conferred by these Regulations is being claimed, or has been obtained, on the basis of fraud or abuse of rights, he or she shall be entitled to make such enquiries and to obtain such information as is reasonably necessary to investigate the matter.

Submissions on behalf of the Applicant.

26. On behalf of the applicant, Mr. Conor Power SC submitted that the applicant's case was one which came within the remit of the *Chenchooliah* decision of the CJEU; therefore, the Minister could not use the s. 3 deportation process to remove the applicant from the State. In that regard, he submitted that where an applicant has been a 'beneficiary' under the provisions of the Citizens Directive, it is unlawful for that applicant to be the subject of a deportation order. It was submitted that such an applicant was entitled to have his removal from the State, be conducted only in accordance with the provisions set down in Art. 15 of the Citizens Directive.

27. It was submitted that the key difference between the two processes, was that a deportation order creates an indefinite ban on entry into a territory; whereas, the removal procedure under the Citizens Directive, involved removal for a finite period, usually not more than 5 years. It was submitted that there was a significant difference between the processes, with the removal process being more favourable to the applicant. Furthermore, it was submitted that the Citizens Directive and the 2015 regulations, contained several safeguards with regard to the removal of an individual, who was once a 'beneficiary' under the Directive. It was submitted that this had been clearly established by the CJEU in *Chenchooliah v. Minister for Justice and Equality* (Case C-94/18).

28. It was submitted that the Minister had initially refused the applicant's application because the applicant had failed to provide sufficient evidence that he was a permitted family member of his brother, but she had accepted that his brother was legitimately exercising his EU treaty rights in the State by virtue of his company, Gourmet Pizza Ltd.

29. Notwithstanding the fact that the July 2020 decision to grant the applicant permission to remain in the State, did not contain any reference to Gourmet Pizza Ltd, it was submitted that the review decision was made with reference to the applicant's membership of his brother's household. It was submitted that at that time, it had already been accepted that the applicant's brother was legitimately exercising his EU treaty rights in the State as a self-employed person, as set out in the refusal letter of 2nd July 2016. It was submitted that the cumulative effect of the original decision and the review decision, was that the applicant had had a legitimate permission to remain, on the basis that he had been a member of his brother's household in the UK and that his brother was exercising legitimate EU treaty rights in the State. Initially, that exercise was owing to his brother's self-employment at Gourmet Pizza Ltd and then subsequently his "employment" with Londis. Therefore, it was submitted, that although the permission to remain during his time with Londis was granted on the basis of fraudulent information, which had been submitted by the applicant; the time during which his brother had been self-employed in the State, had been legitimate. It was submitted that the applicant had been, at one point, a 'beneficiary' within the meaning of the Citizens Directive.

30. In support of that assertion, counsel pointed to an affidavit sworn on 16th September 2022 by Mr. Naveed, in which he averred at para. 4 that he had worked in Ireland from around June 2015, to in or around August 2016.

31. It was submitted that it was not acceptable for the Minister to assert *ex post facto*, in the affidavit of Mr. Kevin Brady sworn on 6th January 2023, that the Revenue returns with respect to Gourmet Pizza Ltd were fraudulent, when that was not set out in the original proposal to revoke the permission. The Minister's decision to revoke the permission only referred to the fraudulent employment with Londis; therefore, it was submitted that the finding that the applicant's brother was never in the State, was unreasonable. The revocation letter must leave a window of roughly one year in duration, during which the applicant had legitimately exercised rights derived through the legitimate exercise by his brother of his EU treaty rights.

32. In light of those circumstances, Mr. Power SC submitted that the Minister had no lawful basis to revoke the applicant's treaty rights *ab initio,* and that the decision revoking his residence must be set aside on that basis.

