Federal Court  Cour fédérale

**Date: 20220711**

**Docket: IMM-6371-20**
**IMM-4946-20**

**Citation: 2022 FC 1014**

**Toronto, Ontario, July 11, 2021**

**PRESENT: Justice Andrew D. Little**

**BETWEEN:**

**ZDENO SARISSKY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**AND BETWEEN:**

**ZDENO SARISSKY**
**(by his litigation guardian Gloria Nafziger)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] These reasons concern two applications for judicial review of decisions made by the same Senior Immigration Officer.

[2] The first decision was a pre-removal risk assessment ("PRRA") decision dated January 7, 2020, made under sections 112-113 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*), which was communicated to the applicant in September 2020. It is the subject of the application in IMM-4946-20.

[3] The second decision under review responded to the applicant's requests to re-open and reconsider the officer's PRRA decision. It is the subject of IMM-6371-20. The officer's reconsideration decision was contained in two letters dated November 2, 2020 and November 17, 2020. The officer also added an addendum dated November 26, 2020, to the letter dated November 17, 2020.

[4] For the reasons below, the applications will be allowed.

## I. Facts and Events Leading to this Application

[5] The applicant is a citizen of the Slovac Republic. He is of Roma ethnicity. He arrived in Canada on October 31, 2012 and made a claim for refugee protection.

[6] The applicant's claim was not heard until six years after he filed the *IRPA* protection claim. His hearing started in August 2018 and was eventually conducted in November 2018.

[7] The applicant's claim was that he suffered discrimination, harassment, threats and physical violence in Slovakia due to being Roma. He claimed that in 2005, neo-Nazis attacked him with baseball bats and rendered him unconscious. He stated that this attack affected his memory of dates and events. He also claimed that neo-Nazis had conducted targeted attacks on a settlement close to his home.

[8] By decision dated December 6, 2018, the Refugee Protection Division ("RPD") refused his claim on the basis of lack of credibility. The RPD accepted that the applicant was Roma. However, the RPD found that the applicant's testimony was inconsistent. He could not remember many of the dates and details of the specific incidents of persecution (including the 2005 attack) set out in his Personal Information Form dated November 15, 2012, to support his claim of persecution. The RPD also found that the applicant did not corroborate his claim and that his credibility suffered due to criminal conduct. The RPD accepted the objective evidence that some Roma faced discrimination that amounted to persecution in Slovakia but due to the credibility findings, the panel found no link between the applicant's circumstances and the country conditions.

[9] Because his claim was originally filed before legislative amendments in late 2012, the applicant had no right to appeal to the Refugee Appeal Division. He did not apply for leave and judicial review of the RPD decision.

[10] On April 15, 2019, the applicant was served with a PRRA application. He filed it on May 15, 2019, with a cover letter from his newly-retained legal counsel (Refugee Law Office, Toronto) and an affidavit in support. In the cover letter, the applicant advised that he was in the process of obtaining further documents to support his PRRA application. He also advised that he

was meeting with a psychiatrist on May 24, 2019. He therefore requested that Immigration, Refugees and Citizenship Canada ("IRCC") refrain from rendering a decision on his PRRA application until "this important new personal and medical information" was submitted and that IRCC provide him with 30 days' notice before making a decision so that he might update the application.

[11] IRCC did not respond to the applicant's requests. The officer rendered the PRRA decision with written reasons dated January 7, 2020.

[12] In the PRRA decision, the officer found that the applicant had had ample time (more than seven months) to provide submissions to be assessed in his application.

