

Federal Court



Cour fédérale

Date: 20200609

Docket: IMM-5385-19

Citation: 2020 FC 657

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, June 9, 2020

Present: The Honourable Madam Justice St-Louis

BETWEEN:

**MOUBARAK SALAH-ADDIN MOHAMED
OUMALKER GAWAD AHMED**

Applicants

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Moubarak Salah-Addin Mohamed and Oumalker Gawad Ahmed (the applicants) are seeking judicial review of the Refugee Appeal Division [RAD] decision dated August 16, 2019. The RAD dismissed their appeal and confirmed the Refugee Protection Division [RPD] decision

that they are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Immigration Act].

II. Brief overview of the facts

[2] The applicants are citizens of Djibouti. On March 21, 2017, they left Djibouti for the United States of America, each with the required visitor's visa for the US issued December 7, 2016. On March 22, 2017, they entered the United States, did not claim refugee protection, and on April 18, 2017, they arrived in Canada where they claimed refugee protection.

[3] On May 10, 2017, the applicants each signed their Basis of Claim Form (Form). Mr. Mohamed referred to the account Ms. Ahmed provided with her Form.

[4] In short, Ms. Ahmed states that Mr. Mohamed has worked for her family since 2010. Their problems began on March 1, 2013, when Mr. Mohamed asked Ms. Ahmed for the second time to marry him. The marriage was refused, and Mr. Mohamed was dismissed, because he belonged to the Hakmi tribe, a tribe of untouchables. On October 23, 2013, they married secretly, and in July 2014, they left Djibouti secretly to go live in Tadjourah. In March 2015, Ms. Ahmed's father and uncles found her and brought her back to Djibouti. In March 2017, Mr. Mohamed and Ms. Ahmed reunited and fled Djibouti for the United States.

[5] In his IMM-5669 form, Mr. Mohamed states that he has been unemployed since July 2013, in Djibouti, and that he resided in the city of Tadjourah from July 2014 to March 2015. In

her IMM-5669 form, Ms. Ahmed states that she resided in Tadjourah from January 2014 to January 2015.

[6] On August 27, 2018, prior to the hearing before the RPD, the applicants each submitted a new Form, and Ms. Ahmed amended her account to indicate that her husband actually belongs to the Akhdam tribe.

[7] On November 14, 2018, the RPD rejected the refugee protection claims, having concluded that the applicants were not credible. The RPD noted inconsistencies regarding several key elements including the male applicant's ethnicity, the fact they married in secret without the consent of Ms. Ahmed's family and the chronology of their secret life in Tadjourah.

[8] The RPD noted the documentary evidence the applicants submitted in relation to the traditions and customs in Djibouti and the possible treatment of single females by their families. The RPD noted, however, that Ms. Ahmed is officially a married woman according to the marriage code of her country, and the documentary evidence about married women focuses on spousal violence. With regard to a possible request for protection in their country, the RPD noted that Mr. Mohamed stated that the authorities did not take his complaints seriously and Ms. Ahmed stated she did not want to dishonour her family by filing a complaint. The RPD noted that Ms. Ahmed is a married woman who wants to live with her husband and it is contradictory for her to declare that she is concerned about dishonouring her family by filing a complaint while she was not concerned about this dishonour when she married in secret. The RPD favoured the documentary evidence over the applicants' testimony.

[9] Lastly, the RPD concluded that the time it took to request international protection is inconsistent with a fear of persecution, considering the three-month delay between the date they obtained their US visas and their departure from Djibouti, and considering that the applicants filed their refugee protection claims in Canada more than one month after arriving in the United States.

[10] For these reasons, the RPD considered that the applicants lacked credibility and rejected their applications.

III. Impugned decision

[11] The applicants appealed to the RAD, which also found that the applicants were not credible.