33. It was further submitted that the Minister should have afforded the applicant an oral hearing, aside from his interview with the GNIB, in circumstances where the finding of fraud had such far-reaching consequences for the applicant's immigration status. In that regard, counsel

relied on *ZK v. Minister for Justice & Ors.* [2022] IEHC 278*; AKS v. Minister for Justice* [2023] IEHC 1; *Saneechur v. Minister for Justice* [2021] IEHC 356; and *RA v. Minister for Justice* [2022] IEHC 378.

34. With regard to the respondent's submission that the applicant was out of time to bring this application, the applicant submitted that the challenge herein was to the proposal to deport the applicant which issued on 31st May 2021 and to the decision to revoke the applicant's permission to remain, which was operative on 27th May 2021, when the respondent confirmed that the applicant did not come under the remit of the *Chenchooliah* decision.

35. In those circumstances, it was submitted that the applicant needed an extension of time of about 28 days, in order to bring this application within the statutory time limits. It was submitted that there was good and sufficient reason to grant that extension of time, particularly as the Minister had suffered no prejudice in the late commencement of proceedings and the applicant would be greatly prejudiced were time not extended.

Submissions on behalf of the Respondent.

36. On behalf of the respondent, Ms. Aoife McMahon BL submitted that the applicant had admitted at interview with the GNIB that he had submitted fraudulent documents for the previous 5 years, which would include those documents submitted in relation to Gourmet Pizza Ltd. Therefore, she submitted, the applicant had accepted that those documents were fraudulent in nature.

37. It was further submitted that the applicant's case could be distinguished from the facts of the *Chenchooliah* decision, which concerned an EU citizen, who had left the State; whereas, the applicant's case herein, was centred around an abuse of rights and fraud.

38. In reliance on art. 35 of the Citizens Directive, counsel submitted that the Minister retained discretion to terminate rights afforded to individuals under the Directive in the case of an abuse of rights or fraud. It was submitted that the applicant's case was one which fell within those parameters, rendering the Minister's decision lawful.

39. As a result of this, counsel submitted that the procedural safeguards set out in art. 15 of the Citizens Directive were not applicable. It was submitted that this was an art. 35 case, which was subject to the safeguards of arts. 31 and 32, and the decision in *Chenchooliah* did not prevent the Minister from deporting the applicant in circumstances of an abuse of rights and fraud. In support of that submission, counsel pointed to paras. 64 and 65 of the *Chenchooliah* decision, which referred to the restriction of rights under the Directive.

40. Counsel refuted the claim made by the applicant that the Minister had only claimed after the fact, that the documents relating to Gourmet Pizza Ltd were fraudulent, she noted that although the proposal to revoke did not reference the Gourmet Pizza Ltd documentation specifically, it was very broadly worded in that regard, setting out that the applicant had submitted false and misleading documentation in his "applications", which applications included the Gourmet Pizza Ltd documentation.

41. With regard to the submission that the applicant should have been given an oral hearing, counsel pointed out that the applicant had had an interview with the GNIB, which was sufficient for the purposes of a fair hearing and ensuring the applicant had an opportunity to orally address the concerns that he had committed the fraud. Counsel relied on *SK v. Minister for Justice* [2022] IEHC 59 and *H v. Minister for Justice* [2022] IEHC 721, in that regard.

42. In relation to the application for an extension of time, counsel submitted that the applicant had failed to outline the reasons why it was appropriate for the court to exercise its discretion to extend the statutory time limit for the bringing of this application. Notwithstanding that the delay was not the fault of the applicant himself, it was submitted that he is bound by the actions of his agent and therefore the application is out of time, relying on *GK. v. IPAT* [2022] IEHC 204 in that regard.

43. Counsel submitted that the delay in challenging the revocation decision was significantly longer than 28 days, in circumstances where that decision had issued on 8th December 2020, as opposed to 27th May 2021, as submitted by the applicant. It was submitted that when the court had regard to the extent of the delay and the applicant's failure to provide reasons for that delay, the court should not exercise its discretion to extend time in this case.

44. On the basis of the foregoing, counsel submitted that the court should refuse the reliefs as sought by the applicant.

