

Deservingness in Judicial Discourse. An Analysis of the Legal Reasoning Adopted in Dutch Case Law on Irregular Migrant Families' Access to Shelter

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In September 2012, the Dutch Supreme Court upheld a judgment of the Hague Court of Appeal that the eviction from basic shelter of a mother and her minor children, who did not have legal residence in the Netherlands, was unlawful. This ruling was instigated by a radically new interpretation of the European Social Charter's personal scope and caused a major shift in Dutch policy.

This article provides a case study into the legal reasoning adopted by the Court of Appeal and the Supreme Court. It argues that, instead of relying on legal doctrinal reasoning for justifying the outcome, both courts referred to factors that the general public relies on to assess people's deservingness of welfare. This finding raises fundamental questions about the relationship between human rights law and deservingness; and calls, therefore, for further research into the relevance of deservingness criteria in judicial discourse.

Keywords: Deservingness, judicial discourse, migrants, CARIN-criteria, legal reasoning.

Introduction

While the relevance in public discourse and policies of people's deservingness of welfare has been studied extensively in sociological and political science research (see the 'state-of-the-art' review earlier in this themed section), deservingness theory has not found its way into legal scholarship or in literature analysing case law (see, however, Davies, 2018). Upon first sight, this makes sense, since judges are supposed to apply the law, not to use an external moral framework to decide cases. However, especially with regard to the application of broad, general norms, such as those contained in human rights law, judges need to provide interpretations and apply the norm to a specific context, which leaves room for moral reasoning. Since deservingness frames are so overwhelmingly found to be relevant in public discourse on welfare eligibility, this raises the question whether they are also used (implicitly or explicitly) by judges when deciding cases on welfare eligibility.

This article conducts an explanatory case study (Stępień, 2019) into the relevance of deservingness criteria in judicial reasoning. It analyses the reasoning adopted by the Hague Court of Appeal and the Dutch Supreme Court in a landmark case about migrants' access to welfare. These judgments concern an unlawfully present mother and her three minor children who were about to be evicted from their state-sponsored shelter because the mother refused to cooperate with return procedures. The Hague Court of Appeal ruled in 2010 that this eviction was unlawful and the Supreme Court upheld this judgment in 2012.

The judgments are of interest for two reasons. First, because the judgments caused a major shift in Dutch policy on migrants without legal residence. Since the Dutch *'Linkage Act'*¹ entered into force in 1998, migrants without legal residence became fully excluded from all state-funded benefits. Rejected asylum seekers were put into the street, irrespective of whether the authorities were able to actually deport them. In 2007, an exception was created to this full exclusion, mainly as an alternative for detention. Migrant families could henceforth receive shelter in a so-called 'freedom restricting location' (*vrijheidsbeperkende locatie, VBL*), under the condition that they cooperated with their return procedure (see on such conditionality: Rosenberger and Koppes, 2018; Ataç, 2019). By declaring an eviction from the *VBL* unlawful, the 2010 judgment of the Hague Court of Appeal brought an end to these exclusionary policies. In response to this judgment, the Dutch central government set up special shelters where families with minor children were housed, irrespective of cooperation in return procedures, until the youngest child reaches eighteen. This judgment, therefore, marked the end of the forced destitution of migrant families without legal residence in the Netherlands.

Secondly, these judgments were instigated by a decision of the European Committee of Social Rights (ECSR) which broke new legal ground and had legal relevance for all contracting states to the European Social Charter. This decision was taken in the case of *Defence for Children against the Netherlands*² and was published on 28 February 2010, one month before the family had to leave the *VBL*. In this decision, the ECSR held that the Netherlands violated a couple of provisions of the European Social Charter (ESC)³ by not providing shelter to unlawfully present children. This decision was controversial, since the personal scope of the ESC is explicitly limited to 'nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned'.⁴ The ECSR, however, held that the restricted personal scope of the Charter should not 'end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake'. The Committee considered that growing up on the streets would leave children in a situation of outright helplessness and concluded that children fall under the personal scope of the Charter, whatever their residence status.

