Federal Court  Cour fédérale

Date: 20120920

Docket: IMM-1859-12

Citation: 2012 FC 1098

Ottawa (Ontario), September 20, 2012

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ROBERT ASUEN JACKSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Robert Asuen Jackson, has applied for judicial review of the January 23, 2012 decision of the Refugee Protection Division of the Immigration and Refugee Board [Board] denying his claim for refugee status as a Convention refugee or as a person in need of protection within the meaning of sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], on the basis of his alleged fear of persecution as a homosexual person in Nigeria. For the reasons that follow, I have come to the conclusion that this application ought to be dismissed.

FACTS

[2] The applicant is a 38-year-old citizen of Nigeria. Since 2000, he has been in a common law relationship with a woman with whom he has two children. However, the applicant attributes his living with a female partner to social pressure and expectations of both his religion and his family. He self-identifies as a homosexual.

[3] The incident leading to the applicant leaving his country occurred on June 6, 2010, when ~~in~~ at a birthday party he met an old boyfriend. The applicant alleges that people, and even his friend's wife, became suspicious when the two men hugged each other. Later in the evening, while the boyfriend's wife was in a discussion with others, the applicant and his friend left the party and locked themselves in the washroom. This was when the friend's wife allegedly caught them kissing in the washroom. She immediately raised the alarm and the two men were attacked by a mob. The applicant jumped out of the window and escaped. He went home, packed his bag and left the house before the news reached his partner.

[4] The applicant alleges that he spent a month at his uncle's place and in a friend's house. His uncle took him to his private doctor to get treatment for his bruises and pain relief and his friend arranged to smuggle him out of the country in exchange of a payment of $5,500. The smuggler was immediately paid $2,000 and asked the applicant to pay the balance later.

[5] On July 11, 2010, the applicant's friend provided him with a fake UK passport and an airline ticket. The next day, the applicant flew to Canada via Switzerland and arrived in Montreal on July 13, 2010. He claimed refugee status on July 14, 2010, in Ottawa and his claim was heard on December 13, 2011.

DECISION UNDER REVIEW

[6] The Board member gave comprehensive reasons as to why (1) the applicant failed to establish his identity to the satisfaction of the Board and his allegation of subjective fear of persecution was not credible, and (2) the applicant's subjective fear, genuine or not, was not objectively well-founded in view of the objective documentary evidence; each of which grounds was sufficient *per se* to reject the applicant's refugee claim.

Identity

[7] At the outset, the Board found that the applicant's identity was not established on the basis of his two identification documents, namely a driver's license issued on July 7, 2010 and a certificate of origin issued on July 5, 2010. At the hearing, the applicant testified that he applied personally for the driver's license and that a cousin got the certificate for him.

[8] The Board raised three concerns with respect to the identification documents.

[9] First, the Board questioned the applicant as to why both pieces of identification were issued just few days before the applicant's departure from Nigeria. The applicant's explanation that he had left his old driver's license at home did not satisfy the Board given the fact that, according to his own testimony, the applicant went home and packed his bag before leaving. In addition, the Board found that it was implausible, on the balance of probabilities, that the state would issue a second driver's license since the applicant already had a valid one.

[10] Second, the Board also drew a negative inference with respect to the applicant's identity, noting the complete absence of any other documents to establish where the claimant lived, worked, etc., such as utility bills, pay stubs, bank account information, or affidavits from friends, relatives or witnesses to help establish his identity. The Board did not accept the applicant's explanation that he has no contact with his family in Nigeria and was therefore unable to obtain such documents. In fact, the evidence disclosed a series of money transfer receipts showing that the applicant regularly sent money to someone, allegedly his uncle, in Nigeria to pay off the smuggler.

[11] Third, the Board member noted the easy access to counterfeit documents in Nigeria based on both the objective evidence from the National Documentation Package [NDP] and on his specialized knowledge. The Board observed an obvious difference between the signature on the applicant's Personal Information Form [PIF] and the signature on his driver's license. As for the certificate of origin, the Board stated that Canadian forensic exams routinely dismiss these as insufficient to establish identity as they contain no biometric data.