[12] Before the RAD, the applicants challenged the negative credibility findings related to (1) the change from Hakmi tribe to Akhdam tribe; (2) getting married in Djibouti; (3) the minor errors in the Schedule A form about the period of residence in Tadjourah; (4) the documentary evidence versus the applicants' testimony about state protection in which the applicants submit that the Member erred by citing excerpts from the objective documentary evidence without indicating why he favoured one point of view over another that would have supported them. The applicants cited passages from tabs 5.3 and 5.1 in the National Documentation Package (Certified Tribunal Record (CTR) at p 75); and (5) the three-month delay before leaving Djibouti. Lastly, the applicants asked that two new pieces of evidence be admitted. The first document is an email exchange dated June 13, 2017, between the male applicant and his prior

counsel, about the correction to be made regarding his tribal affiliation. The second is a photocopy of a text that is almost completely illegible.

[13] In its decision, the RAD rejected the applicants' two new pieces of evidence. The RAD erroneously considered the first document to post-date the RPD decision even though the exchanges in it precede the RPD decision. The RAD was of the view, however, that although the email came after the decision, it did not meet the jurisprudential criteria of being new, credible and relevant. The RAD noted that the name of the tribe had been replaced before the hearing and had been discussed at length by the RPD; it also noted that the applicants had provided their version of the facts. It did not accept this new piece of evidence. The RAD rejected the second document, as it was almost illegible and a promised clearer copy was not received.

[14] The RAD began its analysis by noting that "[t]he very essence of this case lies in the appellants' credibility". The RAD analyzed the five elements raised by the applicants. Regarding the tribal affiliation of the male applicant, the RAD noted the contradictions and implausibility in the testimony, when Ms. Ahmed stated that she did not know the various tribes including her husband's and that she did not make the change in her account, and Mr. Mohamed maintains that he is a member of the Hakmi tribe despite the change in the account. This seemed unlikely to the Member, since they lived together for four years and Mr. Mohamed's affiliation to an inferior tribe was the reason Ms. Ahmed's father refused. For the RAD, these implausibilities were the Gordian knot of the refugee protection claim. In regard to the refusal of Ms. Ahmed's father to consent to the applicants' marriage, the RAD noted that the name of the female applicant's father appears on the marriage document, and the contradictory explanation that she provided to

explain this was not credible. In relation to the errors in the date of their stay in Tadjourah, the RAD found that this was not a peripheral error since it was a matter of months that did not align with the account. The RAD expressed doubts. In relation to the documentary evidence about state protection, the RAD noted the inconsistency in the testimony of Ms. Ahmed, who had allegedly gone against her father's will by getting married but did not want to bring shame on herself by filing a complaint about him with the police; the RAD therefore agreed with the RPD analysis. Lastly, in relation to the delay in leaving their country of origin and requesting international protection, the RAD did not agree with the applicants' explanations and considered it unfavourable that they failed to claim protection in the United States. Ultimately, the RAD rejected each of the arguments and found that the RPD had not erred. As a result, the RAD dismissed the appeal.

[15] Moreover, the RAD stated that it considered "Chairperson's Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution" in regard to Ms. Ahmed's case.

IV. Issues

[16] Considering the arguments raised by the applicants, the Court must decide whether:

- (a) the RAD's rejection of the new evidence was unreasonable;
- (b) the RAD's decision was substantively reasonable;
- (c) the RAD violated the principles of procedural fairness by adding a reason for refusal that the RPD did not raise.

V. Standard of review

[17] I agree with the parties that the standard of reasonableness applies to the first two points (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65) [*Vavilov*] and that the presumption has not been rebutted.

[18] When the reasonableness standard applies, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov* at para 100). The focus of the Court “must be on the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome” (*Vavilov* at para 83) to determine whether the decision is “based on an internally coherent and rational chain of analysis and that it is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). Close attention must be paid to the decision maker’s written reasons, and they must be interpreted holistically and contextually (*Vavilov* at para 97). It is not a line-by-line treasure hunt for error (*Vavilov* at para 102). When “the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and . . . it is justified in relation to the relevant factual and legal constraints that bear on the decision”, then it is not open to this Court to substitute its own view of a preferable outcome (*Vavilov* at para 99).

