Federal Court  Cour fédérale

Date: 20181115

Dockets: IMM-1911-18

Citation: 2018 FC 1152

Ottawa, Ontario, November 15, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

STEPHANIE ONYINYE OBINNA
AMAKA ALMAS OBINNA
CHIDIEBERE ELLIANA OBINNA
OLUCHI EMMANUELLA OBINNA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The principal applicant, Ms. Stephanie Oninye Obinna, [PA], and her three minor daughters, Amaka Almas Obinna, Chidiebere Elliana Obinna and Oluchi Emmanuella Obinna [the minor applicants] are Nigerian citizens. They claimed refugee protection, fearing persecution because of the PA's identity as a bisexual and because they are in need of protection from Boko Haram supporters.

[2] On March 29, 2018, the Refugee Protection Division of the Immigration and Refugee Protection Board [RPD] held that the applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], leading to the present judicial review application.

Allegations of fear and risk

[3] The PA was born in 1981 and resided in Lagos, Nigeria with her husband [Mr. Emelogu], whom she married in 2004, and the minor applicants who are their children. The applicants were issued US visitor visas in March 2012 and Canadian visitor visas in July 2012. They arrived in Canada on August 6, 2012, originally for the purpose of visiting the country as tourists but ultimately never visited the US.

[4] On October 15, 2012, two months later, the applicants claimed refugee protection because a combination of incidents led them to believe that they could not safely return to Nigeria. The claims were not heard by the RPD until March 21, 2018. Two scheduled sittings were cancelled by the RPD and the applicants' counsel was often unavailable. At the hearing, the PA testified in English and acted as the minor applicants' designated representative.

[5] The PA's narrative, in her personal information form [PIF], disclosed the following information:

a) The PA is a Jehovah's Witness and joined her church's evangelical prayer group in February 2012. This group visited Kaduna in the Muslim North of Nigeria to

"pray and seek god's intervention regarding the insecurity and bombing of Christians in that part of the country";

b) While the prayer group was at a park near Kaduna Polytechnic, a group of 40 to 50 youths, believed to be supporters of Boko Haram, wielding weapons attacked everyone there and accused the prayer group of "harbouring and encouraging those who set fire to a [sic] Quaran";

c) Most people escaped the attack though some people died. The PA lost her purse in which she kept identity cards listing her address;

d) A week after the incident in Kaduna, the home of a prayer group member in Lagos was burned down and her son was killed;

e) The PA noticed "strange faces loitering around our house" and that she believed these people were sent by Boko Haram to harm her: they had her Lagos address, since she lost her identity documents. She also received a call threatening to kill her because of her involvement in the prayer group;

f) The PA filed a police report. The police told her that they do not intervene when Boko Haram is concerned because they do not want to be targeted;

g) A news article, submitted by the applicants, dated September 6, 2012, reported that the home of another prayer group member in Ilorin, Nigeria was burned down.

[6] The PIF also states that the PA is bisexual and kept this secret while in Nigeria. It continues that her husband and his family recently discovered that she is bisexual after he was told by her partner's husband. The PA and her husband had planned to go for counselling and prayers after her planned holiday trip to Canada. However, in September 2012, after the applicants arrived in Canada, the husband of the PA's partner reported their sexual relationship to the police in Nigeria. The PA testified at the hearing that she and her partner were caught a few weeks before the applicants arrived in Canada and provided further details about how she was caught. In her amended PIF, the PA states that Mr. Emelogu divorced her in February 2014 because she is bisexual. Indeed, the divorce certificate states that the marriage was "dissolved on the ground of irreconcilable differences" and "incompatibility" (CTR at pp 630-631). The amended PIF claims that Mr. Emelogu told her to stay away from Nigeria because the police came looking for her in January 2015. The amended PIF also states that in December 2017 her husband's family informed her father that they would kill her "for bringing shame to their family and running away with their children" (CTR at p 777).