This article analyses the reasoning adopted in the judgments of the Hague Court of Appeal and of the Supreme Court using qualitative content analysis (Webley, 2012). Different from the few other legal scholars who use the concept of deservingness (Davies, 2018) or the related concept of 'earned citizenship' (Kramer, 2016; Spaventa, 2017) to analyse the *outcome* of case law on welfare eligibility, this article examines to what extent judges use deservingness criteria as an argumentative tool, in order to *justify* the outcome of their cases. To this end, this study systematically identifies the arguments adopted by the courts; compares them with deservingness theory; and evaluates them from a legal doctrinal perspective.

This study draws on the criteria that, according to van Oorschot's large-scale survey research, the general public, independent of gender, age or class, uses for assessing a person's deservingness of welfare; the so-called CARIN-criteria (van Oorschot, 2000, 2006, 2008, see further the 'state-of-the-art' review in this themed section):

1. *control*: poor people's control over their neediness, or their responsibility for it: the less control, the more deserving;
2. *need*: the greater the level of need, the more deserving;
3. *identity*: the closer to 'us', the more deserving;

4. *attitude*: poor people's attitude towards support, or their docility or gratefulness: the more compliant, the more deserving;
5. *reciprocity*: the more reciprocation, the more deserving.

By qualitatively examining how these deservingness criteria play out in judicial reasoning, this research adds to existing qualitative research into the CARIN criteria, that mostly focusses on policy makers (see 'state-of-the-art' review) and indicates a possible much broader relevance of these criteria.

In addition to comparing the arguments adopted by the two courts with the CARIN criteria, this article analyses to what extent the arguments find support in the legal framework. In this way, the possible relevance of deservingness criteria can be more fully explored, as this will not only show similarity between the courts' arguments and deservingness criteria, but also whether these criteria merely complement legal doctrinal reasoning or even replace it. To this end, it identifies the legal authority (i.e. legislation, case law) that the courts explicitly refer to; assesses the applicability of this authority to the circumstances of the case; and evaluates the doctrinal analysis of the courts (e.g. if and how the arguments are connected to the authority; if and how the courts discuss relevant legal doctrines etc.).

The outcome of this case study generates the hypothesis that, especially in politically sensitive cases, judges prefer to rely on generally accepted ideas about deservingness of welfare instead of elaborate legal doctrinal reasoning to justify their judgments. As this raises important questions about the relation between human rights and deservingness and the authority of legal reasoning, more research into judicial reasoning on welfare eligibility is necessary. The final section presents conclusions and some suggestions for further research.

The judgments of the Court of Appeal

*Background*⁵

The case is about an Angolan mother and her three children. In 2001, the mother arrived with her husband and their, at the time, two-year old child in the Netherlands. In 2002 and 2008 two children were born in the Netherlands. In 2001 and 2009, the mother submitted an asylum application for herself and her child(ren), but they were denied and appeals were rejected. In February 2009, the mother and children were offered accommodation in the *VBL* in Ter Apel. Since the mother did not cooperate sufficiently in acquiring travel documents and did not intend to return to Angola voluntarily, the authorities announced that they would end the accommodation on 1 April 2010.

The mother started an interim injunction procedure against this announcement. With reference to Article 31 ESC (on the right to housing) and, in particular, the decision of the ECSR in the case of *Defence for Children v. the Netherlands* (see above), the mother asked for a legal ban against the eviction order and demanded the state provide them with shelter for as long as they remain in the state's jurisdiction. This claim was denied by the president of the District court of the Hague.⁶ The president held that the ESC (and other human rights conventions) could not be used to support the claim. According to the president, the mother was primarily responsible for taking care of her children. Since she refused to cooperate with a reasonable alternative i.e. expulsion to Angola, the family

could not claim shelter and assistance from the state, according to the judge. The mother lodged an appeal against this judgment with the Hague Court of Appeal.

The judgments

The Court of Appeal⁷ made a distinction between the situation of the mother and that of the children. With regard to the mother, the Court held:

On the basis of the final rejection of her asylum application, it must be accepted that there are no obstacles in returning to Angola. The authorities could, therefore, expect from her to cooperate with acquiring travel documents. It is undisputed that she categorically refused to cooperate seriously with the return procedure. She has to deal with the consequences. The state does not, in principle, act unlawfully by turning her into the street.