[19] However, *Vavilov* does not affect the jurisprudential debate on the standard of review that applies to procedural fairness issues, such as the third point in this case. The Federal Court of Appeal recently stated that procedural fairness issues do not necessarily lend themselves to a standard of review analysis. The role of this Court is to determine whether the procedure is fair

considering all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

VI. Parties' submissions and analysis

A. *New evidence*

[20] Through their arguments regarding the male applicant's [TRANSLATION] "insignificant" tribal affiliation, the applicants contend that the RAD erred by dismissing the email exchange from June 2017. Contrary to the RAD's conclusion, which was that the exchange came after the RPD decision, this exchange was from June 2017, which was more than a year prior to the first hearing before the RPD in September 2018. The applicants argue that this error prevented the RAD from correctly assessing their credibility. The applicants submit that it is the RAD's responsibility, not the respondent's, to determine whether the error had an impact. The applicants submit that with its mistake in dates the RAD applied the jurisprudential criteria in a restrictive manner, and they argue that this document is essential for establishing the male applicant's credibility. They add that the RAD did not apply the correct legal test and that this vitiates its decision.

[21] The respondent submits that the error raised by the applicants is inconsequential. The emails pre-date the hearings before the RPD, so they are not new evidence. The respondent adds that the RAD nonetheless assessed the document according to the criteria that apply to all new evidence under section 110 of the Immigration Act.

[22] Contrary to the argument the applicants raised, I note that the RAD indeed concluded that “[a]lthough this email was sent after the decision, it does not meet the jurisprudential criteria”. So, despite its error regarding the date of the emails, it noted that the content of this evidence was not new and, correctly, highlighted the fact that the replacement was made before the hearing and that the parties had the opportunity to present their versions. Contrary to the applicants’ arguments, the delay between the correction and the hearing is not a determining factor; the RAD decision relies instead on the fact that Ms. Ahmed did not know which tribe her husband belonged to and the fact that Mr. Mohamed provided confusing testimony that he was from the Hakmi tribe, even after changing the account to indicate instead that he was from the Akhdam tribe. The decision to not allow this document is reasonable considering these findings.

B. *Was the RAD decision reasonable?*

(1) Male applicant’s tribal affiliation

[23] The applicants submit that the RAD erred by interpreting their testimony about the male applicant’s tribal affiliation as being contradictory. On the contrary, they argue, the relationships between the Akhdam and Hakmi tribes explain why there was no contradiction in their testimony. The applicants submit that there was no contradiction and that the RAD misunderstood the ethnic context. As for the female applicant’s ignorance of her husband’s tribe, the applicants replied that the female applicant knew that her husband was from an inferior caste and that was enough for her father to deny their union.

[24] The respondent notes that the RAD described the male applicant's tribal affiliation as the "Gordian knot" of the refugee protection claims in question. The claims rely on the behaviour of the female applicant's family in reaction to the social and ethnic group of the male applicant. In this context, the name of the male applicant's tribe is key. The respondent notes that the applicants provided [TRANSLATION] "disjointed" testimony about this key issue. First, they submitted two Forms, the original indicating the tribe name as "Hakmi" and the amended Form indicating it as "Akhdam". Second, the female applicant testified that she never discussed tribes with her husband. Third, the male applicant provided [translation] "confusing" testimony to explain the correction of Hakmi to Akhdam in his Form. For these reasons, the respondent submits that the RAD reasonably concluded that the RPD decision was correct.

[25] Contrary to the applicants' arguments, the RAD considered the context of the tribes (at para 28), but found Mr. Mohamed's testimony confusing on this subject. Lastly, and perhaps most importantly, the RAD conclusion on this issue is mainly based on the unlikelihood that Ms. Ahmed did not know her husband's tribal affiliation. The RAD considered this paradoxical situation was highly damaging to their credibility. It is reasonable for the RAD to find this ignorance unlikely, considering the factual background and considering Mr. Mohamed's tribal affiliation is at the heart of their refugee protection claim.

