Federal Court  Cour fédérale

Date: 20151124

Docket: IMM-1505-15

Citation: 2015 FC 1311

Ottawa, Ontario, November 24, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ABDIRAHMAAN WARSSAMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Warssama has been held in jail for more than five years. Why? Because he will not sign a piece of paper! He does not wish to return to Somalia and will not sign a declaration that he will cooperate in his return. Were it not for his criminal record, Canada would not even attempt to return him at this time.

[2] The authorities have every reason to believe that if Mr. Warssama were to be released into the population at large he would not voluntarily appear for his removal. On the other hand it is common ground that he is not a danger to the public.

[3] As of March 2015, Mr. Warssama had been in detention 57 months. This is the judicial review of the 12 March 2015 decision of a member of the Immigration Division of the Immigration and Refugee Board of Canada which maintained his detention. His detention has subsequently been continued, but the Minister does not, and indeed should not, take the position that this judicial review is now moot. If there ever was a case in which a live controversy remains between the parties, this is it (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342).

I. The Issues

[4] Although not quite framed as the parties have, the way I see it, the issues are:

a. Was the decision unreasonable?

b. Has the continuing detention deprived Mr. Warssama of his right to life, liberty and security, as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*?

c. Is Mr. Warssama being arbitrarily detained or imprisoned in violation of section 9 of the Charter?

d. Does his continued detention constitute cruel and unusual treatment or punishment contrary to section 12 of the Charter?

e. Is the burden of proof in monthly detention hearings, which build on earlier decisions, procedurally unfair?

II. The Facts

[5] Briefly stated, Mr. Warssama, now 51 years of age, came to Canada in 1989. His refugee claim was denied. However, he was later given a ministerial permit which allowed him to apply to remain in Canada on humanitarian and compassionate grounds. Due to his failure to keep his address current with the authorities, a number of queries went unanswered, and so he never obtained permanent resident status. He then got himself in trouble with the law. He was found inadmissible for criminality and ordered deported in 2009.

[6] He was arrested the following year and detained for immigration purposes. He has remained incarcerated ever since. He made an application for a pre-removal risk assessment, which was dismissed. It is not in the record. He recently applied to remain in Canada on humanitarian and compassionate grounds. However, in the normal course a few years will pass by before a decision is reached on that application.

[7] There has been a "temporary" administrative stay on removals to Somalia, but it does not apply to persons found to be inadmissible on the grounds of criminality or serious criminality (section 230 of the *Immigration and Refugee Protection Regulations*).

[8] Upon being detained, Mr. Warssama was entitled to an initial review thereof within 48 hours, another seven days thereafter, and 30-day reviews ever since (section 57 of the *Immigration and Refugee Protection Act* [IRPA]).

[9] Notwithstanding that the Regulations permit Canada to return convicted felons to Somalia against their will, the immigration authorities first attempted to rely upon the exception in s 230(3)(f) where a person "…informs the Minister in writing that they consent to their removal to a country or place to which a stay of removal applies." Mr. Warssama does not want to return to Somalia and, naturally, refused to sign the form.

[10] By the end of last year, he was offered a new form to sign. If he signed it, he gave his word that he would cooperate with his removal. He has refused to sign this form as well. Counsel for the Minister interprets the form as meaning that not only would Mr. Warssama not cause a ruckus on the airlines, but also that he would not seek asylum en route. Currently, Somalians who agree to return there from the Toronto area are first flown to Turkey, then to Kenya, and from there on an airline known as African Express to Mogadishu. The Somalian is accompanied by guards on the first two legs of the trip, but not the last.

[11] Given that we already spent hundreds of thousands of dollars in detaining Mr. Warssama, why not charter a plane? Apparently, because it is too dangerous to send Canadian pilots to Mogadishu!

[12] It is said that it is African Express which requires a signed form of cooperation. It is also said it is the only airline which will accept unescorted failed refugee claimants on its flight from Nairobi to Mogadishu. Why unescorted? Because Immigration Canada considers it too dangerous to send its own people there!

III. The Law

[13] To give full effect to IRPA, detentions and releases are dealt with at section 240 and following of the Regulations. Counsel for Mr. Warssama does not contest that if he were not in detention he would unlikely appear voluntarily for his removal (section 244) and is therefore a flight risk (section 245). He is not a danger to the public (section 246) and his identity has been established (section 247). Without question, there are grounds for Mr. Warssama's detention.