Determination made by the RPD

[7] The RPD dismissed the refugee claims because the applicants did not present sufficient credible and trustworthy evidence. In particular, the PA's testimony was found untrustworthy as the RPD determined that the PA omitted important information from her PIF, "could not keep her story straight," and the RPD further drew a number of negative inferences for various reasons. The RPD also held that, on the balance of probabilities, the PA did not establish that she is bisexual.

Preliminary issue: the new Charter argument

[8] As a preliminary issue, I will first address the applicants' argument that the RPD breached their constitutional rights. The respondent objects to the Court deciding the issue at this point in time.

[9] In their further memorandum of argument, filed on October 4, 2018, the applicants submit that the RPD breached their rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter], by failing to hear the claims in a reasonable time because five and a half years elapsed between the claims for refugee protection and the hearing. They ask this Court to render a directed verdict under subsection 24(1) of the Charter, ordering the RPD to grant them refugee status, as this would be an appropriate and just remedy.

[10] In this respect, the applicants submit that the principles of fundamental justice and the duty of fairness require RPD hearings to be heard within a reasonable time (*Sasan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7323 (FC) and *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692). In their view, the evidence demonstrates that delays induced by the respondent caused them psychological distress. They further submit that the delay of more than five years compromised the fairness of the RPD's hearing, as it harmed the PA's ability to recall some details of her claim which led to inconsistencies in her testimony that the RPD raised in its decision.

[11] In contrast, the respondent submits that it was improper for the applicants to raise the new Charter argument at this late date (*Al Mansuri v Canada (MPSEP)*, 2007 FC 22 [*Al Mansuri*]). Accordingly, the Court should summarily strike same. In the alternative, the new Charter argument has no merit whatsoever. Firstly, the applicants have not produced any evidence to establish their psychological distress or any prejudice to their refugee claims resulting from the delay. Secondly, the credibility concerns raised by the RPD in the impugned decision are not related to lack of memory but on a number of inconsistencies and implausibility findings.

[12] According to paragraph 301(e) of the *Federal Courts Rules*, SOR/98-106, an application must set out a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on. While the applicants never raised the new Charter argument before the RPD, nor in their application for leave and judicial review, or in their first memorandum of argument, the Court may exceptionally exercise its discretion to entertain an issue raised for the first time in a further memorandum.

[13] The non-exhaustive considerations raised in *Al Mansuri* are relevant (at paragraphs 12-13):

> (i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?
>
> (ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?
>
> (iii) Does the record disclose all of the facts relevant to the new issues?
>
> (iv) Are the new issues related to those in respect of which leave was granted?

(v) What is the apparent strength of the new issue or issues?

(vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[14] I find these factors weigh in favour of not deciding the new Charter argument.

[15] Nothing prevented the applicants from raising this issue in their application as they were evidently aware of the delay when they applied for leave. Moreover, the Charter argument is not related to the credibility and evidentiary grounds upon which leave was granted. Entertaining the new Charter argument at this stage would inevitably prejudice the respondent which can no longer produce relevant evidence explaining the delay in issue.

[16] Determining if a remedy is warranted requires this Court to evaluate how that delay compares to inherent time requirements for such a matter, the impact of the delay, and the causes of the delay beyond inherent time requirements (*Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 160 [*Blencoe*]; *Yadav v Canada (Citizenship and Immigration)*, 2010 FC 140 at para 62). This approach entails a "contextual analysis of all the circumstances relevant to the delay at issue" (*Ching v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 839 at para 85). However, the respondent is foreclosed from providing further evidence at this stage and allowing such evidence to be produced would unduly delay the hearing of this application. Indeed, this Court is unable to precisely compare the delay in this matter to inherent time requirements or determine the reasons for this delay. The Court should not decide the new Charter argument in the absence of a proper evidentiary record (*Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 80).