(2) Ms. Ahmed's father's name on marriage documents

[26] The applicants submit that the RAD's conclusion was unreasonable and contrary to the evidence, when there was nothing to confirm or even suggest that the father was present at the wedding ceremony to sign the documents. Instead, they argue that they had a reasonable

explanation, based on objective evidence, why the father's name appeared on the document even though it is misspelled and that, considering this [TRANSLATION] "entirely coherent" explanation, the RAD unreasonably found that it undermined the female applicant's credibility in regard to whether her father attended the wedding. The applicants note that the respondent had no answer to this argument.

[27] The RAD noted, as the RPD did before it, that Ms. Ahmed's father's name was on the marriage certificate despite the fact their wedding allegedly took place in secret. Ms. Ahmed first explained that the authorities copied this name from his national identity card. However, the RAD noted, correctly, that the name the authorities copied is not written the same way in these two documents. This conclusion is not erroneous since the names are indeed written in different ways. The RAD remarked that the RPD "noted inconsistencies between the appellants' testimony and the evidence submitted on the record concerning the couple's marriage" (RAD decision at para 30), and it looks like it dismissed Ms. Ahmed's subsequent explanation that she had been asked to give her father's full name.

[28] The secret wedding is an essential element in the applicants' account. The presence of the female applicant's father at the wedding or his consent to this marriage taints this account. The inclusion of Ms. Ahmed's father's name on the marriage certificate, the Family Code requirements and the confirmation of a dowry might suggest that the father consented. It was reasonable for the RAD to not accept Ms. Ahmed's explanation, when she had to adjust her testimony.

(3) Chronology of their common residence

[29] The applicants submit that the RAD drew an unreasonable and erroneous negative credibility finding when, on the contrary, they gave complete and coherent testimony about their stay in the city of Tadjourah to escape Ms. Ahmed's parents.

[30] They state that the dates Mr. Mohamed provided in his IMM-5669 form and at the hearing were not contradictory. He had always maintained that he resided in Tadjourah from July 2014 to March 2015, stating that he was unemployed in "Djibouti" during this period (CTR at p 79) and he merely mentioned the country (Djibouti), neglecting to indicate the city.

[31] According to the applicants, these dates are fully consistent with the female applicant's testimony before the RAD. In light of these reasonable explanations, the applicants submit that the RAD identified contradictions that do not exist and, as a result, made erroneous credibility findings.

[32] The respondent submits that according to the IMM-5669 form completed by Ms. Ahmed, she lived in Tadjourah from January 2014 to January 2015, which contradicts the dates indicated in the IMM-5669 form completed by Mr. Mohamed, which instead indicates he lived there from July 2014 to March 2015. This also contradicts her amended account, in which she states that her family found her in Tadjourah in March 2015.

[33] The RAD reviewed the explanations provided by the applicants to justify these inconsistencies but found them to be unsatisfactory. The applicants essentially repeated the same

explanations before his Court. It was open to the RAD to conclude that these inconsistencies created doubt about this key event in the chronology of the alleged persecution; as for Ms. Ahmed, this was an error of several months about a determinative event in her account.

(4) Delay in leaving their country of origin

[34] The applicants submit that they did not have sufficient financial means to leave earlier, which is a completely reasonable explanation. Neither the Immigration Act nor the Convention sets out a maximum time after persecution to leave the country. The SAR unreasonably dismissed the applicants' explanation.

[35] The respondent submits that the RPD and RAD concluded that the applicants' behaviour was inconsistent with their fear. The applicants had passports and US visas since December 2016 at the latest, but only left in March 2017. The RAD was not satisfied that the applicants did not have the financial means, as funds are also required to obtain passports and visas.

[36] Although there is no maximum deadline, it is well established that delaying a refugee protection claim can indicate a lack of fear of persecution (*Kayode v Canada (Citizenship and Immigration)*, 2019 FC 495 at para 29; *Osorio Mejia v Canada (Citizenship and Immigration)*, 2011 FC 851 at paras 14–15). The same applies to not immediately leaving the risk environment (or country of persecution), without a reasonable justification (*Alvarez Contreras v Canada (Citizenship and Immigration)*, 2009 FC 398 at para 17).