[14] The case turns on the factors set out in section 248 of the Regulations, which were developed in response to the decision of Mr. Justice Rothstein, as he then was, in *Sahin v Canada (Minister of Citizenship and Immigration)*, [1995] 1 FC 214, 85 FTR 99. Mr. Justice Rothstein was well aware that the Charter looms in the background.

[15] Section 248 reads:

248. If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	**248.** S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :

(*a*) the reason for detention;	*a*) le motif de la détention;
(*b*) the length of time in detention;	*b*) la durée de la détention;
(*c*) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	*c*) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(*d*) any unexplained delays or unexplained lack of diligence caused by the Department or the person concerned; and	*d*) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère ou de l'intéressé;
(*e*) the existence of alternatives to detention.	*e*) l'existence de solutions de rechange à la détention.

IV. The Decision Under Review

[16] A hearing was held on 10 March 2015, followed two days later by an oral decision.

[17] The member noted that in the past, Mr. Warssama "refused to sign a statutory declaration required for his removal from Canada". What he forgot to say is that this would only apply if Mr. Warssama intended to voluntarily comply with the enforcement (IRPA, section 238). The Minister is entitled to remove Mr. Warssama against his will (IRPA, section 239). The member found, quite reasonably, that if Mr. Warssama were released from detention, he would not voluntarily appear for removal from Canada.

[18] He then referred to section 48 of IRPA which provides that someone in Mr. Warssama's position is to be removed from Canada as soon as possible.

[19] The member is incorrect in stating that Mr. Warssama is "not willing to sign a statutory declaration that is required for him to leave Canada." No statute requires him to sign the declaration. Only African Express does.

[20] As to the five factors set out in section 248 of the Regulations, the first is the reason for his detention. The reason given was that there was every ground to believe that Mr. Warssama would not voluntarily appear for removal and so is a flight risk. That factor favours continued detention. The member also noted that Mr. Warssama does not pose a danger to the public, and although he has had criminal convictions, the sentences were very lenient.

[21] The member went on to say that the length of time that he has been in detention favours his release. Detention for administrative purposes is not meant to be punitive. However, that factor has to be weighed against the others.

[22] As to the third and fourth factors, the member concluded that the length of time in detention has been caused by Mr. Warssama himself by refusing to sign the declaration. Reference was made to the decision of Mr. Justice O'Keefe in *Canada (Minister of Citizenship and Immigration) v Kamail*, 2002 FCT 381, 2002 FCJ No 490 (QL), in which he said at paragraph 33: "I cannot accept that the delay caused by the respondent's refusal to sign travel

documents can be used to support a finding that his detention time cannot be ascertained or to support a finding that further lengthy detention is anticipated."

[23] Finally, as to alternatives to detention, he noted that if Mr. Warssama were released on his own recognizance, the John Howard Society would provide him with shelter. However, this was not a viable alternative because it did not guarantee that Mr. Warssama would appear for removal.

[24] Finally, he purported to distinguish the decision of Mr. Justice Mandamin in *Panahi-Dargahlloo v Canada (Citizenship and Immigration)*, 2009 FC 1114, on which more will be said.

V. Judgment

[25] I find the decision patently unreasonable, and shall send it back to another member of the Immigration Division for redetermination in accordance with the directions set out later on in these reasons. The record is completely inadequate as to whether or not there are alternate means to remove Mr. Warssama to Somalia, or if not, alternatives to detention, such as monitoring devices and restrictions imposed on his movements. In the circumstances, it is not necessary to consider the Charter. The burden is upon the Minister to justify the continued detention. Although this burden is often discharged by building upon earlier detention decisions, with evidence that nothing else has transpired except the passage of 30 days, there comes a point in time in which time itself becomes overwhelming, requiring the parties, and the Immigration Division, to think outside the box.

VI. Analysis

[26] As matters presently stand, Somalia is a failed state and Mr. Warssama may remain incarcerated in Canada for the rest of his life. I have avoided invoking the Charter, not because I think there are no Charter issues, but because I think a proper decision should be first made on a proper record.

[27] At some point, long before this March 2015 review, the whole process became completely unreasonable. The burden of proof is upon the Minister at each and every detention review. While it may often be that it is appropriate for the Minister to simply rely upon earlier decisions (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2004 FCA 4, [2004] 3 FCR 572, the passage of time cumulates with each monthly review.