Remarkably, the Court of Appeal did not refer to *any* legal authority when deciding that evicting the mother would not be unlawful. Instead, the Court of Appeal referred to the circumstances that the mother ‘categorically refused to cooperate seriously’ with return procedures and that she had to deal with the consequences. This kind of reasoning links very well to the criteria for assessing people’s deservingness of welfare found to be relevant in public discourse. The mother was in *control* over her neediness – if she would cooperate, she would receive assistance – and her *attitude* was not docile and compliant enough.

With regard to the children, the Court of Appeal quoted the provisions of international human rights conventions that the applicants appealed to (articles 17 and 31 ESC, 3 and 8 of the European Convention on Human Rights, and 2, 3, 27 and 37 of the International Covenant on the Rights of the Child) and concluded that these provisions lay down ‘substantively the same’ standard as the standard from Dutch national law that the government is responsible for the protection of children and that state obligations could follow from that. Even though the Court of Appeal in this part of the judgment referred to a number of relevant legal sources, it did not engage with these sources at all. It did not refer to the decision of the ECSR in the case of *Defence for Children v. the Netherlands* (and, therefore, did not deal with the contested nature of this decision) or to the limited personal scope of the ESC, nor did it discuss case law of the European Court on Human Rights (ECtHR), that is a necessary means of interpretation for the general human rights standards laid down in the ECHR.

Instead, the Court of Appeal listed (without any further elaboration) the following observations:

- (a) The children are currently ten, eight and two years old; they are, therefore, very young and entirely dependent on an adult for their care and upbringing.
- (b) The two youngest children were born in the Netherlands: the oldest was almost two years old when he arrived in the Netherlands with his mother; the two eldest have been staying in the Netherlands for already eight years or longer; the children are, therefore, to some extent rooted in the Netherlands, partly due to the fact that they (the two eldest) (...) have been and still go to school in the Netherlands and have learned to speak Dutch.
- (c) The mother’s decision not to cooperate with returning to Angola procedure cannot be attributed to the children, nor can they be blamed for it; the children did not have a

- voice in this decision, which means that (...) the judgment as regards the children cannot or should not necessarily align with the judgment as regards the mother.
- (d) Even though parents are primarily responsible for taking care of their children, which is in line with the relevant treaty provisions, this does not mean, as also stems from the treaty provisions and from the Dutch civil code, that the state is not obliged to ensure that the rights and interests of children are protected and safeguarded, if parents do not take this responsibility (sufficiently), and to take, if necessary, legal or factual measures.
 - (e) In its oral pleadings, the state, in answer to the question about the children's fate were the judgment of the district court to be upheld, stated that they, after a short reflection period, would be provided with a day card for public transport and be transported to a train station, after which time they should fend for themselves (...).
 - (f) The state mentioned that there is a safety net in Dutch law for the most distressing cases. The State mentioned the possibility of a residence permit for migrants who cannot return for reasons out of their control and Article 10(2) of the *Aliens Act 2000* on emergency health care. The State did not mention other kinds of assistance for humanitarian emergencies.
 - (g) In this lawsuit, it did not appear that any kind of (non)governmental agency was willing and able to take responsibility for the actual and/or financial interests of the children if the state evicted them from the *VBL*.⁸

The Court of Appeal concluded, on the basis of these facts and circumstances, that putting the children into the street – merely under the care of their mother who does not have the financial means to provide them with adequate care and shelter and without any insurance of alternative care – would be inhumane and unlawful. The Court of Appeal ruled, as an interim decision, that the state could only evict the family from the *VBL* if in another way adequate care, shelter, medical care and schooling would be provided. In reaching this conclusion, the Court of Appeal did not connect the 'observations' quoted above to the legal framework. It did not examine under what circumstances states are obliged to take protective measures for children or why the listed facts and circumstances are relevant from a legal point of view (e.g. how they connect to the arguments of the ECSR in the decision of *Defence for Children v. the Netherlands* or to arguments used by the ECtHR in its case law).

