

IN THE HIGH COURT OF SINDH AT KARACHI

**Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Jawad Akbar Sarwana**

(1) C.P. No. D-715 of 1996

Mst. Anila Abrar
Versus
Government of Sindh & others

(2) C.P. No. D-1572 of 1996

Nilofer Sumar & another
Versus
Federation of Pakistan & another

(3) C.P. No. D-2251 of 1996

Mst. Zainab
Versus
Government of Pakistan & others

(4) C.P. No. D-1415 of 2004

Mst. Najma Bano & another
Versus
Government of Pakistan & others

A N D

(5) C.P. No. D-7019 of 2021

Mst. Soofia Imran
Versus
Government of Pakistan & others

Date of Hearing: 26.10.2023, 07.12.2023, 08.12.2023,
15.12.2023 and 19.12.2023

Petitioner in CP No.D-715 of 1996: Through M/s. Abid S. Zuberi, Agha Ali Durrani, Faraz Nawaz Mahar and Imran Munawar Mahar Advocates.

Petitioner in CP No.D-1572 of 1996: Through M/s. Salahuddin Ahmed, Nadeem Ahmed, Muhammad Rizwan and Salman Mirza Advocates.

Petitioner in CP No.D-2251 of 1996 & CP No.D-7019 of 2021: Through M/s. Waseem Shaikh and Muhammad Yousuf Advocates.

Petitioner in CP No.D- 1415 of 2004: Through M/s. Neel Keshav and Anwar Ai Tunio Advocates.

Respondent Federation of Pakistan: Through Qazi Abdul Hameed Siddiqui, Deputy Attorney General.

Respondent Province of Sindh: Through Barrister Sandeep Malani, Assistant Advocate General.

J U D G M E N T

Muhammad Shafi Siddiqui, J. - In all these petitions, the petitioners who have Pakistan citizenship seek Pakistan citizenship for their foreign husbands on being married to them.

2. In C.P. No.D-715 of 1996 petitioner has married to an Indian who was residing in Pakistan since 1980; on 29.07.1988. Petitioner's husband was arrested and challaned under section 3(6)4 of Pakistan Control of Entry Act, 1952 followed by his arrest in terms of order dated 07.04.1996 of respondent No.1 for three months or till his departure to India. The petitioner has thus sought setting aside of such order and citizenship for her husband.

3. In C.P. D-1572 of 1996 petitioner has married to an Indian i.e. petitioner No.2 in 1992 when latter has come to Pakistan on visit visa. The petitioners then applied for Pakistani citizenship, which was rejected vide order dated 26.09.1994 followed by memorandum dated 12.02.1996 issued on subsequent application. Finally in terms of letter dated 27.8.1996 petitioner No.2 was ordered to be externed from Pakistan by 12.09.1996. Hence petitioners have approached this Court for citizenship of petitioner No.2 being married to a Pakistani woman, the petitioner No.1.

4. In the same way in C.P. No.D-2251 of 1996 and C.P. No.D-7019 of 2021 both the petitions seek citizenship for an Indian namely Imran Yousuf. He first married to petitioner of earlier petition on 25.07.1996

and then on 01.10.2011 from petitioner of subsequent petition. Both the petitioners have moved separate applications for citizenship of their husband. In subsequent petition it has also been stated that petitioner in C.P. No.D-2251 of 1996 has died. In C.P. No.D-7019 of 2021 petitioner (as being second wife) has married to Imran Yousuf during pendency of CP No.D-2251 of 1996 and filed separate petition. In this petition, petitioner pleaded that they were arrested in November 2011 by Indian intelligence on espionage charges and were released and came to Pakistan in 2019. Petitioner then applied for citizenship of her husband, on medical ground as well, however vide letter dated 15.11.2021 he (petitioner's husband) was given 15 days departure time.

5. In C.P. D-1415 of 2004 petitioner No.1 married on 06.05.1997 to petitioner No.2 who is an Indian. After marriage both the petitioners went to India however due to some health issues, petitioner No.1 came back to Pakistan in 1999. Petitioner No.1 has claimed that due to health issues, she cannot live with her husband (petitioner No.2) in India and hence she seeks citizenship for petitioner No.2 so that they both can live together in Pakistan.

6. In all these petitions, the petitioners being women seek citizenship for their foreign spouses, on being married to them, in terms of Section 10 of The Pakistan Citizenship Act, 1951, which for the sake of brevity is reproduced as under:-

10. Married women.— (1) any woman who by reason of her marriage to a 8 [British subject] before the first day of January, 1949, has acquired the status of a British subject shall, if her husband becomes a citizen of Pakistan, be a citizen of Pakistan.

(2) Subject to the provisions of sub-section (1) and subsection (4) a woman who has been married to a citizen of Pakistan or to a person who but for his death would have been a citizen of Pakistan under section 3, 4 or 5 shall be entitled, on making application therefore to the Federal Government in the prescribed manner, and, if she is an alien, on obtaining a certificate of domicile and

taking the oath of allegiance in the form set out in the Schedule to this Act, to be registered as a citizen of Pakistan whether or not she has completed twenty-one years of her age and is of full capacity.

(3) Subject as aforesaid, a woman who has been married to a person who, but for his death, could have been a citizen of Pakistan under the provisions of sub-section (1) of section 6 (whether he migrated as provided in that sub-section or is deemed under the proviso to section 7 to have so migrated) shall be entitled as provided in sub-section (2) subject further, if she is an alien, to her obtaining the certificate and taken the oath therein mentioned.

(4) A person who has ceased to be a citizen of Pakistan under section 14 or who has been deprived of citizenship of Pakistan under this Act shall not be entitled to be registered as a citizen thereof under this section but may be so registered with the previous consent of the Federal Government.

7. Primary object of concern of all the counsels who pleaded their case for respective petitioners and also of learned Deputy Attorney General Qazi Abdul Hameed Siddiqui is that Section 10(2) of Citizenship Act offends rights of women citizens when it comes to transmitting citizenship rights to their foreign husbands. In another way, it caters for a foreign woman who has married to a citizen of Pakistan, who shall be entitled to be registered as a citizen however, in the same breath it does not grant an equivalent right to a foreign man marrying a woman citizen of Pakistan. To challenge its¹offending outcome, as framed in 1951, the petitioners' counsel have pleaded few points which we discuss to evaluate legality of ibid provision vis-à-vis Constitution of Islamic Republic of Pakistan, 1973:

8. It is argued that Section 10(2) discriminates Pakistani women marrying foreign spouses vis-à-vis Pakistani men marrying foreign spouses. It is their case that men and women should have equal rights under the Constitution. It is their case that the term 'women' and 'she' used in Section 10(2) must be read, wherever necessary, to include

¹ Section 10(2) of Citizenship Act, 1951

‘man’ and ‘he’. While relying on Section 13 of General Clauses Act, 1987, statutory interpretation is urged and in that way harmony could be achieved, as argued.

9. Learned counsels in addition to it submitted that to avoid striking out a statutory provision, this Court can effectively interpret by applying principles of reading down and reading in by “appropriate insertions” to harmonize it with the Constitution.

10. Thirdly it is argued that the Court may, under Article 268(6) of the Constitution, even adopt the words of an existing statute (i.e. statute in force prior to the promulgation of the Constitution) to bring it in conformity with the present Constitution.

11. We have heard learned counsel appearing for petitioners as well as learned Deputy Attorney General and Assistant Advocate General, appearing for federation and Province of Sindh.

12. Pakistan’s commitment to eradicate discrimination against any gender is evident in the form of Constitutions promulgated and their further commitments to United Nations in the fields of human rights in relation to civil, political, economic, social and cultural rights emphasized invariably.

13. We believe to have travelled far beyond colonial era since our freedom but despite numerous legislations with the growing wisdom of legislators, running of the affairs of State does not make us think that way.

14. Citizenship Act was legislated in the year 1951 when there was no constitution running the country. The only sacred instrument upon which all legislations were canvassed pre-partition was left behind in India as Act of 1935, which never recognized and/or ensured any fundamental rights. Up until 1958 there was no Constitution or paramount law which could have recognized fundamentals of living as a family.

15. Pakistan ratified the International Convention on Civil and Political Rights (ICCPR). Article 23 of it emphasized that “Family” is a natural and fundamental group of society and is entitled to protection by society and the State (emphasis applied). It stresses upon rights of men and women of marriageable age to marry and to form a family, which ought to be recognized as a group/family and not individually. It provides protection to a family, which one could conceive lawfully. State, identifying the covenants of Convention, formed thereunder, recognizes the rights of everyone to an adequate standard of living for himself/herself and family.

16. In the early days, citizenship rights of men were treated as primary and those of women were seen to flow from their relationships with men; father and then husband. This bias had an assumption that the unit of a family is based on patriarchal notion that this unity be determined only by the male “head of the household”. This contributed to the subordination of women in the society and perpetuation of gender inequality.

17. The subject under consideration is “indifferent treatment” meted out by a class i.e. “citizens” which include both men and women. There can be three major grounds for obtaining citizenship under laws of different countries i.e. (i) Jus Sanguinis, (ii) Jus Soli and (iii) naturalization. Jus Sanguinis operates on the basis of citizenship of parents; Jus Soli determines it on the basis of place of birth and naturalization is a process which operates for grant of nationality after birth. A foreign male spouse often uses this procedure to acquire his wife’s citizenship. Many countries still continuing with patrilineal practice of tracing one’s nationality only through the father/husband’s lineage i.e. women’s dependency to acquire nationality through her relationship to men, either husband or father. It is a belief that woman

cannot support her foreign husband and/or is dependent. The patriarchal assumption was that a woman goes to her husband's house rather than vice versa and that prevailed in the minds of legislators.

18. Article 25 of our Constitution deals with the protection of citizens being equal before law and hence no discrimination within a class could pass through such filters unless classification (such as men and women separately) is based on intelligible differentia. There are situations and events, which could distinguish men and women and to be treated separately; such as men cannot play (officially) and selected in the women cricket team as it is based on intelligible differentia, however class under discussion is "citizens of Pakistan".

19. In the light of all these standards set by our and international jurisprudence, let us now see how far this provision i.e. Section 10(2) of Citizenship Act could stand.

20. To begin with we must test the provision under challenge, whether it constitutes discrimination. We are cognizant of the fact that discrimination exists only within a class which we have defined above. It is not Federal Government's case that "class" for whose benefit law promulgated is women and for their protection, as it is the woman of Pakistan who are being deprived and discriminated when a right to transmit citizenship to her foreign husband is denied by State under the challenged provision of law. Our Constitution is not meant to recognize the rights of strangers or aliens and would deprive those of citizens. It is therefore for protection of "citizen's" rights. So by saying that foreigner wife/wives are protected there seems to be no logic as our own women citizens are deprived. Now since the Constitution safeguards the rights of all citizens it includes men and women as one class. It is for these citizens that Section 25 came into being and not for a "foreign wife". So

a “citizen” forming a family, as stated above, must be provided equal protection.

21. Principle of policy in the Constitution of Pakistan 1973 recognizes many milestones and those relating to the subject in hand; the relevant ones being protection of family and participation of women in all affairs. The right to enjoy “family life” vests in every citizen of Pakistan, whether male or female. It is (formation of life) part and parcel of the right to live, protected under Article 9 of the Constitution and the dignity of man and privacy of home guaranteed under Article 14 of the Constitution. Indeed, Article 35 (Principles of Policy) of the Constitution provides that “*the State shall protect the marriage, the family, the mother and the child*”, and that does not takeover the effect or eclipsed the strength of Article 25 of the Constitution rather would come in support for a family protection to be able to live together.

22. Thus, when we say all citizens are equal before law and are entitled to equal protection of law it covers both men and women. Sub-article 3 of Article 25 of the Constitution would not undermine the effects of Sub-Articles 1 and 2 neither gives a different flavour. Woman was considered as weak limb of our society to which we disagree; it is only a patriarchal assumption; only a group that considers them weak whereas they are not and why should we think that way by legislating to emphasize it. Sub-article 1 and 2 of Article 25 should have been enough to recognize women’s right which is separately designed in sub-article 3 of the Constitution. The history suggests that it was never a weaker limb of our society. It is strong mind that counts most and history is full of such events.

23. The law of 1951 was developed when we just came out of colonial regime and perhaps its shadow served our nation for quite a long period successfully and indeed, with this background, to overcome colonial

legislation, the clarificatory legislation was necessary in the shape of above discussed Article 25. We recognize the fundamental rights for the first time via 1956 Constitution but the effects were not seen. It then changed its title as 1962 Constitution and ultimately 1973 but the colonial shadow did not leave when it comes to its practical approach and indeed the emphasis of sub-article 3 of Article 25 of the Constitution is only to overcome such shadow.

24. In those days i.e. 1951, the idea of a “Pakistani woman” marrying a foreign man was extremely remote and perhaps unusual and the legislators’ mindset of the era was responsible for such legislation. The legislators did not bother to frame Constitution instantly rather framed gender based law before Constitution; indeed, equality between men and women in those days was less established. The principle statute at the relevant time was Government of India Act, 1935, which itself did not guaranteed fundamental rights equally to all citizens.

25. Arguments that canvassed that Citizenship Act is intended to give preferential treatment to (foreign) women and positive legislation for women and children expressly permitted by Article 25(3) of the Constitution is fallacious; fundamental right recognized above should also cater first to women citizen of Pakistan who cannot be deprived to have a family of their own i.e. husband and children to live together. Life is not a concept to live alone; you live your life with family and that is one of the modern definitions of life.

26. Fundamental right’s canvas has extended its horizon since 1951. Legislating, Reading and interpreting the said provision of Act of 1951 in 1951 and thereafter reading with 1973’s Constitution and in particular, modern jurisprudence as developed recently may carry altogether different meaning and understanding. Statute is always being towed by a principal law of Constitution and would assume shapes accordingly. The said provision of 1951 could at best be classified as anachronic in present frame of our Constitution.

27. With consistent development of human rights and citizens, under a Constitution, with above understanding, we reach to an understanding of law that Section 10(2) in fact discriminates fundamental rights of citizens of Pakistan. If it discriminates, as it does, what are the remedial steps available? The question is where a statutory shortcoming, as of now vis-à-vis constitutional frame is shown to exist, what is a way ahead.

28. Surprisingly in the year 1973, by Amendment Act (48 of 1973) our Assembly could only recognized a change in Section 10(2) and that is from “Central Government” to “Federal Government”. The other change was in Section 5 which caters for children. That is all they could improve up until 1973; no change thereafter despite directions of Courts.

29. We would now apply the arguments made by Mr. Salahuddin Ahmed. First argument of reading of the words, woman/she with men/he is not applicable while applying principles of Section 13 of General Clauses Act. Firstly, it was a conscious legislation (with whatever mindset of the relevant time) treating the two genders indifferently and privileges were being provided to men citizens marrying foreign women. The kind of discrimination identified later and now was not recognized then. They believed what they were doing was correct and lawful. Section 13 of General Clauses Act would operate when it would have been a case of shortening of the language of enactment, or the unconscious approach of draftsman when Section 13 could come to cater.

30. Other argument of learned counsel for petitioners was applicability of Article 266 of Constitution of Islamic Republic of Pakistan, 1973. It is their case that all existing laws shall, subject to the Constitution, continue to enforce so far applicable with the necessary adaptations until altered, repealed or amended by the appropriate

legislature. For this enforceability, learned counsel relied upon Article 268(6) that any Court... required or empowered to enforce an existing law shall, notwithstanding that no adaptations have been made in such law, by an order made under Clause 3 or Clause 4, construe the law with all such adaptations as are necessary to bring it into accord with the provisions of the Constitution. Sub-clause 3 however is the initial sub-clause, which enables the President of Islamic Republic of Pakistan who by an order within a period of two years from the commencing day to make such adaptations, whether by way of modification, addition or omission, as may deem necessary or expedient, any such order may be made so as to have effect from such day not being a day earlier than the commencing day, as may be specified in the order. However, provisions of the Part II of the Constitution are omitted for such application. Part II of the Constitution includes the fundamental rights and the principles of policy and it is petitioners' case that the challenged provision of Citizenship Act offends certain fundamental rights available in Part II of the Constitution of Islamic Republic of Pakistan, 1973 hence the arguments are not available for Part II above.

31. Third argument of learned was in relation to reading in the missing words to harmonize it with the Constitution that governs and controls all laws of the country.

32. Indeed, our jurisprudence, as developed, does not require this Court to transport itself decades or centuries back in time and "adopt" the mindset of legislature as it may have been on the date of promulgation of the statute as it now requires interpretation in line with Constitution of Pakistan, as it stands. The said provision sounds anachronistic currently. The Court has to review the offending provisions in the progression and in the manner required by our Constitution being developed everyday as an organic component and if permissible it could be by applying the missing words as reading in, if

law permits, otherwise the alternate recourse of Court would be that the subject part of legislation be declared as one offending an Articles of Constitution and to be suitably amended.

33. As we have scored off the principles of “class legislation” for man alone, who married a foreign woman, it is but treated as a piece of offending legislation, at least now, in presence of Constitution; a provision that discriminates “women” of our country. It is Pakistani woman who is not granted right to live with her foreigner husband in a country of which she is a citizen, as a family group.

34. Mansoor Ali Shah, J, while interpreting certain provisions of law, which were head-on, ruled that one that would make the provision consistent with the Constitution (emphasis applied) should be followed². The situation here is slightly different; it is a case where Section 10A abridges the privileges to female citizen and act as an ouster clause for them. We do not have two offending provisions in a statute to be streamlined with Constitution as the above Lahore case did. We, however, rule out the applicability of casus omission as (at the relevant time) it was intention of legislature; the intention of legislature however is now being adjudged on the touchstone of constitutional frame. The doctrine of reading in is available once a constitutional violation or defect or shortcoming is found to exist³.

35. So not the offending part (which is not here) as Section 10(2) only enables male citizens to transpose their citizenship to their foreign wives, but a “missing part” in the said provision of the statute, which is to be supplied and remedied as per the existing tools of operation i.e. Constitution of Pakistan and the modern doctrine of interpretation of statute, while being within contours of Constitutional frame and jurisprudential requirement. Now certainly what constitutional frame

² PLD 2014 Lahore 221

³ PLD 2022 SC 39

provides us today could not have been visualized 72 years before as the law and wisdom both developed being stronger, complete and more useful, progressive and evolved through process. With the kind of jurisprudence we have come across recently, had it been available with them, they would not have missed out the required words i.e. man/he.

36. So can a statute be read with the requirement and demands of constitution. The law that could encourage the Court is of Aamlog⁴ which featured the necessity of harmonizing law vis-à-vis constitutional frame. Aamlog says “It is a constitutional remedy to correct the “defect” (emphasis applied) as seen now, without striking down the offending provision. The focus of attention is the constitution and not just the statute in and of itself.”

37. It is a well settled rule of interpretation that “a statute made pursuant to the provision of the Constitution cannot restrict or retard the Constitutional provision”⁵. Similarly, if the statute is conceived decades before which discriminates a member of the class then it could also be seen/upgraded with fresh filters of Constitutions.

38. In the case in hand the provision of a statute under consideration came into being 73 years from now and 22 year before the Constitution of 1973 came into being when dignity of men/women highlighted and principles of policies conceived. The dignity of women alone has a special place in the Constitution. The privileges given to a man while marrying a foreigner, in transmitting citizenship to his foreign wife is not available to a woman citizen while transmitting the living rights to her husband. A family not allowed to live together, is a denial to live and hence constitutes a denial of first fundamental right to a woman citizen in any circumstances.

⁴ Aam Log Ittehad v. ECP (PLD 2022 SC 39) Relevant Paras 26 and 27

⁵ MQM V. Pakistan (PLD 2022 SC 439) Paras 41 and 42

39. This particular issue that concern with a marital rights is under discussion for some time. Recently, United Nations Working Group on the issue of discrimination against women in law and in practice has worked out some statistics. The said Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) discussed both counts of discrimination against women:

- a) Women marrying a foreigner surrendering their own nationality for the nationality to be transmitted to her by her husband;
- b) She herself not allowed to transmit her nationality to her husband (foreigner) and at times to her children.

40. Article 9 of the Convention on the “Elimination of All Forms of Discrimination against Women” (hereinafter “CEDAW”) reaffirms that laws and practices which treat women differently than men in terms of nationality constitute discrimination against women, reiterating provisions of the 1957 Convention on the Nationality of Married Women concerning the equal rights of women with regard to their own nationality.

41. Section 10(2) of the Citizen Act gives a preferential treatment to the spouse of Pakistani man vis-à-vis a Pakistani woman and thus infringes constitutional guarantees. Indifferent treatment under the law to different classes is permitted if based on a reasonable classification made in accordance with intelligible criteria having a rational nexus to the object of the law⁶. Government of Pakistan however has not given any reason for the classification of men and women to be kept in separate baskets, except a statement that the law was framed “in the larger national interests and security”.

42. Indeed, security is the first consideration in forming any policy or to legislate but it is neither stated to be a policy, which otherwise

⁶ I.A. Sharwani v. Government of Pakistan (1991 SCMR 1041)

discriminates men and women, nor were able to establish it to be a reasonable classification. As far as security risk is concerned, in today's world, there is nothing which a woman cannot do to invade security. This is being done since several hundred years and several states claimed to have collapsed due to their successful invasion. So transmitting citizenship, to women only, considering security issue, is as bad as it is in granting citizenship to foreign men. (This is in response to arguments of learned Assistant Advocate General). Seemingly, there is no rational basis for assuming that a foreign wife of a Pakistani man would be more loyal to Pakistan than a foreign husband of a Pakistani woman. So considering the statement of learned Deputy Attorney General in relation to national interest, either bestowing citizenship in its entirety is wrong or in case it is not wrong in the case of foreign wife, it is equally balanced in case of foreign husbands. So the argument is not at all confidence inspiring on any rational of classification. It is for this reason, during oral arguments, as recorded in the order of 15.12.2023, the learned Deputy Attorney General fairly conceded to the discriminatory nature of the challenged provision, however, conceded to the extent of appropriate amendment in the law by the legislators.

43. Lahore High Court⁷ and Peshawar High⁸ Court has already declared Section 10(2) *ibid* to be violative of Article 25 of the Constitution while directing grant of citizenship to the foreign husband of a Pakistan citizen. Federal Shariat Court⁹ too declared Section 10(2) of the Citizenship Act to be violative of the Islamic Injunctions relating to gender equality and directed the legislature to amend the law.

44. The object is foreign spouses and not just foreign wives and thus making of 10(2) and reading it now may vary with constitutional demands. The intent of the said provision is not to encourage or

⁷ Mrs. Rukhsana Bibi v. Government of Pakistan (PLD 2016 Lahore 857)

⁸ W.P. No.1536-P/2023 - unreported judgment of Peshawar High Court

⁹ *Suo Moto* Case No.1/K of 2006 (Gender Equality) (PLD 2008 FSC 1)

facilitate women to marry Pakistani men. The concept which now emerged through international jurisprudence is to enable Pakistanis married to foreigners to be able to live together and acquire nationality for their spouses and live a family life in Pakistan and the Act of 1951 should now be read and tamed accordingly. Restricting the benefit of Section 10(2) to Pakistani men only is a clear discrimination to Pakistani women.

45. The doctrine of reading in is used by Courts to extend the scope to avoid and limit the discriminatory language having head-on conflict with a constitutional provision. The doctrine of “reading in” involves adding words to a statutory provision to bring it in conformity with constitutional provisions. As such it is a jurisprudential approach adopted to avoid having to strike down the statutory provision altogether.

46. A two-pronged test is considered for applying the doctrines of “reading down” and “reading in”¹⁰;

- a) Whether the statute can remain operational after such an interpretative adjustment (reading down or reading in)
- b) Whether the legislature would have enacted the challenged law, in the form as required now, if it had been aware of the constitutional issues now being presented and the jurisprudence of which we have the benefit.

47. Here the application of “reading in” is required to cater section 10(2) of the Citizenship Act to save it from offending Article 25 of the Constitution that is wherever reference is made to “woman” and “she” therein; the words “or man” and “or he” be read. This adjustment shall not have any effect on the operability of the statute. Indeed, had the legislators been cognizant of the requirements of Article 25 at the time, they would surely have made the adjustment themselves. As such, both

¹⁰ Province of Sindh v. MQM (PLD 2014 SC 531 and Haroon-ur-Rashid v. LDA (2016 SCMR 931)

tests for applying the remedial doctrine of “reading in” are fully satisfied.

48. We, therefore, allow these petitions by reading in the missing words “man/he” in the subject provision i.e. Section 10(2) of the Pakistan Citizenship Act, 1951. Hence the status of the spouses of the petitioners be adjudged and processed accordingly and till such time the spouses of the petitioners may not be repatriated or dealt with contrary to the findings given above.

Dated: 05.03.2024

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