[37] The applicants simply repeated the explanation that was provided to the RAD and then dismissed by it. They did not identify a reviewable error in the reasons the RAD relied on to reject this attempt to justify their delayed departure.

(5) State protection

[38] The applicants accuse the RAD of having drawn a negative inference from the fact they did not file a complaint with the police in Djibouti. They feel that the RAD conclusions were incompatible with the documentary evidence and the case law, which support their position that state protection is unavailable for people in their situation.

[39] They cite excerpts from the NDP to support their position (Tab 2.1, Applicants' Record at p 238; NDP, Tab 2.3, Applicants' Record at p 266; NDP, Tab 5.1, Applicants' Record at p 276; NDP, Tab 7.2, Applicants' Record at p 281; NDP Tab 13.3, Applicants' Record at p 286) and allege that state protection is even less accessible for members of the Akhdam tribe, exposing Mr. Mohamed to an additional risk of persecution.

[40] The respondent submits that the applicants did not take any steps to complain to the authorities in their country of origin. Instead, they chose to seek international protection. According to the respondent, they are asking this Court to reassess the evidence without identifying any reviewable errors. The applicants refer to the documentary evidence and the case law to support their statements about the lack of state protection. However, the respondent submits that this evidence and case law involve marriages in which the women could not file complaints against their husbands (NDP, Tab 5.1, Applicants' Record at pp 275–78). The

applicants are not in this type of situation, quite the contrary. Considering the applicants are married, the female applicant is no longer accountable to her father; it is her husband who becomes the head of the family.

[41] The respondent also submits that the RAD found that Ms. Ahmed's explanations contradicted the documentary evidence and that her behaviour indicated a lack of subjective fear. According to the respondent, the applicants did not raise any error in this regard.

[42] Both tribunals considered state protection in their analyses of the applicants' subjective fear. The key issue for the RAD was to determine whether the applicants' behaviour was consistent with that of people who fear for their lives.

[43] The applicants admitted that they did not file a complaint with the police in Djibouti. They explained that it would have been useless as the police are corrupt and it would have been "shameful" to bring charges against her father. Both tribunals found that this decision to not ask for state protection was inconsistent with their alleged fear. According to the applicants, the documentary evidence supports their lack of confidence in the protection provided by the Djibouti state. However, both tribunals felt that the documentary evidence indicated that police officers must take complaints from female victims of violence (RAD decision at para 37; RPD decision at para 17).

[44] The tribunals also reviewed Ms. Ahmed's statement that she did not file a complaint against her father because it would have been "shameful". Both tribunals felt this behaviour was

contradictory since “[i]n her mind, it is shameful to act and speak against her father’s will, but it should be noted that she went against the wishes of her father and his family by marrying in secret” (RAD decision at para 37).

[45] When confronted with this contradictory statement and the documentary evidence showing the possibility of obtaining state protection, both tribunals concluded that the applicants’ failure to request protection was behaviour inconsistent with that of people who fear for their lives.

[46] The applicants have not persuaded me that the RAD erred. Both tribunals concluded that the applicants’ behaviour was contradictory and inconsistent with their alleged fear. This conclusion was based mainly on the contradiction created by Ms. Ahmed’s justification, according to which it would have been “shameful” to file a complaint against her father, even though she decided to marry in secret, which is also shameful.

[47] The RAD was entitled to conclude that the applicants’ explanations were insufficient to justify their decision to not seek state protection. With no satisfactory explanation, the RAD reasonably determined that this failure to seek state protection was inconsistent with their alleged fear.

C. *RAD did not violate principles of procedural fairness*

[48] According to the applicants, the RAD violated procedural fairness in this case by raising a new reason for refusal, namely the fact they did not claim refugee protection during their short stay in the United States, when the RPD did not rely on this reason. They state that the RPD never raised this reason. The RPD instead criticized them for delaying leaving their country of origin.