[28] The detention reviews of Mr. Warssama have not been robust for some time. In *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350, the Supreme Court dealt with other provisions of IRPA which allow the Ministers of Citizenship and Immigration and of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident is inadmissible on security grounds. The person is thereafter detained. The certificate and the detention are reviewed directly by a judge of the Federal Court, rather than by a member of the Immigration and Refugee Board of Canada. Nevertheless, the Board must keep in mind what Chief Justice McLachlin had to say at paragraph 123:

> In summary, the *IRPA*, interpreted in conformity with the *Charter*, permits robust ongoing judicial review of the continued need for

> and justice of the detainee's detention pending deportation. On this basis, I conclude that extended periods of detention pending deportation under the certificate provisions of the *IRPA* do not violate s. 7 or s. 12 of the *Charter*, provided that reviewing courts adhere to the guidelines set out above. Thus, the *IRPA* procedure itself is not unconstitutional on this ground. However, this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*.
>
> [My emphasis.]

[29] The member placed undue reliance upon *Kamail*, above, and failed to distinguish *Panahi-Dargahlloo*, above, which is far more relevant.

[30] Mr. Kamail's detention was caused by his refusal to sign a travel document required by the Iranian authorities. The decision of the Immigration Division to release Mr. Kamail on the basis that his detention was indefinite was found to be unreasonable. Mr. Kamail should not benefit from his failure to cooperate. To find otherwise would encourage deportees to be as uncooperative as possible. However, the detention review under judicial review was only the sixth. Mr. Justice O'Keefe said that "the respondent's stay in detention of approximately four months was not an unreasonable length of time".

[31] The member distinguished *Panahi-Dargahlloo*, above, on the grounds that in that case it was the Iranian Embassy which required him to sign a letter that he was voluntarily returning to Iran. However, the distinction is really in Mr. Warssama's favour. There is no evidence that Somalia is requiring him to sign anything. Rather, it is a private airline.

[32] Mr. Panahi-Dargahlloo had been detained for some 21 months. As Mr. Justice Mandamin stated at paragraph 49 of his reasons:

> The Member went on to conclude the Applicant was unlikely to appear for removal given his lack of cooperation in obtaining a travel document. In my view, the Member did not consider the question of the length of detention choosing instead to focus on the cause for the continuing detention.

[33] He concluded that the member's failure to consider the length of detention was unreasonable. He did not find it necessary to hold that there was a violation of the Charter. Given that in this case Mr. Warssama had been detained for almost five years at the time of the detention hearing under review, the member was wrong to conclude that the other section 248 factors outweighed the length of his detention.

[34] Furthermore, inadequate consideration was given to alternatives to detention. For example, in *Re Charkaoui*, 2005 FC 248, Mr. Justice Simon Noël authorized Mr. Charkaoui's release on certain conditions notwithstanding that he, unlike Mr. Warssama, constituted a threat to national security. A number of the 16 conditions are not relevant to Mr. Warssama's situation but some are, such as a requirement that he reside at a specific address, that he not wander too far therefrom, that he wear an electronic monitoring device, that he allow employees of the Canada Boarder Services Agency access to his residence at any time, that he undertakes to be present at further hearings, that he keep the peace, that he be required to report at a specific place at regular intervals to be identified by an officer of the Canada Boarder Services Agency, and that if he not observe the conditions, he may again be incarcerated. See also *Majhoub (Re)*, 2013 FC 10.

VII. *Habeas Corpus-Obiter Dicta*

[35] This was an application for judicial review under section 72 of IRPA. The usual remedy, and indeed the one granted in this case, is to quash the decision and refer it back for redetermination. This is not an application for a writ of *habeas corpus*.

[36] I draw this distinction in light of the recent decision of the Ontario Court of Appeal in *Chaudhary v Canada (Public Safety and Emergency Preparedness)*, 2015 ONCA 700, which held that the Ontario Superior Court's *habeas corpus* jurisdiction with respect to detention decisions of the Immigration Division of the Immigration and Refugee Board of Canada, should be exercised notwithstanding that the Federal Court has exclusive jurisdiction to judicially review decisions of federal boards, commissions and tribunals (*Federal Courts Act*, s 18 and s 18.1).

[37] Mr. Chaudhary and the other appellants had been in detention awaiting deportation from just over two years to in excess of eight years. Mr. Justice Rouleau defined the issue as being "whether the appellants can, instead of seeking judicial review in the Federal Court, apply to the Superior Court of Justice for habeas corpus to challenge their continued detentions". He departed from the Court's earlier decision in *Peiroo v Canada (Minister of Employment and Immigration)*, 69 OR (2d) 253, which established that in immigration matters *habeas corpus* should not be issued because there is a statutory scheme providing for review at least as broad and no less disadvantageous than *habeas corpus*.