[12] The Board stated that the applicant's failure to establish his identity was fatal to his claim for protection but went on to discuss the merits of the claim. In reading the Board's decision, it appears that the identification issue is in fact intertwined with the applicant's general lack of credibility.

Subjective fear of persecution: credibility

[13] The Board raised several issues that undermined the credibility of the applicant's account and the presence of a subjective fear on his part; the most significant being the discrepancies and the lack of evidence with respect to the applicant's itinerary and travel documents, such as a boarding pass, airline ticket, luggage tags, etc. The applicant testified that the smuggler kept all these documents during the flight and after their arrival in Canada, that he did not remember the name he traveled under with the false UK passport, that he did not remember the name of the hotel he stayed in while in Montreal before taking a bus to Ottawa, and that he had lost the hotel receipt, the bus ticket and the bus receipt.

[14] The Board also found implausible that the applicant, instead of claiming refugee protection upon his arrival at the Montreal Airport, traveled to Ottawa to make his claim. The Board did not believe the applicant's explanation that no one spoke English at the Montreal International Airport.

[15] With respect to the alleged incident of June 6, 2010, the Board found it implausible that the applicant and his friend would take the risk of hugging in public despite the social taboos and legal sanctions against homosexuality in Nigeria, of which they were both aware. The Board was not satisfied by the applicant's answer that at the time people were focused on dancing; the mere fact of openly and publicly engaging in a conduct which they knew was legally and culturally unacceptable was found to be implausible. The Board also drew a negative inference from the fact that the applicant remembered the date of the incident (he was positive it occurred on June 6) but did not remember which day of the week it was.

[16] The Board further questioned the fact that the applicant was unable to adduce any medical evidence of the treatment he allegedly received after the June 6, 2010 incident or any other evidence to corroborate his account, despite the fact that he is in touch with his uncle in Nigeria and regularly sends him money to pay the smuggler.

[17] Finally, the Board questioned the applicant's allegation of homosexuality as the applicant was "surprisingly ignorant of gay symbols and neighbourhood". The Board also noted that the applicant had been in a heterosexual relationship for many years and has two children whereas he has not been in any gay relationships since he arrived–in Canada; a fact that the applicant attributed to his difficulties communicating. The Board did not find this answer reasonable in a multi-cultural city like Ottawa, where the applicant now lives. The applicant has attended only one gay event since he is in Canada, during which he took several pictures that he filed in support of his claim.

[18] Given these findings, the Board gave little weight to the psychologist report according to which the applicant is diagnosed with Post Traumatic Stress Disorder [PTSD]. The Board did not specifically dispute the symptoms reported in Dr. Fulford's report but did not believe that those symptoms resulted from the applicant's story which the Board found not to be credible.

Objective fear of persecution

[19] The Board found that the applicant had adduced no persuasive evidence to establish that he would face more than a mere possibility of persecution in Nigeria. The Board conducted a review of the objective documentary evidence from various sources, including Responses to Information Requests [RIRs] as found in the NDP released in August of 2011, as well as four articles submitted by the applicant reporting recent anti same-sex marriage legislation passed in Nigeria's Senate in November and December 2011.

[20] The Board's overall assessment of the objective evidence available on conditions for gays and lesbians in Nigeria favours an assessment made in February 2011 by a diplomat at the Canadian High Commission in Lagos. The relevant paragraphs of this opinion read as follows:

> Homosexual acts are indeed punishable by up to 14 years imprisonment, as per the Nigerian Criminal Code. However, the offence is seldom prosecuted. In 2009, several gay activists flocked to the National assembly to protest a plan to make same-sex marriage illegal. While they were widely criticized in the media and by religious leaders, not one of the protesters was prosecuted or subjected to physical harm.
>
> Nigeria is not Uganda. While homosexuality is widely condemned, there are fairly active gay scenes in Lagos, and to a lesser extent, in Abuja.

