Federal Court  Cour fédérale

Date: 20210916

Docket: IMM-5756-20

Citation: 2021 FC 957

Ottawa, Ontario, September 16, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MILLICENT MHLANGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by an Officer of the High Commission of Canada located in Hatfield, Pretoria dated October 22, 2020 [Decision]. The Officer refused the Applicant's application for a study permit and determined the Applicant was inadmissible to Canada for directly or indirectly misrepresenting or withholding material facts

pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

[2] The Applicant is a citizen of South Africa. She applied for a study permit having been accepted by the New Brunswick Community College into its Personal-Support Worker – Acute Care program.

[3] On August 21, 2019, the Officer issued a procedural fairness letter to the Applicant over concerns she had provided fraudulent information regarding her Bank Statements. The Applicant responded by providing the same bank documents with additional information and authentication marks.

[4] On March 9, 2020, the Officer issued a second procedural fairness letter, this time regarding inconsistent information provided relating to her common-law relationship. In her study permit application, the Applicant stated she had entered into a common-law relationship in July 2015. However, on a previous temporary resident visa application submitted in April 2017, she stated she was single.

[5] On March 11, 2020, the Applicant submitted her response to the second procedural fairness letter. The Applicant confirmed she was in a common-law relationship since 2015 but in 2017, she and her common-law partner decided to take a “break” from their relationship. The Applicant and her common-law partner reconciled in 2018.

III. Decision under review

[6] On October 22, 2020, the Officer refused the Applicant's application for a study permit on the basis that she was inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) of the *IRPA*. The sole reason cited concerned the bank documents.

[7] Paragraph 40(1)(a) of *IRPA* states a permanent resident is inadmissible for directly or indirectly misrepresenting facts or withholding material facts:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[8] The Officer found the Applicant submitted fraudulent documents regarding her finances and assets available to support her purpose of visit in Canada, as well as her establishment in South Africa. An Officer had checked the Applicant's bank statements with officials of the bank concerned, who indicated that while the Applicant's name was linked to a verification number,

the account number on the printout submitted by the Applicant was different, and the end balance at a certain date did not correspond with the bank's records.

[9] Regarding the Applicant's response to the procedural fairness letter about the bank documents, the Officer noted the Applicant did not address concerns related to the authenticity of the bank statements because she provided the same bank documents with additional material and authentication marks. The documents provided did not explain why the account number on the printout was different, or why the end balance at a certain date did not correspond to the bank's records. While the Officer attempted to verify documents a second time, verification was inconclusive.

[10] Therefore, based on documents provided by the Applicant and the results from the initial verification from Absa, the Officer in the Decision concluded the Applicant misrepresented her finances:

> Upon review of the documents provided and the response received from Absa officials when we first verified the statements, I am satisfied that PA submitted fraudulent documents and misrepresented the finances and assets available to support her purpose of visit in Canada and her establishment in her country of residence. This misrepresentation could have induced an error in the administration of the Act. As such, I am refusing this application under A40.

IV. Issues

[11] The issues are as follows:

A. Did the Officer breach procedural fairness?

B. Is the Decision reasonable?

V. Standard of Review

A. *Principle of Procedural Fairness*

[12] With regard to the first issue, questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But, see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [Rennie JA]. In this connection I note the Federal Court of Appeal's recent decision which held judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[13] I also note from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[14] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

B. *Reasonableness*

[15] When determining whether an immigration officer made a reviewable error in concluding that an applicant made a material misrepresentation pursuant to paragraph 40(1)(a) of the *IRPA*, the standard of review is that of reasonableness: *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 176 [Shore J] at para 16.

[16] With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe, which was issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority explains what is required for a

reasonable decision, and importantly for present purposes, what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[17] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or

> an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
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> [Emphasis added]

[18] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[19] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

VI. Analysis

[20] The Applicant submits the Officer breached procedural fairness and the Officer's decision to refuse the application was unreasonable.

A. *Preliminary issue: Did the Officer render their decision on the basis of the Absa bank statements alone, or was the issue of the common-law relationship also considered?*

[21] The Applicant submits the Officer rendered their decision on the basis of the Absa bank statements alone. The Applicant concedes the recommendation by an Officer to the Immigration Program Manager (IPM) raised concerns with respect to her common-law relationship; however, the final Decision focused exclusively on concerns surrounding the bank statements.

[22] The Respondent disagrees and submits the entry made on May 5, 2019, includes both issues surrounding the Applicant's common-law relationship and her bank statements to be material to her study permit application. No further submissions were advanced by either party.

[23] I agree with the Applicant because in my respectful view, the applicable reasons are those dated October 22, 2020, being those of the last and most senior IRCC officer on this file.

B. *Did the Officer fail to observe procedural fairness?*

[24] The Applicant acknowledges the duty of fairness owed to visa applicants is at the low end of the spectrum: see *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (FCA) [*Chiau*] [Evans JA], at para 41, dealing with a visa to enter Canada as a permanent resident in the self-employed class. However, the Applicant submits in the context of misrepresentation, the importance of having a meaningful opportunity to meet the duty of fairness is more evident, given the potential consequences of a finding of misrepresentation, see *Toki v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 606 at para 17 [Diner J].