[17] In any event, the applicants have not presented convincing arguments to this Court that this is a case in which the simple passage of time justifies a directed verdict that the applicants are Convention refugees or persons in need of protection. In the case at bar, the applicants have not led evidence establishing that this delay caused them significant prejudice. At the risk of repeating myself, to succeed in arguing that delay caused by an administrative tribunal compromised the applicants' ability to receive a fair hearing, the applicants would have to lead evidence that the delay caused them significant prejudice and not merely rely on assertions (*Blencoe* at paras 101-102; *Rana v Canada (Minister of Citizenship and Immigration)*, 2005 FC 974 at para 20; *Johnson v Canada (Citizenship and Immigration)*, 2007 FC 561 at para 5). However, the fact that a considerable period of time has elapsed may provide a basis to assert significant prejudice, as memories do fade over time (*Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73 at para 45). While I acknowledge that some of the RPD's negative credibility findings may have resulted from details forgotten due to the passage of time, many of the credibility findings resulted from omissions in the PA's PIF, perceived internal inconsistencies between the applicants' evidence and her testimony, concerned details that the PA could not have reasonably forgotten, or were related to perceived contradictions in the PA's testimony at different times throughout the hearing. Furthermore, the RPD rendered its decision little more than one week after the hearing and I do not believe the pre-hearing delay caused it to make factual errors. As such, the applicants have not established that their new Charter argument has any merit.

Reasonableness of the adverse credibility findings

[18] Credibility findings are assessed on a reasonableness standard (*Kleib v Canada (Citizenship and Immigration)*, 2016 FC 1238 at para 13). Indeed, the dismissal of a claim may fall within the range of possible acceptable outcomes where the RPD has drawn a negative conclusion about an applicant's credibility due to an accumulation of contradictions, inconsistencies and omissions regarding crucial elements of the refugee claim, even if these elements would be insufficient in isolation (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 22).

[19] The RPD provided transparent and intelligible reasons supporting the dismissal of the claims. In particular, the following credibility findings are clearly material:

a) The RPD has taken issue with the PA's omission of details about how her same-sex relationship was discovered by her partner's husband in her PIF, which the PA only raised in her testimony. The RPD also drew adverse inferences because the PIF did not disclose details about the PA's past same-sex relationships in Nigeria and the PA did not add information about her current same-sex relationship in Canada to the amended PIF that she produced before the hearing (CTR at pp 824-832);

b) With their amended PIF, the applicants produced Nigerian newspaper articles, from February 2013, and various blog posts and online articles stating that the police were searching for the PA after her partner's husband submitted a police report. Many of the articles state that he "ran to the police" after catching the PA

and her partner which, according to the RPD, implies that he reported the incident immediately after discovering them together while the applicants were still in Nigeria (CTR at pp 652-653, 661-676). The PIF states that her partner's husband "outed her" in September 2012 which was after the applicants arrived in Canada;

c) The PA could not explain why Mr. Emelogu allowed her to have custody of the minor applicants following their divorce in 2014. In email correspondence between Mr. Emelogu and his brother, submitted by the applicants as evidence (the PA testified that she accessed the emails because she had her husband's password), he says: "I may have to take our children away from her at this point because I wouldn't want the kids to emulate her. In fact I am planning to take them away so that she will not be able to see them again." (CTR at p 658);

d) The email correspondence suggested that the PA's husband knew that she had sexual relationships with two women nine months before she was caught by her partner's husband and that he confronted her about this. But the PA testified that he found out when her partner's husband told him shortly before leaving Nigeria and that she was only in a relationship with one woman before she left Nigeria (CTR at pp 657-658, 844);

e) The PA travelled to the United Kingdom in 2011 but did not make a claim for refugee protection there even though she was aware of the treatment of known bisexuals in Nigeria. In the RPD's view, she re-availed to Nigeria;

f) The RPD noted that the National Documentation Package provided that the police often arrest and detain the family members of wanted criminals. The RPD drew a negative inference because the PA claims that the Nigerian authorities are searching for her but none of her family members in Nigeria has been arrested or detained;

g) The RPD drew an adverse inference because the PA's alleged same-sex partner attended the hearing for moral support and filed an affidavit, but was not asked to act as a witness before the RPD;

h) The PA's testimony regarding the incident in Kaduna lacked detail and she contradicted her PIF with respect to when the incident took place. She testified that the incident occurred in June or July 2012, though her PIF stated that it occurred in February 2012;