> We are not aware of any incident in recent years in which a person was charged or prosecuted for homosexual acts. Not aware of attacks against homosexuals either (although this does not mean that none have happened).

[21] The Board also referred to other NDP evidence leaning in the same direction. While the US Department of State report dated April 8, 2011, the UK *Operational Guide Note* dated April 14, 2009 and a Norwegian report from March 2006 (NDP on Nigeria, August 31, 2011, Tabs 2.1, 2.3 and 1.4) make no mention of harassment or persecution of gays, a more recent UK Home Office *Country of Origin Information Report* (idem, Tab. 2.2.) provides the following assessment :

> According to LEDAP [Legal Defence and Assistance Project] officials, Nigerian law does not clearly define 'sodomy', and the law on sodomy covers other types of non-conformist sexual behaviour or acts, which are all regarded as "sodomy". Under the law on sodomy, nobody can be convicted without a confession. No one has been convicted for sodomy under common law as sodomy is hard to prove. […] At a meeting with the Nigerian NGO, Civil Liberties Organisation (CLO), a spokesman stated that he believed that homosexual acts or behaviour were tolerated in Nigeria, as long as they were carried out discreetly and in private, but homosexuals would be arrested for offending public decency if they showed affection in public. He added that violent attacks against homosexuals were not a common occurrence in Nigeria. He further stated that the public have little confidence in the police who are perceived to be inefficient and corrupt, but believed that they would provide protection for homosexuals threatened with violence for being homosexual. However, the spokeswoman for Global Rights stated that violence against homosexuals is widespread, and that societal disapproval of homosexuality meant that, even if a bribe was offered to the police to drop sodomy charges, at least 65% of such charges and prosecutions would go ahead, in her opinion at least.

[22] The Board also highlighted the following excerpts of the RIR found at Tab 6.1 of the NDP:

> Information on whether death penalty sentences have been carried out could not be found among the sources consulted by the Research Directorate. According to the LEDAP officials quoted in the joint British/Danish report,
>
> > [b]etween 2003 and 2007, 20 people [were] charged under the homosexuality provisions of Sharia law, although not all have been convicted. Between 10 and 12 people have been sentenced to death by stoning, but these sentences have not been implemented, as they have been overturned on appeal by the federal courts.(UK/Denmark 29 Oct. 2008, Sec. 5.4).
>
> [...]
>
> Information on protection offered by government institutions could not be found among the sources consulted by the Research Directorate. According to the Amnesty International Report 2009, authorities have proven "unable or unwilling to provide sufficient protection" (AI 2009). However, the report of the joint British/Danish fact finding mission quotes a spokesperson for the Nigerian NGO Civil Liberties Organisation who stated that
>
> > … homosexual acts or behaviour were tolerated in Nigeria, as long as they were carried out discreetly and in private, but homosexuals would be arrested for offending public decency if they showed affection in public. He added that violent attacks against homosexuals were not a common occurrence in Nigeria. He further stated that the public have little confidence in the police who are perceived to be inefficient and corrupt, but believed that they would provide protection for homosexuals threatened with violence for being homosexual. (UK/Denmark 20 Oct. 2008, Sec. 5.8)
> >
> > However, the same report also quotes the spokesperson for Global Rights who stated that violence against homosexuals is widespread, and that societal disapproval of homosexuality meant that, even if a bribe was offered to the police to drop sodomy charges, at least 65% of such charges and prosecutions would go ahead. (UK/Denmark 20 Oct. 2008, Sec. 5.8)

[23] Noting that the RIR version did not include the last paragraph of the UK Home Office *Country of Origin Information Report*, the Board stated that considering that almost all RIR sources are LGBT/Human Rights advocacy groups, "their findings cannot be as objectively derived given their admitted subjectivity" although "this does not mean that their conclusions are factually wrong or unsupported by objective facts." With respect to the recent criminalization of gay marriage in Nigeria, the Board stated that "such draft legislation merely confirms that Nigeria remains a rather homophobic culture. Given that gay acts are already illegal, this draft legislation, if passed into law, would not appreciably worsen the already poor situation for gays. I also note that similar legislation was introduced in 2005 and 2009, and failed both times to be passed into law."