Conclusions.

45. The first issue which the court must decide, is whether the applicant is out of time to bring these judicial review proceedings in which he seeks to challenge the decision to revoke his EU fam residence permission, which he maintains was made on 27th May 2021 and the decision to deport him which was made on 31st May 2021.

46. The applicant submits that he is not out of time to challenge the revocation decision. The respondent disagrees and maintains that the applicant requires an extension of time to challenge

the revocation decision, because that decision was effectively taken on 8th December 2020, with the subsequent decision of 27th May 2021, being merely an affirmation of the earlier decision.

47. The court is satisfied that having regard to the content of the email correspondence that was exchanged following the initial revocation decision of 8th December 2020, and in particular, having regard to the fact that the Minister had indicated therein that she was considering whether the *Chenchooliah* decision was applicable in the circumstances, it was reasonable, and indeed probably necessary, for the applicant to await the Minister's decision on that aspect, before instituting his judicial review proceedings; because, if the Minister had conceded that the *Chenchooliah* decision applied to the applicant's case, there would have been no need for him to have instituted any legal proceedings. It was only when that decision was adverse to the applicant's contention, that the necessity arose for him to institute the within proceedings. Accordingly, I hold that the effective decision which he is challenging is the revocation decision of 27th May 2021. In these circumstances, he is not out of time to challenge that decision.

48. The applicant accepts that given the limitation period that applies in respect of the decision under s. 3 of the 1999 Act, he requires an extension of time in these proceedings of 28 days. The delay in that regard has been explained in the affidavit sworn by the applicant's solicitor, who has stated that when he sent the papers with instructions to counsel, there was a delay on the part of counsel in returning the draft papers. The court accepts that explanation for how the delay occurred. The court is satisfied that in all the circumstances of the case, in particular, having regard to the fact that the applicant is within time to challenge the revocation decision, it is appropriate to extend the time to enable him to challenge the deportation decision as well.

49. Turning to the central argument in this case, which is to the effect that the Minister can only make the decision and order to remove the applicant from the State, where that decision is made pursuant to the Directive. Relying on the decision in the *Chenchooliah* case, the applicant submits that because he was a beneficiary of rights under the Directive, while his brother was resident in the State in the period June 2015 to August 2016, that was sufficient to afford him the procedural protections that are provided for under the Directive, and in particular, under art. 15 thereof.

50. In this regard, the applicant relies on the following dicta from the judgment in the *Chenchooliah* case at paragraph 73:

> "*According to the very wording of Article 15 of Directive 2004/38, and on pain of depriving that provision of a large part of its substance and practical effect, the scope of Article 15*

must extend to an expulsion decision made, as in the main proceedings, on grounds wholly unrelated to any danger to public policy, public safety or public health but which are connected to the fact that a family member of a Union citizen who, in the past, enjoyed a temporary right of residence under Directive 2004/38 deriving from the exercise by the Union citizen of his right to freedom of movement, now no longer has such a right of residence following the departure of that citizen from the host Member State and his return to the Member State of which he is a national."

51. The applicant relies on the fact that in the initial decision which refused him a residence card, which decision was taken in July 2016, the Minister reached that decision on the basis that the applicant had not established that he was a member of his brother's household in the UK, prior to his departure for Ireland. The applicant points out that it was accepted by the Minister in that decision, that his brother had come to Ireland in exercise of his EU treaty rights and that he was exercising his right to carry on self-employed work within the State. The applicant submits that that finding by the Minister was never revoked, or even questioned, until the Minister made her decision to revoke the applicant's permission to remain in the state on 8 December 2020.