i) The PA testified that she did not think she would be in danger in Kaduna, though she previously testified and wrote in her PIF that the group visited Kaduna to pray and relieve the area of insecurity and bombings. The PA also stated that she did not expect to encounter problems in Kaduna which is a Christian area, though Kaduna is known to be a Muslim area;

j) The PA provided contradictory testimony with respect to her religious identity. Her PIF states that she identifies as a Jehovah's Witness. At the hearing, she stated that she is not a Jehovah's Witness and that once she attended university, she no longer attended the Jehovah's Witness church (see CTR at pp 800-803.

Following further questions she said: "… like being a Jehovah's Witness is something that I have been since a kid but I just never – there is just some parts that I didn't agree with the beliefs");

k) The PA contradicted her original testimony that she did not attempt to renew her driver's license after losing it in Kaduna;

l) The PA testified that the attack on a prayer group member's home in Ilorin occurred before she left Nigeria and that this member's son died. Her PIF and a news article submitted as evidence (about the incident in Ilorin) provided the opposite: the Lagos incident occurred before she left Nigeria and involved the death of a member's son; the Ilorin incident occurred after she left and did not entail death of a member's son (CTR at pp 809-810, 816, 846);

m) The PA testified that she never spoke to journalists about the events following the incident in Kaduna. She only spoke to the police. However, one of the newspaper articles she produced, dated July 21, 2012, stated that the PA "narrated her ordeal to journalists" (CTR at p 649-650);

n) The PA did not provide a satisfactory explanation as to why she never travelled to the US even though the applicants were issued US visitor visas in March 2012. (She said that she was stressed because of calls from her husband asking her to return to Nigeria to undergo counselling and that she wanted to "stay in her holiday"). Since the Kaduna incident allegedly occurred in February 2012, the

RPD drew a negative inference from the applicants' decision to remain in Nigeria until August 2012;

o) The PA stated that her plan was to visit in Canada for two or three weeks but she could not explain why she remained in Canada longer before receiving the news that a police report had been filed against her after the same-sex relationship was discovered. (She testified that she planned to go to Niagara falls, do a helicopter ride, go to a water park, Canada's Wonderland, malls and then go to Disney World in the US (CTR at pp 798-799, 834, 850));

p) The PA could not explain why she waited in Canada for two months before claiming refugee protection.

[20] Before this Court, the applicants do not seriously challenge the RPD's conclusion that they are not threatened by supporters of Boko Haram, nor the particular findings supporting same. However, with respect to the issue of the PA's sexual orientation, the applicants submit multiple errors of fact for this Court's consideration. Essentially, they ask the Court to revisit the RPD's credibility findings and negative inferences. The applicants invite the Court to conclude that the RPD unreasonably dismissed their evidence of risk and gave it insufficient weight.

[21] In turn, the respondent essentially affirms the reasonableness of the RPD's decision and submits that it made a number of adverse credibility findings that were not challenged by the applicants and were central to both bases of the claim for refugee protection.

[22] I agree with the respondent.

[23] In particular, I find it was reasonable for the RPD to draw negative inferences from contradictions in the email correspondence, between Mr. Emelogu and his brother, and the PA's testimony. The PA testified that Mr. Emelogu was not aware of her sexual orientation until she was exposed by her partner's husband and that her partner was the only woman she had seen romantically for the five or six years that preceded the incident (CTR at pp 843-844). Her PIF also states that her husband and his family recently discovered that she is bisexual, after her partner's husband told him. However, in email correspondence dated July 23, 2012, Mr. Emelogu states that about nine months earlier, he discovered her romantic involvement with two women and confronted her about this. I cannot agree with the applicants that the RPD gave these emails "the wrong evidentiary weight." While some of the information in those emails would certainly be favourable to the applicants' claims if accepted, the fact that the PA's testimony and the PIF contradict the contents of those emails impugns both her credibility and the weight those emails should be afforded.