[24] Thus, the Board concluded that, on a balance of probabilities, the objective evidence discussed above refutes the alleged objective fear of persecution in the applicant's case.

ISSUES

[25] The applicant takes issue with all of the Board's identity and credibility findings as well as its assessment of the objective basis of his claim. I have identified the following issues in the applicant's submissions:

1) Did the Board err in law or in fact in concluding, in light of its credibility findings, that the applicant has not proven his identity?

2) Does the impugned decision raise a reasonable apprehension of bias on the part of the Board member?

3) Was the Board's finding that the applicant's fear of persecution is not objectively well-founded unreasonable?

STANDARDS OF REVIEW

[26] In the absence of any submissions by the parties addressing the appropriate standard of review, the Court notes that it is trite law that the standard of reasonableness applies when reviewing the Board's findings of fact, credibility and its assessment of the evidence (*Aguebor v Canada (Minister of Employment and Immigration*), [1993] FCJ No 732, 160 NR 315; *Jin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 595 at para 4; [2012] FCJ 677). Similarly, the Board's finding that the applicant failed to establish an objective basis for a well-founded fear of persecution is a question of mixed fact and law and attracts a standard of reasonableness (*Butt v Canada (Minister of Citizenship and Immigration)*, 2010 FC 28 at para 6, [2010] FCJ 77).

[27] As the Supreme Court of Canada indicated in the case of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the Court will therefore concern itself with the "existence of justification, transparency and intelligibility within the decision-making process" and with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[28] The question whether the Board misstated or misapplied the law is a question of law reviewable on the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 44, [2009] 1 SCR 339).

[29] Lastly, whether there is an apprehension of bias has been found to be a question of fact within the jurisdiction of the reviewing Court, and no deference is owed to the Board (*Luzbet v Canada (Minister of Citizenship and Immigration)*, 2011 FC 923 at para 5, [2011] FCJ 1153; *Ke v Canada (Minister of Citizenship and Immigration)*, 2012 FC 862 at para 35, [2012] FCJ 909).

ANALYSIS

Issue 1 – Did the Board err in law or in fact in concluding, in light of its credibility findings, that the applicant has not proven his identity?

[30] The applicant submits that the legal test applied by the Board to invalidate his identification documents was the wrong one. However, the applicant has not referred me to any case law establishing a single test for determining the authenticity of identification-related evidence.

[31] The jurisprudence of this Court recognizes that "it is an error of law to find that apparently validly issued identity documents are fraudulent if there is no evidence to establish this" (*Kathirkamu v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 409 at para 34, [2003] FCJ 592, citing *Ramalingam v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 10, 77 ACWS (3d) 156). However, in the present case, the Board did provide reasons as to why the applicant's identification documents were insufficient to establish his identity. Having considered all the evidence, I find that these reasons do fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[32] The Applicant argues that the Board unreasonably rejected his testimony explaining why his pieces of identification were issued so close to his departure, and erred by raising the lack of further evidence that was not requested from him during the hearing. I do not find these to be reviewable errors in so far as they are supported by reasoning and by evidence. A bare assertion that the panel was not alert or sensitive to the evidence before it is insufficient, as the applicant has failed to show which evidence was disregarded or overlooked by the Board. During the hearing, the applicant was advised that the two documents filed did not, in the context of this case, establish his identity to the Board's satisfaction. He was asked if he had anything else, which gave him the opportunity to file additional evidence.