[13] On the merits of the PRRA application, the officer found that the risks cited by the applicant were "essentially the same as those heard and assessed by the panel of the RPD. The credibility of the applicant was impugned by the panel; he has simply restated his case and he has not addressed this issue." The officer found that any medical or mental health issues the applicant may be experiencing, in and of themselves, did not constitute a forward-looking risk to bring him within the definition of a person in need of protection under section 97 of the *IRPA*. The officer found that certain country condition documents described the "general country conditions in Slovakia, and the applicant [had] not linked this evidence to his personalized forward-looking risk in that country." The officer further found that the applicant had not provided objective documentary evidence to support that his profile in Slovakia was similar to those persons who would currently be at risk of persecution or harm. The officer found that the documents related to conditions faced by the general population, or described specific events or conditions faced by persons not similarly situated to the applicant. The officer found that the

applicant has not provided evidence to rebut the determination of the RPD that he had failed to establish that he faced discrimination or other harm in Slovakia or that his personal circumstances linked him to the country evidence on the risk facing some Roma in Slovakia.

[14] Overall, the officer's decision concluded that there was "less than a mere possibility that the applicant faces persecution as described in section 96 of the *IRPA* should he return to Slovakia". The officer also concluded there were no substantial grounds to believe he faced a danger of one of the concerns described in section 97.

[15] In September 2020, IRCC communicated the negative PRRA decision dated January 7, 2020, to the applicant's counsel.

[16] By this time, the applicant had lost touch with legal counsel as he forgot their name and contact information. He became homeless. He was also incarcerated for a period of time. He ended up in immigration detention.

[17] Fortunately for the applicant, his legal counsel noticed that he was there and contacted him. Counsel arranged for a psychiatric assessment, which occurred on October 15, 2020. At that time, the applicant remained in immigration detention and no videoconference service was available, so the assessment had to occur by telephone. A written report followed on October 19, 2020.

[18] By letter dated October 20, 2020, the applicant requested that the officer reopen and reconsider the PRRA decision in light of the new psychiatric evidence and comprehensive objective evidence concerning current country conditions that postdated the officer's PRRA

decision. This correspondence also sought to explain the circumstances for the applicant's failure to present psychiatric or medical evidence at an earlier date (i.e., at the RPD hearing and also in May 2019 when his PRRA application was filed).

[19] On November 2, 2020, the officer decided not to reconsider the PRRA application. However, a letter to that effect was not immediately communicated to the applicant or his counsel.

[20] Also on November 2, 2020, the Immigration Division of the Immigration and Refugee Board (the "IRB") appointed a designated representative to represent the applicant in the context of his detention review hearings.

[21] Soon after, the applicant submitted additional materials in support of the request to reopen and reconsider. The following events are material:

- On November 6, 2020, the applicant submitted an affidavit from the applicant's designated representative appointed by the Immigration Division on November 2, 2020.
- By letter dated November 10, 2020, the applicant sent additional medical evidence from a physician who has examined him and determined that he had scars at the neck and posterior thorax consistent with his history of traumatic lacerations, and had an overbite of his jaw consistent with previous trauma to the jaw. The applicant submitted that these injuries were sustained in the assault that occurred in March 2005. (This medical examination occurred immediately after the applicant's release from immigration detention on November 9, 2020.)

- On November 23, 2020, counsel at the Department of Justice advised the applicant's counsel about the November 2, 2020 decision on the applicant's request for reconsideration.
- By letter dated November 24, 2020, the applicant filed further submissions that confirmed that the November 2 decision had not been received by the applicant or his counsel. The submissions summarized the evidence filed before the applicant and his counsel became aware of the decision. The applicant asked that the officer reconsider and revisit the November 2 decision or render a new decision in light of the compelling new evidence.

[22] By the time the applicant filed the letter dated November 24, 2020, the officer had already written a further letter dated November 17, 2020, which addressed the filings on November 6 and November 10, 2020. The officer decided not to reconsider the application and therefore the initial decision to refuse the PRRA application remained unchanged.

[23] The officer added a short addendum dated November 26, 2020, confirming that no further action was required as the applicant's submissions only addressed matters already considered in the letter dated November 17, 2020.

[24] As may be seen from one of the styles of cause in the two applications before this Court, the applicant is now represented by a litigation guardian.