52. The applicant accepts that he was engaged in a fraudulent activity from in or about August 2016 onwards, when his brother left the State; at which time, the applicant assumed his identity and continued to reside and work in the State under that false identity. However, the applicant asserts that for the period June 2015 to August 2016, he was the lawful beneficiary of derived rights, due to the fact that his brother was lawfully resident in the State and exercising his EU treaty rights therein. The applicant asserts that that is sufficient to bring him within the parameters of the *Chenchooliah* decision, which means that the provisions of art. 15 of the Directive apply; in particular, the provisions of art. 15.3 apply, which prevent the Minister from making a deportation order, which would involve an outright ban on his entry into the State in the future.

53. The court does not regard this argument as being well-founded for a number of reasons. First, the decision that was reached by the Minister on 8th December 2020, was a decision to revoke the applicant's permission to be in the State, which permission had been granted by virtue of the Minister's review decision of 20th July 2020.

54. When one looks at the background to that decision, it arose out of the previous judicial review proceedings that had been brought by the applicant in respect of an earlier review decision of 13th July 2017, which had affirmed the earlier decision of July 2016, refusing the applicant's

original application for permission to remain in the State based on the exercise by his brother of his EU treaty rights.

55. As part of the settlement of the first judicial review proceedings, it was agreed that the applicant could make further submissions and that a new review decision would be made. The applicant exercised his right to make further submissions by way of extensive written submissions that were furnished on his behalf by his former solicitor. Those submissions were made on 4th February 2020. They contained numerous lies. In the background section of the submissions, it was stated: "*They were members of the same household and residing together in the UK. They continue to be a member of that household and reside together in Ireland*."; and "*The applicant continues to reside with his brother, the EU citizen, and continues to be supported by him*". Later in those submissions, under the heading 'Additional Supporting Documents', it was stated: "*Documents provided with the submissions show continued shared residency, dependency and continued financial support*". Under the heading 'Grounds of Review', it was stated: "*The applicant provided a further 16 documents confirming this close relationship continues in Ireland*"; and "*The applicant was a member of the EU citizen's household for 8 years prior to entering this State and continues to be dependent on and a member of the household in Ireland and it is on that basis the applicant applied for a residence card*"; and "*The applicant and his brother, the EU citizen, were and continue to reside at the same address and are members of the same household*." These statements were all false, because the applicant's brother had left the State in August 2016, over three years prior to the making of those statements.

56. Those submissions and the documentation that was furnished with them, brought about a successful result from the applicant's point of view. On 20th July 2020, he was successful in obtaining permission to remain in the State, based on his brother allegedly exercising his EU treaty rights to reside and work in the State at that time. It was not until 5th October 2020, that the applicant's lies caught up with him. When he was interviewed by members of the GNIB on that date, he admitted that he had secured employment under the assumed identity of his brother and had been using his brothers PPSN for the previous five years.

57. In light of those developments, the Minister wrote to the applicant on 12th October 2020, notifying him of the Minister's intention to revoke the permission that had issued to him in July 2020. The applicant was given an opportunity to make submissions in that regard. He did not make any submissions.

58. On 8th December 2020, the Minister made a decision to revoke the applicant's permission to remain in the State. In her letter notifying the applicant of her decision, the Minister set out in considerable detail the background to the case and the facts that demonstrated why the documents he had provided as evidence of his brother's residence and exercise of rights within the State, were false and misleading. The letter pointed out that examination of documentation from Companies House in the UK, showed that the applicant's brother was residing in that country, where he operated his business 'Green Star IT Solutions Ltd' and was recorded as being employed as an IT technical support specialist with 'Syneos Health'. The letter went on to note that the Minister had outlined her concerns in her letter dated 12th October 2020, but the applicant had failed to make any representations, or submit any documentation, to allay those concerns.