[33] The applicant submits that the Board member, by his own admission, had no particular expertise in assessing signatures or writing. This argument is ill-founded. I agree with the respondent that even if Board members are not experts in the assessment of irregularities that may affect identity documents, they are nonetheless allowed to use what is in plain view (such as the discrepancy between the applicant's signature on his PIF and on his driver's license) without the assistance of experts. The fact that an original driver's license was before the Board is not determinative. Even if a copy would not carry the same probative weight, it is within the Board's discretion, and not that of the Court, to assess the weight to be given to the documentation before it. As Justice Blanchard held in *Ipala v Canada (Minister of Citizenship)*, 2005 FC 472 at para 18, [2005] FCJ 583, the heightened level of deference to the Board's assessment of identity documents is justified by its first-hand access to those documents and by its high level of expertise in this area. It is certainly not for this Court to decide whether the applicant's driver's license is, as he contends, "rationally verifiable" because it "has machine readable data encoded in the magnetic strip".

[34] The applicant argues that his two pieces of identification were checked and accepted by trained document verification expert officers of the Canadian Border Services Agency and Citizenship and Immigration Canada; otherwise the applicant could have been detained for identity purposes. The jurisprudence of this Court instructs us that the assessment of identity for detention purposes must be distinguished from the assessment of identity for the purpose of ruling on the merits of a refugee protection claim. As Justice Martineau stated in *Matingou-Testie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 389 at para 27, [2012] FCJ 401:

> […] the Minister's position upon the applicant's release after several weeks of detention is not binding on the RPD, and the RPD must be satisfied of the identity of a refugee claimant before assessing his claim for protection. Moreover, it is the RPD that is tasked with assessing the probative value of any identity document submitted by a refugee claimant.

Although in the latter case the applicant had been detained and later released from detention, the rationale is equally applicable here. If the applicant's position was correct, there would be no need for the Board to assess a claimant's identity unless the claimant was detained upon arrival in Canada; such a finding is unsupported by both the wording of section 106 of the IRPA and the more explicit requirement of rule 7 of the *Refugee Protection Division Rules*, SOR/2002-228, which provides that "[t]he claimant *must* provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them." [emphasis added]. I find that the Board's conclusion that the applicant had not properly established his identity for the purpose of assessing the merits of his refugee protection claim is reasonable, in light of the Board's overall findings on the applicant's lack of credibility.

Issue 2 – <u>Does the impugned decision raise a reasonable apprehension of bias on the part of the Board member</u>?

[35] The applicant has raised a number of concerns that he finds would lead to a reasonable apprehension of bias on the part of the Board member who disposed of his claim.

[36] First, the applicant relies heavily on a June 2010 decision of the Board in which the same Member granted refugee protection to a Nigerian homosexual, having concluded that the latter did not benefit from state protection in Nigeria where homosexuality is against the law. The applicant further highlights that in that decision the Board member accepted a Nigerian driver's license and birth certificate as establishing with satisfaction the claimant's identity.

[37] The applicant also refers to paragraph 15 of the Board's reasons, arguing that the member used his specialized knowledge as an excuse to make unreasonable findings of facts with respect to the applicant's credibility. The impugned paragraph reads as follows:

> The claimant was asked to adduce documents to prove that he arrived in Canada as he said he did. He was asked for a boarding pass, airline ticket, luggage tags, etc. He said he had nothing and that the smuggler kept all the documents. According to his PIF, he could not even remember the name he travelled under with his false UK passport. The claimant was confronted with my specialized knowledge concerning this kind of arrival story. He was told I have heard almost identical stories from several Nigerian claimants and in each and every case when their story was checked by the Canadian government (i.e. date and place of arrival – always Montreal, country of passport issued and false name), the government of Canada had no records of any such arrival in every case. He said he stayed briefly at a hotel in Montreal and then took a bus to Ottawa. He was asked the name of the hotel and for a hotel receipt. He could not remember the name and he had no receipt. He was asked for his bus ticket or bus receipt and he said must have lost it.

[38] The principle that evidence which is extrinsic to the record before the Board cannot be considered by the reviewing Court has an exception: that is when the grounds for review fall within jurisdictional errors, including a breach of procedural fairness (*McFadyen v Canada (Attorney General)*, 2005 FCA 360 at para 15; [2005] FCJ 1817). That includes the apprehension of bias on the part of the decision maker. I have therefore considered the Board's decision in the other file referred to by the applicant although, for the reasons below, I am of the view that it does not support the applicant's allegation of apprehension of bias in the case at bar.