[25] In this Court, the applicant raised concerns about procedural fairness and argued that both the officer's PRRA decision and the reconsideration decision were unreasonable, applying the

principles described in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

## II. Standards of Review – General Principles

[26] There is no dispute about the applicable standards of review. The parties agree that the standard of review for procedural fairness is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 ["*CPR*"], esp. at paras 49 and 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, at para 35. The Court's review involves no margin of appreciation or deference. The question is whether the procedure was fair having regard to all of the circumstances, focusing on the nature of the substantive rights involved and the consequences for the individual(s) affected: *CPR*, at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[27] With respect to the officer's PRRA decision and the decision to reconsider, the standard of review is reasonableness, as described in *Vavilov*. In conducting a reasonableness review of a substantive decision, the court determines whether the decision as a whole is transparent, intelligible and justified: *Vavilov*, at para 15. A reasonable decision is one that is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, at paras 85 and 99. The reviewing court reads the reasons holistically and contextually, and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 91-96, 97, and 103; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67, at para 31.

[28] The Supreme Court has identified two types of fundamental flaws in an administrative decision: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it: *Vavilov*, at paragraph 101. To intervene, the reviewing court must be satisfied that any flaws or shortcomings are sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100.

[29] A reviewing court may not re-weigh or reassess the evidence, but a decision may be jeopardized if the decision maker fundamentally misapprehended or failed to account for material evidence: *Vavilov*, at paras 125-126.

## III. Analysis

[30] At the hearing in this Court, the applicant focused on the reconsideration decision. For the original PRRA decision, the applicant relied on his written submissions that he was denied procedural fairness because the officer did not respond to his request in mid-May 2019 not to make the PRRA decision until he had filed additional psychiatric evidence after his scheduled appointment on May 24, 2019 and additional country condition evidence. The applicant also relied on his written submissions with respect to the alleged substantive unreasonableness of the PRRA decision.

[31] The applicant identified four concerns to justify his submission that the reconsideration decision should be set aside. In essence, the applicant's position was that the new psychiatric evidence, medical evidence and the affidavit from the designated representative all demonstrated

that the applicant has very significant memory and possibly cognitive issues that were not known to the officer at the time of the PRRA decision. Those difficulties undermined the officer's reliance on the RPD's determination that the applicant was not credible owing to his inconsistent testimony at the RPD hearing and inability to support his claim with accurate descriptions of events in the past. The new medical evidence provided corroboration of the applicant's description of the attacks he suffered in March 2005. The designated representative's affidavit showed that the applicant has demonstrable problems, considering both the appointment of the designated representative by the IRB and the content of the affidavit (which described the designated representative's interactions with the applicant). In this Court, therefore, the applicant submitted that the officer's reconsideration decision ignored or did not appreciate the importance of the new evidence.

[32] The respondent submitted that the RPD's credibility findings were not based simply on the applicant's issues with memory inconsistency and inability to testify about the sequence of events in the past. The respondent noted the absence of corroborating evidence and the applicant's criminal history in both Slovakia and in Canada.

[33] The respondent conceded that IRCC should have sent a letter in response to the request in May 2019 to refrain from a decision pending the filing of additional evidence and to provide him with 30 days' notice before making a decision. However, the respondent submitted that the applicant's concerns about the procedural fairness were moot, because the officer had considered the later-filed psychiatric report dated October 19, 2020, in the reconsideration decision. In essence, the respondent submitted that there was no need to set aside the PRRA decision because

if the Court finds the reconsideration decision to be unreasonable owing to a failure to properly consider the evidence filed on reconsideration, then the PRRA would have to be redone -- yielding the same practical outcome for the applicant. The respondent also submitted that it was not unreasonable to find that the applicant had ample time to file before the PRRA decision was made on January 7, 2020.

[34] The applicant submitted that the psychiatric report dated October 19, 2020, was crucial evidence and the officer's reconsideration decision hinged on it. The respondent submitted that the officer did not ignore the psychiatric report. It was addressed in the officer's letter dated November 2, 2020. The respondent effectively acknowledged that the officer's initial analysis, on its own, would have rendered the reconsideration decision unreasonable. However, the respondent submitted that the officer went on to assess the psychiatric report on its merits.