59. Based on a consideration of the file and taking into consideration all documentation and information that was available, the applicant was informed that the Minister had reached the following conclusion:

> *"Based on the above information, the Minister is satisfied that the documentation you provided in support of your application to evidence the residence of you and your family member in this State is false and misleading as to a material fact. The Minister is also satisfied that the documentation you provided to evidence the exercise of rights by your family member in this State are also false and misleading as to a material fact. You knowingly submitted this documentation 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 abuse of rights or fraud, such as marriage of convenience". 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 4 EU fam) granted to you on 20/07/2020 was obtained through your fraud, that immigration permission is deemed never to have been valid.*
>
> *Therefore, the permission to remain which was granted under the provisions of the European Communities (Free Movement of Persons) Regulations 2015 has now been revoked for the reasons stated above."*

60. The court is satisfied that, having regard to the numerous false statements that were made in the submissions that were made on behalf of the applicant on 2nd February 2020, and having regard to the documentation that was submitted to prop up those falsehoods, the Minister was entitled to hold that the permission that had issued as a result of the decision on 20th July 2020, had been procured by fraud.

61. In these circumstances, the Minister was entitled to proceed under the provisions of art. 35 of the Directive, rather than under the provisions of art. 15 of the Directive. That is the essential difference between this case and the circumstances in the *Chenchooliah* case, where it was accepted by all concerned that the EU national had been in the State and had contracted a valid marriage to the applicant and had been exercising his right to work in the State for a period, prior to his departure for Portugal. There was no question of fraud in that case. In *Chenchooliah*, the CJEU recognised that the member state could proceed under art. 35, independently of the requirements of art. 15; see paras. 64 and 65 of the judgment.

62. The essential point is that a decision to revoke a permission, can only go back as far as the decision to grant the permission in the first place. This is because it is the initial permission to be in the State, which was being revoked. In the circumstances of this case, where the permission to remain, which had issued on 20th July 2020, had been procured on a completely fraudulent basis, to the effect that the applicant's brother remained in the State at the time of that review decision and was exercising his EU treaty rights to work in the State, and that as a result thereof, the applicant had a legitimate claim to derived rights to be in the State, he being a member of his brother's household; it was entirely logical and reasonable for the Minister to revoke that decision, once it had come to light that it had been procured by fraud on the part of the applicant.

63. It is also noteworthy that in the decision to revoke the permission of 8th December 2020, the applicant was given the right to seek a review of that decision, if he felt that it was incorrect in law or in fact. He did not seek any review of that decision.

64. In *MA (Pakistan) v. Minister for Justice* [2018] IEHC 95, the court was considering whether the applicant had entered into a marriage of convenience, and whether the Minister had acted appropriately in determining that he had. In the course of his judgment, Humphreys J. ruled that the *Chenchooliah* decision did not deal with marriages of convenience and was not therefore determinative of any issues that arose before him. He held that in the case before him, they were dealing with an absolute abuse of law and legal rights. He held that an applicant was not entitled

to a removal order where EU law "rights" had been procured by abuse and fraud and had been withdrawn. He stated as follows at paragraph 66:

> "*It seems to me the Igunma doctrine does not apply. Here we have an absolute abuse of law and legal rights. An applicant is not entitled to a removal order where the EU law "rights" are procured by abuse and fraud and have been withdrawn. In such a case it is lawful for the Minister to make a deportation order. I therefore would uphold the plea at para. 13 of the statement of opposition that it is open to the Minister to terminate or withdraw the right under art. 35 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, at least in such circumstances and where the Minister has so terminated or withdrawn the right, it is open to the Minister to make a deportation order.*"

65. The court is satisfied that the submissions made by Ms. McMahon BL, to the effect that in this case the provisions of art. 35 of the Directive, were engaged, rather than the provisions of art. 15 thereof, are supported by the decision in the *MA (Pakistan)* case. This court is of the same view. Accordingly, I hold that in the circumstances of this case the decision in the *Chenchooliah* case is not applicable. The Minister was entitled to revoke the permission in the way that she did and was entitled to proceed to make a decision to deport the applicant under the provisions of the 1999 Act.

66. The second line of argument raised by the applicant as to why the decisions of 27th May 2021 and 31st May 2021, should be set aside, was that the applicant had not been afforded an interview prior to making those decisions. The applicant submitted that the decision in *ZK v. Minister for Justice* [2022] IEHC 278, was supportive of his entitlement to an oral hearing, or interview, prior to the making of a decision which would have very serious consequences for him, and which decision would involve an attack on his credibility.