[25] The Applicant's counsel submits the procedural fairness letter regarding the bank records "simply raised a concern with the banking information", adding because "she submitted this application without any legal or professional assistance" she returned to the bank and acquired certified copies of her account information in reply. It is submitted this was enough.

[26] I disagree. In my respectful view, the procedural fairness letter raised the general authenticity of the bank statements. After all, on the bank statements submitted not once but

twice, the account number on the printout submitted by the Applicant was different, and the end balance at a certain date did not correspond with the bank's records.

[27] The Respondent suggests the Application should have no effect because it was completed without the assistance of a professional. The Respondent correctly submits this Court has consistently held neither ignorance of the law, nor reliance upon incompetent professionals permit an applicant to avoid their obligations and onus to ensure compliance with the *Act.* For obvious reasons, the Court does not have varying standards depending on whom the Applicant relies for material to be filed.

[28] The Applicant submits the August 21, 2019, procedural fairness letter was insufficient because it did not inform her of the Officer's "specific concerns". The Applicant cites *Penez v Canada (Citizenship and Immigration),* 2017 FC 1001 at para 36 to argue the purpose of procedural fairness letters. However, *Penez* stands for the *dicta* that procedural fairness owed to a student permit applicant has been described as "relaxed", that the onus remains on the Applicant to provide all the necessary information to support their application, and that Officers have no legal obligation to seek out explanations to assuage concerns by way of a procedural fairness letter. See *Penez* at paras 36-37 [Gascon J].

[29] The Applicant further submits she should have been provided with details of the Officer's attempts at verifying the bank statements. The GCMS notes reveal that an Officer called Absa Bank to verify her banking information on two occasions. The first occasion was prior to the issuance of the first procedural fairness letter, which revealed that the account number was

different from what she had submitted and an end balance was not consistent with documents on the bank's file. The second occasion was after the issuance of the first procedural fairness letter, which revealed inconclusive results.

[30] The Applicant submits she should have been afforded another opportunity to respond to the Officer's investigations, especially since the Officer's second investigation yielded inconclusive results. The Applicant submits the Officer failed to provide a transparent explanation as to how they conducted their investigation and in doing so, the Officer breached procedural fairness.

[31] The Respondent submits, and I agree, both procedural fairness letters were clear. The general authenticity of the bank statements was raised in the first procedural fairness letter. The Applicant failed to provide an adequate response by simply sending in the same material with added material and authentication markings. The Respondent submits, and I agree, the Officer had no obligation or duty to coax further information from the Applicant or to conduct an interview, especially if that information is required to be submitted in accordance to the statutory requirements of the application, see *Suri v Canada (Citizenship and Immigration),* 2020 FC 86 [Manson J] at para 20:

> [20] I agree with the Respondent. There is no breach of procedural fairness where the applicant is given a reasonable opportunity to respond to the case against her, particularly where the applicant takes advantage of this opportunity (*Liu v Canada (Citizenship and Immigration*), 2016 FC 440 at para 12). In this case, the Officer informed the Applicant that the GIC was confirmed to be fraudulent. This was the only detail of the study permit application the Officer was concerned about, and the Applicant was given an opportunity to respond. The Applicant took this opportunity, responding by way of a letter drafted by her father to explain that

> she received the GIC documentation from a travel agent. However, the Applicant did not address the fraudulent nature of the GIC.

[32] Moreover, the Officer alerted the Applicant to their concerns, and was not required to be more specific as to the cause of their concerns, see *Kong v Canada (Citizenship and Immigration)*, 2017 FC 1183 [Kane J] at paras 26-37, 31:

> [26] In the present case, the Officer alerted the Applicant to the concern, stating "[s]pecifically, I have concerns that the BOC bank statement that you submitted in support of your financial status is not genuine". In my view, this was sufficient information to advise the Applicant of the concern. The Applicant was given an opportunity to respond and did so.
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> [27] The Officer was not required to be more specific and advise that it was the 16 digit code that was the basis for the concern. The Applicant's own affidavit and her response to the Procedural Fairness letter reveal that she understood the concern. She states that she corrected the information regarding the code, at least on one statement, and that she provided a letter, from the bank, along with screen shots.
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> […]
>
> [31] In the present case, the concern regarding the bank statements was stated and the Applicant had a reasonable opportunity to respond.

[33] It is well established – by the Supreme Court of Canada - that the tests for procedural fairness are context specific, see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [L'Heureux-Dubé J] at para 21:

> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to

> determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J.
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> [Emphasis added]

[34] While in some cases more detail may be needed, in others a satisfactory procedural fairness letter will require less detail about the officer's issues. I was pointed to *Ntaisi v Canada (Minister of Citizenship and Immigration),* 2018 CanLII 73079 (FC) where Barnes J discusses "specific concerns" to be set out in a procedural fairness letter concerning an applicant for temporary residence. I note *Ntaisi* is a "speaking order" without a neutral citation, that is, a decision intended to be given reduced precedential value. I also was pointed to *Kaur v Canada (Citizenship and Immigration),* 2020 FC 809 [Norris J], but again the context was different despite it being a case involving an application for a temporary resident visa.