When the observations of the Court of Appeal as quoted above are compared to the CARIN criteria for assessing deservingness of welfare, however, striking similarities can be identified. The observations made by the Court of Appeal that lay at the basis of its conclusion *all* fit the CARIN principles. The children were in *need* of shelter, as they were very young and entirely dependent on an adult and, if evicted, would only receive a train ticket (observations *a* and *e-g*). Moreover, they were not in *control* over their neediness; their mother's decision not to cooperate with the return procedure could not be attributed to the children, nor could they be blamed for it (observation *c*). Finally, the observation made by the Court that the children were rooted in the Netherlands, as they went to school in the Netherlands and spoke Dutch, links to their *identity*, makes them closer to 'us' (observation *b*).

Hence, the Court of Appeal found a number of circumstances of the case relevant for deciding on the lawfulness of the eviction and for making a distinction between the mother and the children in that respect. These circumstances were not linked to the legal framework, nor did the Court discuss relevant legal doctrines (such as the personal scope

of the ESC, the legal status of decisions of the ECSR, the scope of the state's positive obligations etc.). Remarkably, *all* circumstances found relevant by the Court, can be linked to the criteria of control, attitude, need and identity that are used in public discourse to establish people's deservingness of welfare.

Before giving its final judgment in the case, the Court of Appeal gave the state the opportunity to indicate which measures would be taken to ensure that the children would receive adequate care should they be evicted from the *VBL*. In its follow-up statement, the state explained that, upon eviction, the children could be taken into (foster) care. In its final judgment,⁹ the Court of Appeal held that such a solution would be in violation with the children's right to respect for family life, as laid down in Article 8 ECHR. The final conclusion of the Court of Appeal was, therefore, that the state should allow the children to continue their stay in the *VBL* together with their mother. A week later, the minister announced that it would lodge an appeal with the Supreme Court since he was of the opinion that 'the migrant's own responsibility was given insufficient weight in answering the question how far the responsibility of the government reaches'.¹⁰ Apparently, for the minister, the mother's *attitude* and *control* over her neediness should have been decisive circumstances for deciding the case. The next section will analyse the reasoning adopted by the Supreme Court in this case.

The judgment of the Supreme Court

The Supreme Court delivered its judgment on 21 September 2012.¹¹ Contrary to the advice of the Advocate General (who advised differently as regards the application of Article 8 ECHR),¹² it decided that the appeal in cassation was unfounded. In explaining why the legal reasoning of the Court of Appeal was correct, the Supreme Court repeated, and thereby confirmed the relevance of three observations made by the Court of Appeal i.e.:

- (a) the mother's decision not to cooperate with the return procedure cannot be attributed to the children, nor can they be blamed for it;
- (b) the primary responsibility of parents with regard to the well-being of their children does not take away the state's obligation to ensure that the rights and interests of children are protected and safeguarded and to take measures if needed, if parents do not, or insufficiently, take up this responsibility; and
- (c) the mother does not have the financial means to provide her children with adequate care and shelter and that no alternative care was ensured.

The Supreme Court held that the relevance of these circumstances was supported by 'the case law of the ECtHR, the principles underlying the EU Reception Conditions Directive and the Return Directive and the views of the ECSR and the Committee of Ministers on the European Social Charter' (para 3.7.2 of the judgment). Hence, at first sight it seems that the Supreme Court engaged more with the relevant legal sources as compared to the Court of Appeal. However, upon further analysis, it turns out that these sources do not provide a convincing legal authority for the arguments used by the Supreme Court.

The Supreme Court referred to three cases of the ECtHR in order to stress the importance of the principle of the best interest of the child: one delivered in 2000;¹³ one in 2006¹⁴ and one in 2008.¹⁵ It is remarkable that the Supreme Court did not use more recent ECtHR cases, such as the well-known case of *Neulinger and Schuruk*¹⁶ in which the Grand Chamber of the ECtHR developed an elaborate framework to establish the interests

of the child. In addition, the Supreme Court did not refer to cases about the state's obligation to provide shelter.¹⁷ In fact, the cases referred to by the Supreme Court all concern so-called negative obligations of the state i.e. obligations for the state not to interfere. The question at stake in the case before the Supreme Court concerned a positive obligation for the state: an obligation to act in order to protect a right. In its case law, the ECtHR usually uses a different assessment framework for negative obligations as compared to the assessment framework for positive obligations. In addition, only one case discussed by the Supreme Court concerns a migrant without the right to stay. Research has shown that the context of migration is highly relevant for the ECtHR's reasoning and the scope of protection it is willing to offer (Dembour, 2015).¹⁸