[35] With respect to that assessment, the officer recognized that the psychiatrist found that the applicant's history, symptoms and presentation during an interview were consistent with severe and chronic Post Traumatic Stress Disorder and severe and chronic Major Depressive Disorder. In addition, the psychiatrist was of the view that the applicant required a neurological workup to rule out a traumatic brain injury. The psychiatrist was of the opinion that these issues were profound and undermined the applicant's ability to testify during the refugee claim hearing in a coherent manner.

[36] The officer gave "little weight" to the psychiatrist's conclusions that any mental health issues the applicant was experiencing negatively affected his refugee claim testimony. In a

paragraph that is important to the outcome of this application, the officer offered the following reasons:

- the psychiatrist's assessment was based on a single interview, rather than an ongoing therapeutic relationship;
- there was no reference to any further assessments or sessions with the psychiatrist or evidence that the applicant has sought or continued any formal mental health treatment or counselling after the single session;
- no evidence had been adduced to demonstrate that the applicant was under formal medical treatment for mental health issues;
- the applicant was referred to the psychiatrist by his legal counsel in reference to immigration matters and not by a licensed health professional;
- there was no evidence that he sought medical treatment with respect to any medical issues; and
- there was no evidence that the applicant was seeking treatment to improve his condition.

[37] The applicant challenged the officer's reasoning in this critical paragraph. The applicant submitted that the officer's reasoning disclosed a reviewable error by requiring that the applicant showed not only a diagnosis of mental health issues, but ongoing treatment. The applicant disagreed with the respondent's position that the officer could properly discount the mental health issues on the basis that the psychiatric assessment was based on a single interview and self-reported symptoms. The applicant relied on the Supreme Court's decision in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909, at paras 46-49.

[38] The respondent conceded the officer erred in law by failing to follow *Kanthasamy* by requiring evidence of ongoing treatment at the end of the key paragraph. However, the respondent maintained that the balance of the paragraph reasonably supported the conclusion and the error did not render the officer's reconsideration decision unreasonable.

[39] I agree with the parties that, on the basis of *Kanthasamy*, the officer's reasons erred in law in the assessment of the psychiatric evidence on the reconsideration decision.

[40] I disagree with the respondent that the rest of the officer's analysis in that paragraph was sound and therefore reasonable within the meaning of *Vavilov*.

[41] First, the respondent's position implied that the officer only made one reference to the absence of evidence that the applicant was continuing in treatment for his mental health issues. In fact, this point is made several times in different ways in that paragraph. In my view, the statements related to this issue were fundamental to the officer's assessment of the psychiatric evidence and were legally flawed based on *Kanthasamy*. In that case, the Supreme Court held that once the officer accepted a psychological diagnosis, "further requiring evidence of treatment … undermined the diagnosis", and had the "problematic effect of making it a conditional instead of a significant factor" in the H&C assessment: *Kanthasamy*, at para 47.

[42] In addition, in considering what the applicant had or had not done for his mental health since his psychiatric assessment, the officer's reasons did not account for or address the applicant's individual circumstances, including the fact that the applicant was in immigration

detention. His psychiatric assessment and diagnosis occurred on October 15, 2020, the resulting report was dated October 19 and the officer assessed it on November 2, all while the applicant remained in immigration detention. Given the reasoning in *Kanthasamy*, it is unclear to me how the officer's reasoning could properly discredit the psychiatric evidence on the basis that the applicant did not provide evidence that he had established a mental health treatment regime through "further assessments or sessions", or that he "continued [to have] any formal mental health treatment or counselling", during the two weeks after the session on October 15 but before the officer's letter dated November 2, 2020, during which he was in immigration detention.