[38] I have no doubt that in certain circumstances *habeas corpus* is a more appropriate remedy. Under IRPA, an applicant must first obtain leave to have the decision reviewed judicially. If that hurdle is overcome, the Federal Court is charged with reviewing the reasonableness of the underlying decision, and must show deference. The Court is not making its own decision. There is no appeal unless a serious question of general importance which could support an appeal is certified.

[39] Finally, as aforesaid, the usual remedy is to refer the matter back for redetermination. The new decision maker may well continue the detention. Indeed, the remedies are discretionary. It is open to the Court to make a declaration without imposing any other remedy (*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6).

[40] What causes me concern is that at paragraph 68 of *Chaudhary*, Mr. Justice Rouleau stated that the Federal Court had no jurisdiction to grant *habeas corpus* in immigration matters.

[41] Indeed, Mr. Justice Rouleau finds himself in good company. In *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, a *habeas corpus* case in a penitentiary context, Mr. Justice LeBel, speaking for the Court stated at paragraph 32:

> However, *habeas corpus* was "deliberately omit[ted]" from the list of writs set out in s. 18 of the FCA. This means that although the Federal Court has a general review jurisdiction, it cannot issue the writ of *habeas corpus* (*Miller*, at pp. 624-26). Jurisdiction to grant *habeas corpus* with regard to inmates remains with the provincial superior courts.

[42] S 18(1)(*a*) of the *Federal Courts Act* provides that this Court has, subject to section 28, "exclusive original jurisdiction…to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal." No mention is made of *habeas corpus*. However, s 18(2) goes on to provide that this Court "has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*… in relation to any member of the Canadian Forces serving outside Canada." Many have concluded that the Federal Court therefore has no *habeas corpus* jurisdiction at large.

[43] With the greatest respect, *R v Miller*, [1985] 2 SCR 613, may be read another way. What was at issue in that case, was whether the *Federal Court Act* ousted the jurisdiction of provincial superior courts to issue writs of *habeas corpus*. The ability of the Federal Court to issue writs of *habeas corpus* other than in relation to the Armed Forces was not discussed. Indeed, Mr. Justice LeDain referred to the reasons of Chief Justice Laskin in *Mitchell v The Queen*, [1976] 2 SCR 570 in which he simply said that the *Federal Court Act* was silent on that subject.

[44] The bulk of the case law compares the benefits of *habeas corpus* with that of judicial review in the Federal Court, rather than deal with the issue as to whether the Federal Court has *habeas corpus* jurisdiction.

[45] One Federal Court case which may have dealt with the issue is *Henry v Canada (Minister of Justice)* (1989), 24 FTR 223, [1989] FCJ No 117 (QL). At issue was a motion for a writ of *habeas corpus ad testificandum*. Mr. Justice Paul Rouleau stated:

> Section 18 of the *Federal Court Act* confers jurisdiction in the area of certain extraordinary remedies of the Superior Courts of Common Law, but *habeas corpus* is not included therein. Accordingly, the Federal Court, although a superior court, has the authority conferred explicitly by its own establishing statutes or other federal statutes and does not have the power to issue a writ of *habeas corpus*.

[46] The Court of Appeal came to a different conclusion in *Henry v Canada (Minister of Justice)* (1991), 131 NR 395, [1991] FCJ No 553 (QL). This is what Mr. Justice Hugessen had to say:

> We are all of the view that the Motions Judge erred. While the specific relief sought by the appellant was perhaps not the correct one, it is clear that what he wanted was to be present at the trial of his action and to present his case to the judge. We consider that justice requires no less. The Motions Judge should have issued an order of the same nature as the one issued by this Court under which the appellant has been brought before us in custody today to argue the present appeal. Such an order is a normal incident of the Court's power to control its own process. Any concerns with regard to security or order in the courtroom can be dealt with by the presiding judge in the exercise of that same power.