As legal support for its conclusion, the Supreme Court also mentioned the 'principles underlying the EU Reception Conditions Directive and the EU Return Directive'. It does not further explain the content or scope of these principles. The EU Reception Conditions Directive¹⁹ obliges EU Member States to provide asylum seekers who are still waiting for a final decision on their asylum application with reception benefits. The mother and her children in the case before the Supreme Court, however, already received a final decision on their asylum application. The EU Return Directive applies to 'third-country nationals staying illegally on the territory of a Member State'²⁰ but does not contain explicit obligations for Member States to provide such migrants with shelter.

The final legal source mentioned by the Supreme Court is the decision of the ECSR. The Supreme Court did not, however, engage with the arguments used in this decision, nor with the limited personal scope of the ESC or the contested legal nature of this decision. It did not connect the circumstances that it found relevant to the reasoning of the ECSR. Other legal authority was not mentioned by the Supreme Court, even though legal commentators to this case have mentioned various relevant sources, such as Article 27 of the International Convention on the Rights of the Child (Werner, 2012; De Vries, 2013),²¹ or case law of the ECtHR on state responsibility for providing shelter to migrants (Slingenbergh, 2012).

Accordingly, the Supreme Court did not refer to convincing legal authority to substantiate its conclusion that the analysis of the Court of Appeal was correct. It did concur with the Court of Appeal on the relevance of three circumstances of the case. As discussed above, these circumstances can all be linked to the CARIN criteria that are used in public discourse to establish deservingness of welfare. The relevance of being *in control over neediness* and showing a compliant *attitude* is reflected in two further observations of the Supreme Court (see Sahraoui in this themed section for a similar finding in the analysis of healthcare professionals' discourses in Mayotte). In a concluding statement, the Supreme Court repeated the relevance of the circumstance that the children could not be held responsible for their mother's decision:

The state has the obligation to guard the rights and interests of minors on its territory, also with regard to minor migrants without legal residence, also because they cannot be held responsible for the behaviour of their family members.

After discussing why the conclusion of the Court of Appeal as regards foster care was correct as well, the Supreme Court added to its reasoning, 'unnecessarily' (since the state had not complained about the level of benefits in its appeal):

If, such as in the present case, eviction is hindered by a parent, it cannot be accepted that, by doing that, the current level of shelter and benefits can be demanded with regard to minors, and, to an even lesser extent, derived from that, with regard to their parents who are not allowed to stay in the Netherlands.

Since the mother chose to oppose a possible return to Angola, the state did not have to provide more than that was strictly necessary to prevent a 'humanitarian emergency', according to the Supreme Court. Hence, the mother's *control* over and *attitude* towards her neediness is used by the Supreme Court to limit the overall responsibility of the state towards the family. In contrast; the Court of Appeal made a clear distinction between the situation of the mother and that of the children, and only used the criterion of attitude to assess the responsibility of the state towards the mother.

Conclusion

This article has analysed the legal reasoning adopted by the Hague Court of Appeal and the Supreme Court in their landmark judgments on access to shelter for unlawfully present migrant families. It has shown that even though some legal sources were mentioned by the courts, these sources were not always applicable to the case (EU Directives; ECtHR case law); and when they were, the courts did not engage with the arguments adopted in these sources, their legal nature or with relevant legal doctrines (ECSR decision; ECtHR case law). In addition, they did not use other, more relevant legal sources to support their conclusions. Further, the article has revealed that the circumstances that were found relevant by the courts for substantiating their conclusions could *all* be linked to one of the five CARIN criteria that the general public uses to assess an individual's or a group's deservingness of welfare, as developed in deservingness theory. Accordingly, instead of relying on elaborate legal doctrinal reasoning for justifying the outcome of a politically highly relevant court case, both the Court of Appeal and the Supreme Court referred to factors that the general public relies on to assess people's deservingness of welfare. Apparently, the judges (unconsciously) found that these factors were a stronger rhetoric tool than the legal authority that was available (and that could possibly have been used to justify the same outcome).