[24] I also find it was reasonable for the RPD to disbelieve the applicants' narrative about the original purpose of their visit to Canada and the itinerary of the trip. The applicants arrived in Canada on August 6, 2012 and according to the PA's testimony, they were going to stay in Canada for two or three weeks, and intended to visit a few attractions before travelling to the US to visit Disney World under visas issued in March 2012. However, it was reasonable for the RPD to take issue with the fact that the applicants' itinerary was relatively scant despite the vacation's intended length. This finding was reinforced by the fact that the applicants ultimately never

travelled to the US, despite the PA's testimony that they already had plane tickets to fly to California (CTR at pp 834), and appeared to remain in Canada for some time before the PA would have been informed that a police report was filed. Given that the applicants never claimed that their original purpose in Canada was to claim refugee protection, it was entirely reasonable for the RPD to draw a negative inference from the limited details provided about what the applicants were doing in Canada for multiple weeks before they would have been informed about the police report.

[25] I will also observe that implausibility findings should only be made in the "clearest of cases" (*Cortes v Canada (Citizenship and Immigration)*, 2014 FC 598 at para 19). However, the RPD reasonably found it implausible that Mr. Emelogu would have allowed the PA to maintain exclusive custody of the children. The RPD noted that in the email correspondence between Mr. Emelogu and his brother, he stated that he was planning to "take the children away" from the PA (CTR at pp 654). The amended PIF states that in December 2017, Mr. Emelogu's family sent threats to the PA's father for running away with their children. At the hearing, the PA testified that Mr. Emelogu wished to have monthly custody of the children but he could not have access to them because they are in Canada (CTR at pp 844-845, 854). In my view, it was reasonable for the RPD to find this explanation unsatisfactory. The RPD reasonably found it implausible that Mr. Emelogu would have allowed the PA to maintain custody of the children or that the Court would have granted her custody given that, according to the applicants' story, the PA was a wanted criminal in Nigeria due to her sexual orientation and there was evidence that both Mr. Emelogu and his family wanted the children back.

[26] At this point, I will however make the following additional observations.

[27] It is questionable whether the RPD could draw a negative inference from the fact that the PA's family members were never arrested or detained. While the family members of wanted criminals may be arrested and detained in Nigeria, this does not appear to be the norm. According to the National Documentation Package before the RPD, this occurs in "many cases" though this practice is not encouraged and "there have been reports of police disciplining officers that have been found to have been involved in such practices" (CTR at pp 302-303). However, any negative inference is not determinative in this case.

[28] It is also questionable whether the PA's decision not to claim protection in the United Kingdom in 2011 and her return to Nigeria could amount to "re-availment". When asked why she travelled to the UK, the PA was able to explain that she wanted to give birth there and believed that this would prevent medical complications. Moreover, according to her story, at that time the PA's bisexuality remained secret. As this Court held in a similar matter, a decision-maker should not assume "that any bisexual person from Nigeria would claim protection at the first opportunity irrespective of whether they have been outed," when there was no reason for that person to believe they ever would be outed (*Gbemudu v Canada (Citizenship, Refugees and Immigration)*, 2018 FC 451 at paras 65-67). In her PIF, the PA claimed that she kept her bisexuality a secret during her time in Nigeria. While it does not appear that she had any reason to suspect that her sexual orientation entailed a risk while she was in the United Kingdom, it remains that the rest of the PA's allegations with respect to her husband's subsequent discovery of her relationships with other women are highly problematic.