[39] First, the jurisprudence is clear that there is no requirement to explain a Board member's departure from a previous decision in different circumstances. As Justice Shore stated in *Aoutlev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 111 at para 26, [2007] FCJ 183:

> This Court's case law has established in a large number of decisions that a decision-maker is not bound by the result in another claim, even if the claim involves a relative, because refugee status is determined on a case-by-case basis, and because it is possible that the other decision was incorrect. *Bakary v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1111, [2006] F.C.J. No. 1418 (QL) (Pinard J.); *Rahmatizadeh v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 578 (QL) (Marc Nadon J.).)

[40] In *Michaud v Canada (Minister of Citizenship and Immigration)*, 2009 FC 886 at paras 49-50, [2009] FCJ 1112, where an allegation of breach of procedural fairness was made based on a previous decision of the Board, Justice Kelen stated:

> With respect to TA7-06842 which appears to contradict the Board's decision in the case at bar, this case is either in error, or the Board member found, but did not adequately explain, that the other claimant was more likely to be exposed to a personalized risk because of his previous and recent experience with the armed gangs than the applicant in the case at bar.

> There is no legal requirement to explain a Board member's departure from a previous Board decision where the profile of the claimants is dramatically different (*Woods v. Canada (MCI)*, 2008 FC 262, 165 A.C.W.S. (3d) 508, per Mr. Justice Gibson at para. 25). Neither is there a need to explain the departure where there were differences in the findings of credibility (*Cius, supra*, per Mr. Justice Beaudry at paras. 35-36).

[41] The test for reasonable apprehension of bias on the part of an independent adjudicative tribunal, such as the IRB, is whether a reasonable person, being reasonably informed of the facts and viewing the matter realistically and practically and having thought it through, would think it more likely than not that the tribunal is biased (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at pp. 394-395, approved in the context of humanitarian and compassionate decision in *Baker*, [1999] 2 SCR 817 at paras 46-47). The grounds for apprehension of bias must be substantial and must rest on something more than pure speculation or conjecture (*Lawal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 861 at para 40; *Lai v Canada (Minister of Citizenship and Immigration)*, 2007 FC 361 at para 64, [2007] FCJ 476). A high burden rests on an applicant who seeks to establish either bias or apprehension of bias (*Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481 at para 53).

[42] Returning to the decision under review, I agree with respondent that there are important dissimilarities between the circumstances surrounding the applicant's refugee claim and those of the case upon which he relies. Not only was the other claimant found to be credible, but the incidents alleged by the latter occurred in the northern part of Nigeria where Sharia law applies. In addition, the objective documentary evidence relied upon in the applicant's case is more recent than the evidence relied upon in the Board's previous decision. The Court also notes that contrary to the

applicant's submission, in that case the claimant had adduced an additional and convincing evidence to establish his identity, namely a birth certificate.

[43] Moreover, the fact that the Board member relied on his "specialized knowledge" (referring to other Nigerian claimants' arrival stories) would constitute a reviewable error if it was the only basis upon which to make an adverse credibility finding in this case. This is not the case as the decision before me highlights a number of omissions and inconsistencies in the applicant's testimonial and documentary evidence which impugned his credibility. Therefore, having carefully reviewed all the evidence and the Board's reasons, the Court finds that the applicant has failed to discharge his rather heavy burden of demonstrating a reasonable apprehension of bias.

[44] Given the Court's answers to the preceding questions (mainly with respect to the applicant's identity and credibility), I find no need to review the other issue raised by the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is hereby dismissed.

2. No question of general importance arises for certification.

« Jocelyne Gagné »

Juge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1859-12
STYLE OF CAUSE:	Robert Asuen Jackson and MCI
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DATED:	September 20, 2012

APPEARANCES:

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