Of the five CARIN criteria, the criteria of *control* was referred to most prominently by both courts. Possibly since this is the only criterion that justifies a distinction between unlawfully present children on the one hand and unlawfully present adults on the other. On this issue, a difference between the two courts was identified. The Court of appeal stressed that the mother was in control over her neediness, while the children were not and concluded that evicting an adult would be lawful, while evicting children was not. The Supreme Court shared the Court of Appeal's finding as regards the mother's possession of control and the children's lack of control but drew a different conclusion. Instead of making a distinction between the state's responsibility towards the mother and the state's responsibility towards children, the Supreme Court limited the scope of this responsibility in general, for both parents and children, by requiring the state to only provide assistance that is strictly necessary to prevent a humanitarian emergency.

The outcome of this case study calls for further research into the relevance of the CARIN criteria in judicial reasoning. Is there a relationship between the CARIN criteria and the arguments used in case law? If so, is that limited to cases about access to welfare, migrants and/or the interpretation of general and abstract human rights norms? Is it also

reflected in decisions of human rights bodies, such as the ECtHR and the ECSR? What does this mean for theory on deservingness and theory on legal reasoning? Are migrants only protected by human rights law if they are found to be deserving of that protection? In order to deal with these questions, more research – for example, using systematic content analysis (Hall and Wright, 2008) into judicial decisions – should be conducted to test the hypothesis that the case study in this article has generated.

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Notes

1 *Wet van 26/03/1998 tot wijziging van de Vreemdelingenwet en enige andere wetten teneinde de aanspraak van vreemdelingen jegens bestuursorganen op verstrekkingen, voorzieningen, uitkeringen, ontheffingen en vergunningen te koppelen aan het rechtmatig verblijf van de vreemdeling in Nederland, Stb 1998, 203.*

2 ECSR 20 October 2009, Complaint No. 47/2008.

3 The ESC is a human rights convention of the Council of Europe. The Netherlands ratified this convention in 1980, and the Revised European Social Charter in 2006. On the basis of an additional protocol, the ECSR is competent to consider collective complaints about unsatisfactory application of the Charter. The Netherlands ratified this protocol in 2006.

4 See the appendix to the ESC. According to Art 38 of the ESC and Art N to the revised ESC, the appendix to the Charter forms an integral part of it.

5 Taken from the summary provided by the Hague Court of Appeal in its judgment of 27 July 2010, ECLI:NL:GHSGR:2010:BN2164.

6 District Court the Hague 15 April 2010, no. 363137/KG ZA 10-426 (unpublished).

7 The Hague Court of Appeal of 27 July 2010, ECLI:NL:GHSGR:2010:BN2164.

8 Para 3.7 of the judgment. Translation mine.

9 The Hague Court of Appeal 11 January 2011, ECLI:NL:GHSGR:2011:BO9924.

10 Letter of the Minister for Immigration and Asylum to parliament, *Kamerstukken II*, 29 344, no. 79.

11 Supreme Court 21 September 2012, ECLI:NL:HR:2012:BW5328.

12 ECLI:NL:PHR:2012:BW5328.

13 *Scozzari and Giunta v. Italy* (ECtHR 13 July 2000, nos. 39221/98 and 41963/98).

14 *Mayeka and Mitunga v. Belgium* (ECtHR 12 October 2006, no. 13178/03).

15 *Maslov v. Austria* (ECtHR 23 June 2008, no. 1638/03).

16 ECtHR 6 July 2010, no. 4165/07.

17 Such as the highly relevant case of *M.S.S. v. Belgium and Greece* (ECtHR 21 January 2011, no. 30696/09) in which the (Grand Chamber of the) Court held for the first time ever that Article 3 ECHR was violated due to poor living conditions.

18 The Supreme Court did discuss case law of the ECtHR on unlawfully staying migrants in paragraph 3.5.4 but did not refer to this case law when concluding that the legal opinion of the Hague

Court of Appeal was correct (it held that this conclusion finds support in the case law of the ECtHR and the other legal sources 'as discussed above in 3.5.1-3.5.3 and 3.5.5').

19 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

20 Article 2 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

21 The Supreme Court does mention Article 27(3) CRC, but only when arguing that the responsibility of the state is limited to preventing a humanitarian emergency.

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