[43] As for the other factors in the key paragraph in the officer's reasons, the respondent noted case law suggesting that it was open to the officer to approach the psychiatric assessment with caution because it was based on a single interview rather than an ongoing therapeutic relationship: see *Egwuonwu v. Canada (Citizenship and Immigration)*, 2020 FC 231, at para 84; *Satar v. Canada (Citizenship and Immigration)*, 2020 FC 329, at para 23; *Rainholz v. Canada (Citizenship and Immigration)*, 2021 FC 121, at paras 51 and 67; *Palka v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 165, at para 17. However, the fact that it was the applicant's counsel (rather than a licensed health professional) who referred him to the psychiatrist was of questionable relevance in the present circumstances given the obvious urgency to obtain an assessment at the time.

[44] In sum, the officer's assessment of the psychiatric evidence was compromised by a legal error, a failure to appreciate or give effect to material factual circumstances, and a consideration of doubtful relevance.

[45] Although the respondent effectively conceded that the reconsideration decision turned on the psychiatric evidence, the review of this decision does not conclude here. There are additional concerns related to the treatment of the applicant's evidence in support of his request for reconsideration and his application for a PRRA overall.

[46] As noted already, in addition to the psychiatric report, the applicant submitted an affidavit from the designated representative appointed by the Immigration Division to represent him. This evidence detailed the representative's interactions with the applicant. Those interactions demonstrated clearly that the applicant was suffering from very significant issues affecting his mental health and his ability to communicate effectively.

[47] The officer's letter dated November 17, 2020, did not refer to any of this evidence in substance. It merely stated that it was the representative's opinion that the applicant would require, in a hearing setting, a number of procedural accommodations as a result of his cognitive impairments and mental health issues.

[48] The applicant also provided additional medical evidence to the officer. That medical evidence was consistent with the applicant's position from the outset that he had been attacked in March 2005 by neo-Nazis. It therefore supported the applicant's position that his memory issues were affected by the 2005 incident.

[49] The officer noted that the medical evidence suggested that the applicant's injuries were consistent with his history of traumatic lacerations. However, the officer made no connection

with the applicant's express submission that the evidence corroborated his longstanding position that the injuries suffered in 2005 affected his ability to remember and to communicate. Instead, the officer stated summarily that she had read the designated representative's and the physician's "submissions" and that they did not demonstrate that he faced a personal, forward-looking risk on return to Slovakia and did "not add to the information concerning personal risk or enlighten as to new risk of developments for you in Slovakia".

[50] In my opinion, the officer either failed to appreciate the nature of the new evidence from the designated representative and the physician, ignored the applicant's submissions about why it was important to consider the evidence on his request for reconsideration of the PRRA decision, or both. The treatment of this factual and medical evidence raises additional material concerns about the reasonableness of the reconsideration decision: *Vavilov*, at paras 126 and 128; *Federal Courts Act*, RSC 1085, c F-7, paragraph 18.1(4)(*d*).

[51] Applying the principles in *Vavilov*, I conclude that the reconsideration decision must be set aside as unreasonable.

[52] The applicant also raised a number of issues related to procedural fairness and natural justice, both in this Court and in his counsel's correspondence with the officer.

[53] There were certain failures to communicate promptly in this matter. As the respondent acknowledged, IRCC should have sent a letter to the applicant in 2019 responding to his request to refrain from making a PRRA decision until he filed additional country condition and

psychiatric evidence and to provide him notice of a pending decision. While I do not find that the officer was required in law to accede to the applicant's requests, a failure to respond at all raises procedural fairness concerns. See *Goodman v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1569, [2020] 3 FCR 143, at paras 62-65; *Naeem v Canada (Citizenship and Immigration)*, 2016 FC 1073, at paras 23-24.

[54] In addition, the officer's initial reconsideration decision made on or about November 2, 2020, was also not immediately communicated to the applicant's counsel. Word only reached his counsel through the Department of Justice three weeks later, on November 23, 2020. By that time, the applicant had filed the additional important evidence on November 10 and the officer had prepared the letter dated November 17, 2020.