[35] The Respondent submits, and I agree, the Applicant did not properly address the Officer's concerns regarding the bank statements, despite the procedural fairness letter. I note as well the Applicant filed an affidavit on this judicial review, which while addressing the issue of her relationship, did not provide any better explanation for the discrepancies in the financial materials notwithstanding she was by then fully aware of the "specific concerns" of the Officer as disclosed to her in the full CTR.

[36] The Officer clearly stated their concerns respecting general authenticity, and the material sent in response was inconclusive in that it was essentially responding material sent previously. Therefore, in my respectful view, there was no breach of procedural fairness.

C. *Was the Decision of the Officer reasonable?*

[37] The Applicant submits the Officer made an arbitrary finding of misrepresentation pursuant to section 40(1)(a) of the *IRPA.* The Applicant asserts section 40 is to be given a broad and robust interpretation, and the narrow exception to a finding of misrepresentation occurs when an individual honestly and reasonably believes they were not misrepresenting a material fact, see *Goudarzi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 425 [Tremblay-Lamer J] at para 33:

> 33 I find that the decision in *Osisanwo* is not of assistance to the applicants in this case. That decision was dependent on a highly unusual set of facts, and cannot be relied upon for the general proposition that a misrepresentation must always require subjective knowledge. Rather, the general rule is that a misrepresentation can occur without the applicant's knowledge, as noted by Justice Russell in *Jiang*, above, at paragraph 35:
>
> > [35] With respect to inadmissibility based on misrepresentation, this Court has already given section 40 a broad and robust interpretation. In *Khan*, above, Justice O'Keefe held that the wording of the Act must be respected and section 40 should be given the broad interpretation that its wording demands. He went on to hold that section 40 applies where an applicant adopts a misrepresentation but then clarifies it prior to a decision. In *Wang v Canada (Minister of Citizenship and Immigration*), 2005 FC 1059, this Court held that section 40 applies to an applicant where the misrepresentation was made by another party to the application and the applicant had no knowledge of it. The Court stated that an initial reading of section 40 would not support this interpretation but that the section should be interpreted in this manner to prevent an absurd result.
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> A few cases have carved out a narrow exception to this rule, but this will only apply for truly exceptional circumstances, where the applicant honestly and r*easonably* believed they were not misrepresenting a material fact.

[Emphasis in original]

[38] The paragraph cited states that this narrow exception is only to apply to "truly exceptional circumstances". The Applicant submits the narrow exception applies to her case because the August 21, 2019, procedural fairness letter did not provide her with an explicit breakdown of the details surrounding the Officer's concerns regarding her bank statements, which prevented her from properly addressing the concerns.

[39] I disagree. In my respectful view, the Applicant's circumstances are not truly exceptional circumstances as contemplated by *Goudarzi.* In my view, this is a variant of the same argument advanced under procedural fairness just discussed; the issue was the general authenticity of the bank records submitted which was not addressed by the Applicant. I find no unreasonableness in the Officer's conclusions in such circumstance.

[40] The Applicant also submits the Officer's reliance on the initial investigation results, despite the second investigation being inconclusive, rendered the purpose of the procedural fairness letter moot. As such, the Applicant submits the Officer's reasons for the decision were unintelligible. Again, I disagree. The Officer stated their concerns respecting general authenticity, the material sent in response was inconclusive in that it was essentially the same as sent previously, and therefore in my respectful view, the Decision is intelligible. Moreover, onus was always and remained on the Applicant to provide evidence confirming the authenticity of her bank statements. By simply having re-submitted the same bank statements with additional material and bank stamps, the Officer was reasonably entitled to find their concerns unresolved.

[41] In *Khedri v Canada (Citizenship and Immigration),* 2012 FC 1397 [Noël J] at paras 4, 10, 12, 30, the Officer considered the applicant's bank statements not authentic. The Court held the Officer was reasonable in concluding on the whole of the evidence and on a balance of probabilities that the statements were fraudulent and material to the application. The Respondent submits that in following the line of reasoning in *Khedri,* the Officer's decision fell within a range of reasonable outcomes. I agree.

[42] As noted in *Hehar v Canada (Citizenship and Immigration),* 2016 FC 1054 at paras 35-36, I held clear and convincing evidence is needed when making a finding of misrepresentation. In my view, that finding was also open to the Officer in this case such that the Decision is justified, intelligible and transparent as required by *Vavilov.* In *Hehar,* the decision was fact-driven where the applicant gave different answers from those of her employer to simple and direct questions, thereby rendering the conclusion on misrepresentation reasonably made on the facts. In the case at bar, the Applicant provided bank statements that did not match information on file with the bank itself.

VII. Conclusion

[43] In my respectful view, the Applicant has not shown that procedural fairness was breached nor that the decision of the Officer was unreasonable. Therefore, judicial review will be dismissed.

VIII. Certified Question

[44] Neither party proposed a question to certify, and none arises.

JUDGMENT in IMM-5756-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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