[47] These cases were decided before *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631, where Mr. Justice Cory stated at page 651:

> The *Federal Court Act* does not remove the historic and long standing jurisdiction of provincial superior courts to hear an application for a writ of *habeas corpus*. To remove that jurisdiction from the superior courts would require clear and direct statutory language such as that used in the section referring to members of the Canadian Forces stationed overseas. It follows that the respondents fail in their contention that the Federal Court has exclusive jurisdiction in this matter. Rather it is clear that there is concurrent jurisdiction in the provincial superior courts and the Federal Court to hear all habeas corpus applications other than those specified in s. 17(6) of the *Federal Court Act*.
>
> [My Emphasis.]

[48] *Idziak* was not mentioned in *Khela*, and only in passing in *Chaudhary* to note it was a penitentiary case.

[49] In the circumstances, did the Supreme Court overrule *Idziak* without even mentioning it? As stated by Chief Justice McLachlin in *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773, at paragraph 59:

> I add this. This Court does not and should not lightly overrule its prior decisions, particularly when they have been elaborated consistently over a number of years and when they represent the considered view of firm majorities: see, e.g., *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 27. Deciding whether to do so requires us to balance correctness against certainty: Craig, at para. 27; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47. We must be especially careful before reversing a precedent where the effect is — as it would be here — to diminish *Charter* protection: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44.

[50] In *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585, the Supreme Court held that the Federal Court's exclusive jurisdiction to judicially review decisions of federal board, commissions and tribunals did not require a party to exhaust that remedy before taking an action in damages in a provincial superior court.

[51] In coming to that conclusion, Mr. Justice Binnie, speaking for the Court, stated at paragraph 18:

> This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

[52] He added at paragraph 32:

> The enactment of the *Federal Court Act* , S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives. […]

[53] In the early days of detention, the length of detention itself is hardly an issue. Thus, it is the other factors set out in section 248 of the Regulations which are more relevant, and should usually be considered by the Federal Court by way of judicial review. There is no judicial economy by beginning in one court and then, after a passage of time, going to another.

[54] The Federal Court owes its existence to section 101 of the *Constitution Act, 1867*. As such, it only has the jurisdiction and power that Parliament may lawfully confer upon it (*ITO-International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752). However, that is not to say that it does not, by implication, have such power as is reasonably necessary to accomplish its mandate. As stated by Chief Justice McLachlin in *R v 974649 Ontario Inc*, 2001 SCC 81, [2001] 3 SCR 575, at paragraph 70:

> It is well established that a statutory body enjoys not only the powers expressly conferred upon it, but also by implication all powers that are reasonably necessary to accomplish its mandate: *Halsbury's Laws of England* (4th ed. 1995), vol. 44(1), at para. 1335. In other words, the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions: *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

Is it not what Mr. Justice Hugessen said in *Henry*, above?

[55] It seems somewhat peculiar that the Federal Court has exclusive jurisdiction to grant a writ of *habeas corpus* with respect to members of the Armed Forces serving outside Canada, but otherwise cannot issue a writ of *habeas corpus* at all, notwithstanding that it is dealing with detention in immigration and penitentiary matters day in and day out.

[56] Perhaps the last word has yet to be written, either by the courts or by Parliament.

VIII. Certified Question

[57] My decision is final unless I certify a serious question of general importance which would support an appeal (IRPA, s 74(*d*); *Valera v Canada (Minister of Citizenship & Immigration)* 2009 FCA 145; and *Zhang v Canada (Minister of Citizenship & Immigration)*, 2013 FCA 168).

[58] The parties did not propose such a question. In any event, as I have found in Mr. Warssama's favour through the traditional route of judicial review there is no question to certify.

IX. Directions

[59] At the hearing *de novo*, the Minister is required to produce information as to all steps he has taken to explore the possibility of returning Mr. Warssama to Somalia other than via African Express. In the aftermath of *Jilaow v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 238, [2007] FCJ No 299 (QL), Mr. Jilaow was eventually returned via Djibouti. The Minister shall provide evidence in support of the proposition that it is too

dangerous to send Canadians to Somalia. The Minister shall provide evidence that he has explored the possibility of hiring foreign nationals who would be less at risk than Canadians to escort Mr. Warssama to Somalia.

[60] Given that Mr. Warssama has already cost the Canadian taxpayers hundreds of thousands of dollars, the Minister shall explain why a plane cannot be chartered to fly him directly to Somalia under escort.

[61] If he cannot be returned, as required under section 48 of IRPA, the member must consider other alternatives to detention such as those set out in *Charkaoui*, above.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision is quashed. The matter is referred back to the Immigration Division of the Immigration and Refugee Board of Canada for reconsideration in accordance with the directives herein.

3. There is no serious question of general importance to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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