[49] The leading case on this issue is *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] (see *Dalirani v Canada (Citizenship and Immigration)*, 2020 FC 258 at para 30). In *Kwakwa*, Justice Gascon compared the case law on this issue, including his decision in *Sary*, to determine the key principle. He wrote the following:

[24] In other words, the RAD is entitled to make independent findings of credibility or plausibility against an applicant, without putting it before the applicant and giving him or her the opportunity to make submissions, but this only holds for situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the applicant

[25] In *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725, the Court concluded that, when a new question and a new argument have been raised by the RAD in support of its decision, the opportunity must be given to the applicant to respond to them. In that case, the RAD had considered credibility conclusions which had not been raised by the applicant on appeal of the RPD decision. This amounted to a “new question” on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions. Similarly, in *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at para 20 and *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at para 12, the RAD had raised in its decision questions which had not been reviewed or relied on by the RPD or advanced by the applicant. These situations can be distinguished from *Sary v*

Canada (Citizenship and Immigration), 2016 FC 178 at para 31, in which I found that the RAD did not examine any “new questions” but rather referred to evidence in the record which supported the conclusions reached by the RPD. A **“new question” is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.**

[Emphasis added.]

[50] The respondent submits that in this case, the RAD’s findings about their failure to claim refugee status in the United States was not a new reason for refusal. As noted in *Sary*, the RAD merely referred to another piece of evidence in the tribunal’s record that supported the RPD’s credibility findings.

[51] The RPD considered the lateness of their departure and the duration of their stay in the United States before claiming refugee protection in Canada in its assessment of their subjective fear:

[TRANSLATION]

[19] The applicants’ delay in seeking international protection was inconsistent with their fear of persecution. Moreover, the applicants’ passports indicate that they had both obtained US visitor visas on December 7, 2016. However, they left Djibouti more than three months later, on March 21, 2017. Additionally, the applicants submitted their refugee protection claim in Canada more than one month after their arrival. Their testimony regarding the fact they did not know they could leave the country or that they did not have sufficient funds to leave was not credible. . . . Their choice to delay the request for protection was inconsistent with a fear of persecution.
(RPD decision at para 19)

[52] This case is similar to *Sary*, as the issue raised by the RAD is not a new issue, but another element that supports the RPD's finding of a lack of credibility. Such an approach is supported by the case law of this Court:

While the RAD cannot raise a new issue without notice to the parties, it is entitled to make independent findings of credibility against an appellant where credibility was at issue before the RPD, the RPD's findings are contested on appeal and the RAD's additional findings arise from the evidentiary record

(Nuriddinova v Canada (Citizenship and Immigration), 2019 FC 1093 at para 47; Smith v Canada (Citizenship and Immigration), 2019 FC 1472 at para 31; Oluwaseyi Adeoye v Canada (Citizenship and Immigration), 2018 FC 246 at paras 12–13).

[53] The RPD raised credibility issues regarding the delay in filing their refugee protection claim and the time they took leaving their country. The applicants challenged these findings on appeal. As a result, I find that the RAD could review other elements from the record that could support the RPD's findings.

[54] As the issue of credibility was raised throughout the RPD's reasons and in the appeal documents prepared by the applicants (CTR at p 76), procedural fairness did not require the RAD to inform the applicants that it would consider this issue. I therefore see no violation of procedural fairness.

[55] Additionally, failure to claim refugee protection at the first opportunity in the United States without providing justification may be a factor (*Jeune v Canada (Citizenship and Immigration), 2009 FC 835; Garavito Olaya v Canada (Citizenship and Immigration), 2012 FC 913*).

[56] The application for judicial review is dismissed.

JUDGMENT in IMM-5385-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. No question is certified.

“Martine St-Louis”

Judge

Certified true translation
This 25th day of June 2020.

Michael Palles, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5385-19

STYLE OF CAUSE: MOUBARAK SAHAL-ADDIN MOHAMED,
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