67. In that case, Phelan J. was satisfied that fair procedures required an opportunity for the applicant and his EU national spouse to be assessed as to the plausibility of their account and the genuineness of their marriage, through the process of a face-to-face meeting or hearing. However, the judge had noted earlier in her judgment that the right to a fair decision-making process, did not always mandate the holding of an oral hearing or interview. She stated as follows at paragraphs 59 and 60:

"*59. The right to a fair decision-making process mandates that the parties concerned should receive a statement of the claims and/or objections raised and be given the opportunity to respond and make views known on the truth and relevance of the facts and documents used. As the Supreme Court found in Ezeani v. Minister for Justice, Equality and Law Reform & Ors [2011] IESC 23, (at para. 45):*

> *"The rules of natural justice require the decision maker to give reasonable notice to the affected person of the substance of any matters being raised which are adverse to his interest. It is not necessary that the entire of every detail of the case against him be notified. The test is whether he has a fair opportunity to prepare himself and to respond".*

60. It is clear that it is not always necessary to have an oral stage to the decision-making process to secure the right to fairness. It is also common case in these proceedings that neither the Directive nor the Regulations require an oral hearing in all cases. In issue is whether or not an oral hearing was required in this case where the decision of the First Named Respondent turned on the credibility of the Applicant."

68. What was at issue in that case, was whether the applicant's marriage to an EU citizen, was a genuine marriage, or was one of convenience. Phelan J. stated as follows para 73:

"*In my view the import of the First Named Respondent's decision for the Applicant is such that he is entitled to a wide panoply of procedural protections because he has been accused of serious misconduct. The need for such protection arises given the life-changing nature of the First Named Respondent's findings which will in all likelihood lead to the removal of the Applicant from the State (see S v. Minister for Justice [2020] IESC 48 at para. 111) notwithstanding his marriage to an EU citizen who is living and working in the State and both his derived right and her rights, albeit not unconditional, as a matter of EU and Irish law to reside in the State with her spouse.*"

69. It has been stated on many occasions, 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. As to whether an oral hearing must always be held, Costello P. stated as follows in *Galvin v. Chief Appeals Officer* [1997] 3 IR 240 at p. 251:

"*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."

70. In *Ezeani v. Minister for Justice, Equality and Law Reform* [2011] IESC 23, Fennelly J. summarised the issue in a broad sense as follows:

"*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*."

71. In the *Z.K*. case, it was held that in the circumstances of that case, an oral hearing, or interview was required. However, in the subsequent cases of *H v. Minister for Justice* [2022] IEHC 721*; SK and JK v. Minister for Justice* [2022] IEHC 591; *and SSA v. Minister for Justice* [2023] IEHC 32; it was held that in the circumstances of those cases, an oral hearing, or interview was not required.

72. The court does not see that there is any inherent tension between the decision in *Z.K.* and the decisions in the subsequent three cases, where it was held that fair procedures did not require the holding of an oral hearing, or an interview. As I understand these decisions, they do not differ on a conceptual or theoretical basis as to the possibility of holding an oral hearing or interview in appropriate cases; they departed, in that in the factual scenarios presented in each of the cases, it was held that in three of the cases, an oral hearing or interview was not necessary, in order for the process involved in each case, to adhere to the requirements of fair procedures.

73. What is clear, is that in order for an applicant to be in a position to argue that an oral hearing, or interview, was necessary; he must have engaged with the concerns of the Minister on the facts as they appeared at that time and the applicant must set out a basis for arguing that it was necessary to have an oral hearing or interview, in order to properly decide the issues being determined in the decision.

