Prot. No. 630

Tirana, 30 July 2020

To the
Public Commissioners

Bulevardi "Deshmoret e Kombit", Nr. 6
Tirana
Albania

Case Number **ADCA/TIR/1/01**

Assessee **Alkelina *** GAZIDEDJA**

RECOMMENDATION TO FILE AN APPEAL

according to

Article B, paragraph 3, point c) of the Constitution of the Republic of Albania, Annex 'Transitional Qualification Assessment', and Article 65, paragraph 2 of Law No. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania"

1. Introduction

The assessee, