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File no: LVwG 20.3-2725/2020-86

Ref: Measures complaint

IN THE NAME OF THE REPUBLIC

The Regional Administrative Court of Styria has ruled through judge HR Dr. Kundegraber on the complaint of Ayoub XXX, born January 6, 2000, represented by Mag. Clemens Lahner, lawyer in 1070 Vienna, regarding the use of immediate administrative power of command and coercion:

A. The refoulement of the applicant on September 28, 2020, at 5.15 p.m., at the Sicheldorf border check point by an officer of the public security services was

unlawful.

B. The complete undressing in the course of the search of the applicant at the Sicheldorf border check point on September 28, 2020 was

unlawful.

C. The Federal Government (Federal Minister of the Interior) shall pay the costs of the proceedings in the amount of € 2,397.20 within 14 days of receipt of the decision. The additional claim for reimbursement of the filing fee is dismissed.

Legal basis:

Art. 130 para. 1 line 2 Federal Constitutional Act (B-VG)
§§ 7, 9, 28 para 6 and 35 Administrative Court Procedure Act (VwGVG)
§ 1 Ordinance on the Compensation of Administrative Expenses (VwG-AufwErsV)
§§ 45a para 1, 37 Aliens Police Act 2005 (FPG), Federal Law Gazette I No 100/2005 as amended by Federal Law Gazette I No 87/2012
§§ Sections 2(1)(13), 12(1) Asylum Act (AsylG), Federal Law Gazette I No. 100/2005 as amended by Federal Law Gazette I No. 56/2018
§§ Sections 40, 88 Security Police Act (SPG), Federal Law Gazette No. 566/1991 as amended by Federal Law Gazette I No. 105/2019
§ Section 38 BFA Procedures Act (BFA-VG), Federal Law Gazette I No. 87/2012 as amended by Federal Law Gazette I No. 56/2018
§ Section 12a Border Control Act (GrekoG), Federal Law Gazette No. 435/1996 as amended by Federal Law Gazette I No. 32/2018 Art. 3 and Art. 8 European Convention on Human Rights (ECHR)

D. Pursuant to section 25a of the Administrative Court Act (VwGG), an ordinary appeal against the decision is inadmissible.

Reasoning

I.1. The complaint of November 5, 2020 essentially states that the complainant was found on Austrian territory without a travel document near the Austrian-Slovenian border and was consequently arrested. He alleges that he had used the English and French words for "asylum" vis-à-vis various officers of the public security service and had thus sufficiently indicated that he required protection from persecution. No procedure had been initiated to examine the application for asylum, but the complainant had been deported to Slovenia only a few hours after entering the country. The refoulement had therefore been unlawful, as the complainant had been granted de facto protection against deportation pursuant section 12 of the Asylum Act.

The complainant had behaved calmly and cooperatively during the entire police action and had complied with the instructions of the police officers. There was no reason to believe that

the complainant was dangerous and therefore no reason to ask the complainant to undress completely and to search the complainant's unclothed body.

The complainant had been subjected to inhuman and degrading treatment pursuant to section 3 of the ECHR and of his right to respect for private life under Article 8 of the ECHR by the search of his unclothed body.

It was requested that the rejection of the complainant as well as the search of the unclothed body of the complainant be declared unlawful and that the legal entity be ordered to pay the costs of the proceedings in accordance with the Ordinance on the Compensation of Expenses as well as the costs for the submission fee.

2. On December 9, 2020, the prosecuting authority submitted a rebuttal in which it pointed out that, on the basis of the decree of the Federal Minister of the Interior of April 24, 2020, Federal Law Gazette II No. 177/2020, the border crossing of the complainant had been illegal, as crossing the internal border had only been permitted at border crossing points. As no application for asylum had been filed, the Asylum Act had not applied. A search of persons had been carried out in this manner, as on the one hand it had to be feared that smugglers (i.e. criminals) had hidden themselves within the group of people apprehended, and on the other hand the search had also been carried out in order to establish identities and to secure evidence pursuant to section 12a (2) GrekoG and section 34b as well as section 39a VStG and § 37 para 1 no 2 FPG. Experience had shown that illegal migrants often concealed their identity and kept original documents in their underwear or directly under their underwear. The search had been legally required and had been proportionate in the circumstances. It had not been necessary to call in an interpreter, as the communication had taken place in English "at a low level".

It was requested that the complaint be dismissed as unfounded and that the costs be reimbursed.

Attachments consisted of a map of the place of apprehension, the registration data sheet, the routing slip and the AFIS match of the complainant, as well as the form used for refusing entry in German and Arabic, and the administrative criminal complaint against the complainant.

2. On December 30, 2020, the complainant submitted a reply in which he pointed out in particular that he had irregularly crossed the border and bypassed the border post because,

in order to enter the national territory, he had to cross several borders irregularly and that it was not logical for a person in this situation that asylum could theoretically already be applied for at the Austrian border. The complainant had intended to advance further into Austrian territory to be able to successfully apply for asylum. The fact that there had been repeated unlawful rejections at various borders of persons who had applied for international protection there also influenced the complainant's decision. The complainant was aware of chain deportations from Slovenia via Croatia to Bosnia. The majority of persons who would apply for asylum in Austria would not cross the border at an official border post but would apply for asylum in the interior of the country. This would explain the complainant's behaviour. Further statements concerned the disproportionate search of the complainant.

In addition, a written record of a conversation on the relevant incidents in English with Yassin Exxx born xxxx 2004, from October 1st, 2020, by the complainant from October 4th and October 21, 2020, as well as a photograph of the complainant together with the journalist Benjamine Oxxxx in Velika Kladusa, Bosnia were submitted. It was explained that Yassin was a person who had also been returned to Slovenia together with the complainant.

4 On January 19, 2021, the complainant submitted a statement by the complainant via video call saved on a USB stick, during which Klaudia Wxxx had asked questions in Arabic with the assistance of an interpreter. It was stated that the complainant was currently in Bosnia and Herzegovina after the described chain deportation and that he did not possess a passport.

5. On February 12, 2021, the complainant submitted a written record of a conversation concerning the relevant incidents with the complainant on October 4, 2020 and October 21st, 2020 as well as of Yassin Exxxx of October 1st, 2020 and of Abdelmounaim Axxxx of February 20, 2021 in German. Abdelmounaim A was another person who had been returned to Slovenia together with the complainant.

6. In a document submitted on February 19, 2021, the complainant submitted a transcript of the complainant's statement of 19 January 2021 via video call.

7. In documents submitted on March 29, 2021, the complainant submitted the statement of Yassin Exxxx via video call and a transcript of the statement of the witness Yassin Exxxx of March 8, 2021 via video call.

II. Facts of the Case:

1. The complainant is a Moroccan citizen. In the early morning hours of September 28, 2020, the complainant, together with six other persons, crossed the green border coming from Slovenia in a group. On the basis of a report by a civilian, the public security inspected the area. In the meantime, the group had split into a group of five persons, including the complainant, and a group of two persons. The police noticed that the group always retreated into the woods or fields when they saw a patrol vehicle. A group of five trainee police, led by BI Sxxxx, was also involved in the search.

At around 12:30 hrs, the group of the complainant could be apprehended by the trainee police in a maize field with shoulder-high stalks. The persons were crouching between the maize stalks. It was raining, so their clothes were soaked and dirty. The persons were shivering as it was chilly, and one person was walking with a limp.

Police officer Gxxxx asked the group in English to remain calm and used hand signals. The persons did not make any signs of attempting to flee and were later led to the police van which was already waiting. Up to this point, none of the group had uttered the word "asylum".

At the police van, Insp. Dxxxxx asked the persons to take off their jackets and patted them down for dangerous objects. Insp. Dxxxxx asked for their nationality in English and received the answer "Morocco"; communication was very difficult. The question about travel documents was answered in the negative. The place of apprehension was approx. 3.5 km from the state border (see map) and the group was subsequently taken to the Sieldorf border checkpoint. The transfer to the Sieldorf border checkpoint was carried out in a KD transporter by Inspector Hxxxxxx and aspirant Pxxxxx. Both police officers sat in the front of the vehicle, while the remaining four persons, including the complainant, sat in the rear of the vehicle. The fifth person in the group rode along in another police vehicle for the purpose of searching for the other two persons. During the journey, the apprehended persons spoke among themselves and tried to draw attention to their concern by using the word "asylum". However, this was not noticed by the two police officers, who were conversing instead.

At the Sieldorf border checkpoint, the apprehended persons – in the meantime there were seven persons – were provided with blankets and water. Food was not provided to the persons concerned despite their request. Subsequently, the complainant and the other persons were asked to undress completely and had to turn around on their own axis and kneel down in order to reveal any hidden objects in their anus area. After the examination, the complainant was subjected to an identification procedure in which photographs and fingerprints were taken. The place where the search took place was in an alcove that could only be seen if one was standing in the corridor. As the persons did not have any identification papers with them, the security officers present there "agreed in an exchange of opinions that a refoulement should be carried out" (statement Dxxxxx, page 8 of March 2, 2021).

The complainant was then asked to write down his name, title and date of birth on a form. Between these actions, the complainant kept uttering the word "asylum", but there was no reaction from the security authorities. Even when the complainant had to wait with the other persons in a locked room with a seat, he and other persons in the group uttered the word "asylum", but there was no reaction from the security officers.

No aggressive behaviour on the part of the complainant or other members of the group could be detected during the entire police operation. There were no indications of dangerous objects being carried. The complainant was asked where he was from and whether he had travel documents or identity papers with him, but not what he wanted in Austria or why he had crossed the green border. The audible demand for asylum – which the complainant expressed several times during the official proceedings – was ignored.

An entry refusal form in both German and Arabic was handed to the complainant, noting that the legal instruction contained therein included not only the administrative court of the respective country but also the "independent administrative senate" (already dissolved six years ago). Insp. Hxxxxx drew up a complaint against the complainant pursuant to section 16, paragraph 1, line 3 in conjunction with section 11, paragraph 1 of the Border Control Act, as the complainant had crossed the border without a valid travel document. At approximately 5.15 p.m., the complainant and the other persons in the group were handed over to the Slovenian officers at the Sieldorf border crossing point. Documentation regarding their names, dates of birth and citizenship was handed over to the Slovenian officials.

The complainant was subsequently handed over to the Croatian police, who in turn took the complainant together with other persons to the border with Bosnia and Herzegovina, where the complainant is believed to be currently staying.

2. The relevant findings are largely based on the statements of the police officers who were questioned. The condition of the persons apprehended was accurately described by the police cadets who were called in (wet and dirty clothes, shivering, tired and frightened). This can be deduced from the content of the witness statements of the trainee police xxxxxxxx. All of the security officers involved stated unanimously that none of the group, including the complainant, showed any aggressive behaviour or made any signs of fleeing. No dangerous objects were seized from the group.

It is clear that the group was provided with water after arriving at the Sieldorf border checkpoint, but was not given food of any kind, although members of the group had requested it. This is clear from the statements of the security officers involved, who indicated that water was provided, but no one saw any food being made available to the persons concerned. It is quite understandable that the complainant as well as other persons in the group – especially when they saw the police officers having food themselves – indicated that they wanted to be provided with food as well, but this request was denied or commented on in a polemic fashion ("This is not a hotel.").

Based on the interview with the complainant (provided on a USB stick and a written transcript) as well as of Yassin E and Abdelmounaim A, the court assumes that the complainant, including other persons of the group apprehended, audibly used the word "asylum" several times during the official act. While no security officer stated that they had heard the word "asylum" nor did any of them state that they had asked the complainant or the other persons why they had come to Austria, it is credible that the complainant, in view of a possible deportation to Slovenia, audibly voiced his demand for asylum and that this demand was apparently denied by the security officers. The assumption expressed by Insp. Dxxxx and other security officers that the persons apprehended wanted to pass through the national territory has no basis whatsoever, all the more so as no question was raised as to the purpose for which the complainant or the other persons entered the national territory. The conclusion that other persons apprehended would have justified themselves by saying that they wanted to go to Germany or Spain to meet other friends or relatives is probably based on a prejudice. In any case, the security officers present at the Sieldorf border control point should have noticed the audible demand for asylum.

Based on the described course of proceedings – no question what the persons wanted in Austria – ignoring of the word "asylum", rejection based on the fact that no identity papers were available (testimony of Insp. Xxxx March 01, 2021) – the court comes to the conclusion that "push-backs" are partly applied as a method in Austria. The fact that the Slovenian police apparently take over the rejected persons without further questioning can be justified in the subsequent chain deportation to Croatia and finally to Bosnia and Herzegovina.

III. Legal assessment:

1. Pursuant to Art. 130 para 1 subpara 2 of the Federal Constitution, administrative courts shall rule on complaints against the exercise of direct administrative command and coercive power on grounds of unlawfulness.

The complaint of November 5, 2020 was received electronically by the Regional Administrative Court on November 6, 2020. Thus, the 6-week appeal period pursuant to section 7 (4) VwGVG was complied with. Since the official acts took place in the municipal area of Halbenrain and Bad Radkersburg (Sicheldorf), the Regional Administrative Court of Styria also has local jurisdiction.

The rejection of a foreigner who is apprehended in the national territory constitutes the exercise of direct administrative command and coercive power within the meaning of Art. 130 (1) Z 2 B-VG, since no administrative procedure precedes it (VfGH 16.04.1994, B 1117/93, 1119/93; Aliens Police Act 2005, p 113, proLIBRIS Verlag 2018, 12th edition). Similarly, a search of a person constitutes an act of direct administrative command and coercive power (VwGH 07.11.1990, 90/01/0195; VfSIG 12.792/1991).

2. Rejection (ruling part A):

§ 45a para 1 and para 5 FPG 2005:

Prohibition of refoulement (ban on refoulement)

(1) The prevention of entry, refusal of entry or deportation of aliens to a state shall be inadmissible if this would violate Art. 2 or 3 of the European Convention on Human Rights (ECHR), Federal Law Gazette No. 210/1958, or Protocol No. 6 or No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, or if it would involve a serious threat to their life or integrity as a civilian as a result of indiscriminate violence in the context of an international or internal conflict.

(5) Aliens who invoke one of the dangers mentioned in subsections 1 to 3 **may only be turned back** or deported **after they have had the opportunity** to present reasons to the

contrary. In such cases, the provincial police directorate shall be informed of the facts of the case before the refoulement and shall then decide on the refoulement.

§ 12 para 1 Asylum Act:

Factual protection against deportation

(1) An alien who has filed an application for international protection in Austria may, except in the cases of section 12a, neither be turned back nor deported until an enforceable decision has been issued, until the proceedings have become devoid of purpose or, after they have been discontinued, until the point in time at which a continuation of the proceedings pursuant to § Section 24 (2) is no longer permissible, be rejected, returned or deported (**de facto protection against deportation**); section 32 remains unaffected. Their stay in the national territory is permissible. A right of residence existing on the basis of other national laws remains unaffected. § Section 16 para 4 BFA-VG shall apply.

§ Section 12a (1) GrekoG:

Powers of the officers of the public security service

(1) The officers of the public security service shall be authorised to subject persons to border checks if there is reason to believe that they are subject to border checks or that they intend to cross or have crossed the border outside border crossing points without authorisation. This authorisation exists for border crossings at border crossing points within the border control area, otherwise at the point where a person subject to border control is encountered; it also exists at the point where a person who intends to cross the border or has crossed the border without authorisation outside a border crossing point is entered in the act.

First, it should be noted that the intervening bodies of the public security service as defined by section 12a (1) of the GrekoG were authorised to subject the complainant to a border control after he had been apprehended. The complainant was found in 8492 Drauchen, Landesstraße L 235, Drauchen Hofwiesenweg next to L 235, i.e. within the border control

area (see report by the Styrian Provincial Police Directorate, PI Hxxxxxxx , dated 1 October 2020, ref. no.: PAD/20/01743696/014/VStV, and the report sheet for refusals). The proceedings conducted revealed that the complainant frequently tried to draw the attention of the public security officers to the fact that he had entered the national territory for humanitarian reasons by using the word "asylum" during the official proceedings. The complainant was apparently only asked by the security officers for his name, where he came from and whether he had travel documents or identity documents with him. Questions as to why the complainant had entered Austria or what he wanted in Austria were not asked (content of the complainant's statement as well as that of the security officers). Instead, the intervening security forces were content with baseless conclusions, assuming without questioning that the complainant had entered Austria because he wanted to travel through to another country, as they had also found this to be the case with other foreigners they had apprehended.

Since the court assumes that the complainant perceptibly and clearly used the word "asylum" several times during the official act vis-à-vis the security officers, he should no longer have been turned back within the meaning of section 12 (1) of the Asylum Act, since in concreto he is granted "de facto protection against deportation". Moreover, it is not sufficient for the lawfulness of the refoulement if the security officer assumes on their own initiative or in case of ambiguity that no application for international protection has been filed, but they also have to ascertain whether an application for international protection is filed (VwGH 14.11.2017, Ra 2017/21/0018-0019). In the specific case, the use of the word "asylum" did not create any ambiguity. The described procedure of the interrogated security bodies gave the court the impression that the method of "push-backs" is frequently applied. This results from the statements of the interrogated security officer, who assumed that the persons wanted to pass through without asking any questions (witness statement Insp. Dxxxx) and that the decision to reject was taken "in an exchange of opinions" by all the security officer present at the Sichelendorf border crossing point.

The rejection of the complainant on 28 September 2020, at approx. 5.15 p.m., to Slovenia was therefore unlawful in gross disregard of the de facto protection against deportation (section 12 (1) of the Asylum Act). Since the reasons for his intended entry into Austria were not discussed with the complainant, and the word "asylum" was not taken into account, it was not possible for the complainant to explain whether he was eligible for asylum or subsidiary protection, and the ban on refoulement was violated by the refoulement.

3. search of the complainant (ruling part B):

§ 37 FPG 2005:

Search of persons

(1) For the purpose of seizing evidence (section 38), the officers of the public security service shall be authorised to search the clothing and the carried containers of strangers if

1. they have been arrested pursuant to section 39 or
2. there is suspicion that they are not lawfully present in the territory of the Federal Republic of Austria and that they are carrying evidence relevant to their transit, deportation or refoulement.

(2) Prior to a search pursuant to para. 1, the alien shall be requested to voluntarily surrender all evidence he or she is carrying; if they comply with this request, the search shall not take place.

§ 38 BFA-VG:

Search of persons

(1) For the purpose of seizing evidence and cash (section 39), the officers of the public security service shall be authorised to search the clothing and the containers carried by a stranger if

1. they have been arrested under this Act,
2. there is a suspicion that the alien is not residing lawfully in the territory of the Federal Republic of Austria and that he or she is carrying evidence that is of importance for his or her deportation,
3. the person files an application pursuant to section 42 sub-section 1 or
4. this person files an application for international protection,

insofar as it cannot be ruled out in the cases of nos. 3 and 4 that the alien is carrying objects and documents that may provide information on their identity, nationality, travel route or reasons for fleeing, or cash, and the person does not present them upon request. Prior to a search, the alien shall be requested to voluntarily surrender all evidence and cash carried.

(2) In addition, the officers of the public security service shall be authorised to search the clothing and containers of an asylum seeker if it is to be assumed on the basis of certain facts in connection with an interrogation that the asylum seeker is carrying documents and objects which they are obliged to surrender pursuant to section 15 para 1 subpara 5 Asylum Act 2005, or if they are carrying electronic storage media which are to be seized as evidence pursuant to section 39 and do not surrender them voluntarily, even upon request.

§ Section 40 para 1 and para 4 SPG:

(1) The officers of the public security service are authorised to search persons who have been arrested in order to ensure that they do not endanger their own physical safety or that of others during their detention and do not flee.

(4) In the case of searches pursuant to paras 1 and 2, the officers of the public security service shall confine themselves to a search of the clothing and an inspection of the body, unless it is to be assumed on the basis of specific facts that the person concerned has concealed an object in their body; in such cases a medical doctor shall be entrusted with the search.

The complainant was searched by the security services immediately on being found on national territory and had to take off his jacket in the course of the search, which was subsequently also searched. The question put to the complainant about his travel documents was answered in the negative (witness statement by Insp. Dxxxx). No aggressive behaviour on the part of the complainant or the other persons apprehended was found.

At the Sieldorf border checkpoint, the complainant had to undress completely and kneel down (video interview with Yassin Exxxx of March 8, 2021) in order to make sure that no dangerous objects were hidden in the anal area.

A search of the clothing and the containers of a foreigner who is not lawfully on national territory and who has other evidence with them, is permissible in principle according to § 38 para 1 BFA-VG and § 37 FPG. Whether this personal search complies with the applicable principle of proportionality must be examined in each individual case. In the case of the complainant, neither aggressive behaviour nor any other indication was found by the security officers that could have led to a suspicion of him carrying a dangerous object. Although the court still considers it proportionate that the complainant had to undress under these circumstances, the stripping of the pants and the subsequent kneeling down constitutes an inadmissible intensity of the body search. In the case of the complainant – and the other

persons in the group – there were no serious grounds for suspicion that would have justified such a procedure. It is perfectly reasonable for the security authorities to inspect or pat down a person who is stripped down to his pants in such a way that obvious documents are most likely to be discovered. In any case, there was no reason to suspect that dangerous objects were being hidden.

The manner in which the person was searched inadmissibly interfered with the complainant's privacy, all the more so because he had to kneel down during the search. The spatial conditions were also not suitable to prevent other security officers from observing the search, as the search was not carried out in a separate room, but in an alcove that was visible from the corridor. Any person passing by in the corridor at the time could observe the search.

A search of the complainant was permissible because the identity could not be established otherwise. Although the complainant stated that he did not have any identity papers or a passport with him and thus contributed to the statement of facts, there were no substantial doubts about the claim and any doubts could have been dispelled by undressing his body down to his pants. In any case, the complete undressing was disproportionate and was carried out under spatial conditions that seriously interfered with the individual's privacy and thus violated Article 8 of the ECHR. Although the relevant legal provisions in the BFA-VG and FPG provide for the right to search the person, the intensity of the intrusion during searches was exceeded in the specific case, as there was no indication that the complainant could have hidden dangerous objects or documents in the anal fold.

IV Pursuant to section 35 VwGGV section 1 VwG-AufwErsV, the complainant is awarded € 2,397.20 in costs. The reimbursement of expenses consists of two times the costs of the written pleadings (rejection and search) in the amount of € 1,475.20 and the costs of the hearings in the amount of € 922.00. The costs for the submission fee had to be rejected, as these are flat-rate fees.

V. Inadmissibility of ordinary appeal:

An ordinary appeal is inadmissible, since no legal question within the scope of Art. 133 (4) B-VG, which is not fundamental to this case. The decision neither deviates from the previous case law of the Administrative Court, nor is there a lack of case law. Furthermore, the existing case law of the Administrative Court is not to be judged as inconsistent. There are also no other indications of fundamental importance of the legal question to be resolved.

Note

An appeal against the decision may be lodged with the Constitutional Court and/or an extraordinary appeal may be lodged with the Administrative Court. The appeal or extraordinary appeal shall be drafted and filed by an authorised lawyer within six weeks from the day of service of the decision. An appeal to the Constitutional Court shall be filed directly with the Constitutional Court, whereas an extraordinary appeal to the Administrative Court shall be filed with the Regional Administrative Court of Styria. A filing fee of € 240.00 each is to be paid for the appeal and the extraordinary appeal. If you are unable to cover the costs of the appeal proceedings without affecting your necessary maintenance and if this is not obviously hopeless, an application for legal aid can be filed within the time limit for appeal. For an appeal to the Constitutional Court, the application for procedural assistance shall be filed directly with the Constitutional Court, for an extraordinary appeal with the Administrative Court. This application does not have to be signed by a lawyer and no filing fee has to be paid for the time being. The extraordinary appeal to the Administrative Court and/or the appeal to the Constitutional Court may also be waived. The waiver of the extraordinary appeal before the Administrative Court shall be notified to the Regional Administrative Court of Styria in writing or shall be declared on record. The waiver of the appeal to the Constitutional Court shall be notified in writing to the Regional Administrative Court of Styria until the delivery of the copy of the decision, thereafter to the Constitutional Court or placed on record. If the waiver of the extraordinary appeal to the Administrative Court or the appeal to the Constitutional Court was not made by a professional party representative or in the presence of such a representative, it may be revoked in writing or on record within three days. The waiver of the extraordinary appeal to the Administrative Court or the appeal to the Constitutional Court has the consequence that the respective appeal is no longer admissible.

Regional Administrative Court of Styria

HR Dr. Kundegraber

Issued to

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3. the Federal Minister of the Interior, for the attention of the Federal Ministry of the Interior,
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