74. Looking at the circumstances of this case, I am satisfied that it was not incumbent on the Minister to hold an oral hearing, or interview with the applicant prior to reaching the decision to revoke his permission to be in the State, or to make the consequential decision that he should be deported from it. I have reached that decision for a number of reasons: first, the finding that the applicant had submitted a fraudulent application leading to the grant of a permission to remain in the State, which issued on 20th July 2020, was not contested by the applicant. The finding that he

had acted in a fraudulent manner, was based on his own admissions in that regard, made to the GNIB on 5th October 2020. The applicant has admitted in the current proceedings that he did act in a fraudulent manner by assuming the identity of his brother after his departure from the State in August 2016. He stated that very candidly in his second affidavit sworn in these proceedings.

75. Secondly, when the applicant was given the opportunity to make submissions when notified of the Minister's intention to revoke the permission, as set out in her letter of 12th October 2020, the applicant did not make any representations, or submissions in relation to the concerns that the Minister had.

76. Thirdly, when the Minister had made the decision on 8th December 2020, to revoke the permission on the basis that it had been procured by means of fraud and the submission of false and misleading documentation, the applicant had been given the opportunity to seek a review of that decision; he did not seek any such review. Fourthly, the applicant never requested, at any stage of the process, that he be given an opportunity to present oral evidence, either on his own behalf, or through other witnesses. Nor has he ever indicated that there was particular evidence which could only be led by means of an oral hearing, or interview.

77. Fifthly, it is noteworthy that the applicant did in fact have an interview, which was with members of the GNIB on 5th October 2020. Taking all of these matters into account, the court is satisfied that the absence of any oral hearing or interview in advance of the decision to revoke the permission, or the decision to deport the applicant, does not constitute a breach of fair procedures.

78. Finally, the applicant laid great stress at the hearing of this application on the fact that it was not made clear to him in advance of the decision of 8th December 2020, that the Minister had concerns that his brother had never resided in the State at all. The court does not regard this submission as being well founded. The Minister's letter of 12th October 2020 made it very clear that the Minister had concerns about the entirety of the applicant's story. It referred to his admission to GNIB that he had been using his brother's PPSN for the previous five years. That meant that had admitted impersonating his brother since in or around October 2015. The court is satisfied that when read as a whole, the letter made it clear that the applicant's entire application was a cause of concern to the Minister.

79. It is also important to note that that letter invited the applicant to make any representations that he wanted, within a period of 21 days. He could have made the case that his brother had been in the State initially and had been exercising his EU treaty rights, and that the applicant had only commenced impersonating him at some later date; but he chose not to do so.

80. Even when the decision to revoke was made on 8th December 2020, he could have called for a review of it and taken the opportunity to put forward whatever factual case he wished to make; but again, he chose not to do so.

81. Even if it were the case that the applicant did not realise that the Minister had concerns about the entirety of his application, that does not appear to the court to be of any relevance. This is due to the fact that the decision, which was made on 8th December 2020, was to revoke the decision to grant the applicant a permission to be in the State, which decision had been made on 20th July 2020. That had been based on an assertion that the applicant and his brother were both residing in the State at that time in 2020 and that his brother was exercising his EU treaty rights to work in the State at that time. All of that was false, because the applicant's brother had left the State in August 2016.

82. In these circumstances the Minister was perfectly entitled to revoke the permission that had issued in July 2020. She was entitled to hold that the applicant's entire story was a fabrication and that his brother had never exercised his EU treaty rights in the State. The fact that she made a finding that the applicant's brother had never resided in the State and had never exercised his EU treaty rights to work in the State, was neither here nor there, in the context of the permission that was revoked, being the permission that was granted on 20th July 2020, which was undoubtedly based in large part on the false submissions made by the applicant on 4th February 2020.

83. For the reasons set out in this judgment, the court refuses all the reliefs sought by the applicant in his notice of motion herein.

84. As this judgment is being delivered electronically, the parties shall have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

85. The matter will be listed for mention at 10.30 hours on 13th October 2023 for the purpose of making final orders.