[29] While not all omissions from a PIF may rationally support a negative credibility finding, the RPD must consider the nature of the omission and the context in which the new information is brought forward to determine if that omission is material (*Shatirishvili v Canada (Citizenship and Immigration)*, 2014 FC 407 at para 30 [*Shatirishvili*]). I find the context supports an adverse inference due to the PIF's omission of how the PA's relationship was discovered by her partner's husband. The email correspondence and newspaper articles are the only documents in the record explaining how the PA's sexual orientation would have become notorious. However, they were submitted to the RPD after the first PIF was filed, and the newspaper articles are dated February 2013 and therefore could not have been drafted when the PA wrote the PIF. The narrative about how the PA's relationship was discovered goes to the heart of her claim: it explains how the alleged risk of persecution would have materialized. Since this narrative formed the very basis of the applicants' claim for refugee protection, its subsequent inclusion through the articles, email correspondence, and the PA's testimony could reasonably support an adverse credibility finding, especially given that the contents of the email correspondence contradicted the PA's testimony (*Hamidi v Canada (Citizenship and Immigration)*, 2015 FC 243 at paras 27-29; *Husyn v Canada (Citzenship and Immigration)*, 2016 FC 1386 at para 25).

[30] The applicants submit that the newspaper articles do not contradict either the PA's testimony or the PIF, and that in any event, the PA is not responsible for their content. These articles state that the husband of the PA's partner "ran to the police" after discovering them together while the PIF states that he reported them in September 2012. This is not exactly a contradiction, as these articles do not state when the police report would have been filed. The fact that he "ran to the police" does not necessarily preclude the possibility that he filed the

report after the applicants departed Nigeria. Be that as it may, I find that these articles nevertheless raise other concerns that the RPD discusses in the impugned decision.

[31] In particular, the RPD found that it was impossible to determine the origin of the newspaper articles and online posts and that many were written using nearly identical language. The applicants claim that these articles have over 150 million readers and that they are credible news sources. However, the RPD could not confirm or deny that this was the case. I would note that for the two paper-based newspaper articles, the name of the publication and date were written over the document in pen and no cover page was included (CTR at pp 652-653). The other exhibits all appeared to be blog posts and articles published online (CTR at pp 661-676). I would further note that the RPD is entitled to give little weight to documents that corroborate an allegation it finds not to be credible without necessarily making an explicit finding as to their authenticity (*Jele v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 24 at para 46 [*Jele*]). It was accordingly reasonable for the RPD to attach little weight to these articles as they were submitted to corroborate an allegation that it did not believe to be credible, in light of the other adverse inferences it drew.

[32] I also find it was reasonable for the RPD to give the affidavit of the PA's alleged partner little weight due to the PA's failure to call her as a witness at the hearing, despite her partner's attendance as a support person. This Court has held that when a party fails to give evidence that it is in their power to give, a tribunal may be justified in drawing an inference that the evidence of that party would have been unfavourable to the party to whom the failure was attributed (*Jele* at paras 35-38). The PA explained that she did not call her partner as a witness because she did

not know that this option was available to her (CTR at pp 849-850). I believe it was reasonable to reject this explanation given that the PA was represented by counsel who could have asked her partner to testify if he had reason to believe this would support the PA's case.

[33] While a lack of corroborating evidence of one's sexual orientation cannot rebut the presumption of truthfulness in and of itself, without supported negative credibility findings related to that issue, the RPD may make general findings of a lack of credibility from an accumulation of inconsistencies and contradictions (*Hohol v Canada (Citizenship and Immigration)*, 2017 FC 870 at paras 19-21). I believe the RPD's conclusion that the PA is not, on the balance of probabilities, bisexual is within a range of reasonable outcomes given the accumulation of negative credibility findings related to the claims for protection on the basis of her sexual orientation. These negative credibility findings were sufficient for the RPD to dismiss the other two affidavits from members of the Toronto LGBT community claiming that they believe the PA to be bisexual and that she attends LGBT events.

[34] On the whole, while some findings or negative inferences made by the RPD may be questionable, the RPD's conclusion that the applicants' allegations of fear of persecution or risk or return are unjustified is reasonable. The RPD's analysis cannot be characterized as imperfect, incomplete or inconsistent to such an extent that this Court's intervention is warranted: *Shatirishvili* at para 35. Overall, the RPD's decision is grounded on multiple rationally supported credibility findings and falls within a range of reasonable and acceptable outcomes.

[35] For these reasons, the present application for judicial review is dismissed. No question of general importance has been raised by counsel.

JUDGMENT in IMM-1911-18

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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