[55] This Court has held that a PRRA officer has an obligation to consider all evidence which may affect the determination even after the officer has written the decision, so long as the evidence is received before the applicant is notified that the decision has been made, or before the date on which the applicant has been told a decision will be made: *Kim v Canada (Citizenship and Immigration)*, 2020 FC 581, at para 85; *Vakurov v Canada (Citizenship and Immigration)*, 2016 FC 859, at para 23; *Avouampo v Canada (Citizenship and Immigration)*, 2014 FC 1239, at para 21 (and the cases cited there).

[56] In this case, the officer was only able to consider the evidence in stages, and to write successive letters and an addendum in response. It also appears that because the applicant was scheduled for removal on November 4, 2020, it may have created an artificial deadline for the

officer's initial reconsideration conclusion which (in the event) was based on only some of the evidence that the applicant ultimately adduced.

[57] As a result of these applications for judicial review, we now have had the benefit of reviewing all of the applicant's additional evidence (the psychiatric report, the designated representative's affidavit, the medical evidence and several submissions from the applicant's counsel) as a package, rather than one by one, some days or weeks apart. I do not criticize the applicant's counsel, who were demonstrably diligent, prompt and comprehensive in filing materials for the reconsideration. The point is that the process that ultimately occurred to reach the reconsideration decision did not involve a single opportunity to consider the evidence all at once before making that decision.

[58] I have considered all the circumstances described in these Reasons, including the substantive and procedural issues, the basis for the application for a PRRA, the grounds for reconsideration of the PRRA decision and the most recent evidence concerning the applicant, as well as the nature and objectives of a PRRA. Overall, I am not confident that the applicant has had a fair and meaningful opportunity to present his PRRA application and to have it fully and fairly considered: see *Baker*, at para 32. In the interests of ensuring that the applicant is afforded natural justice, the appropriate result in these particular circumstances is that his entire PRRA application should be considered anew by a different officer. As Justice Phelan noted in *Gyarchie*, there is no requirement to find fault when concluding that an applicant has been denied natural justice. I find it unnecessary to make such a finding in this case: *Gyarchie v*

*Canada (Citizenship and Immigration)*, 2013 FC 1063, at para 17. See also *Ravi v Canada (Citizenship and Immigration)*, 2021 FC 1359, at paras 10-13.

[59] As a result, both the reconsideration decision and the PRRA decision will be set aside.

[60] Two final points. The applicant submitted that the officer's PRRA decision did not properly consider the country condition evidence with respect to the treatment of Roma as a minority in Slovakia. The applicant submitted that the officer misunderstood the evidence, by finding that it related only to circumstances suffered by the general population in Slovakia. The respondent did not directly answer this submission. I make no comment on it, other than to say that the officer who will reconsider the applicant's PRRA will have to consider all of the country condition evidence as it applies to the applicant and his circumstances.

[61] Finally, I complement and thank both parties' counsel for their thorough and responsible submissions on behalf of their respective clients in this application.

[62] Neither party proposed a question for certification and none will be stated.

**JUDGMENT in IMM-6371-20 and in IMM-4946-20**

**THIS COURT'S JUDGMENT is that**:

1. The application in IMM-6371-20 is allowed. The reconsideration decision set out in letters dated November 2, 2020 and November 17, 2020, is set aside.
2. The application in IMM-4946-20 is allowed. The pre-removal risk assessment decision dated January 7, 2020, is set aside.
3. The applicant's pre-removal risk assessment application is remitted for redetermination by another officer. The applicant shall be permitted to update his evidence and/or submissions on the application.
4. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6371-20 & IMM-4946-20 |
| **STYLE OF CAUSE:** | ZDENO SARISSKY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 7, 2022 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | A.D. LITTLE J. |
| **DATED:** | JULY 11, 2022 |

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| Kevin Doyle, Madeline Macdonald | FOR THE RESPONDENT |

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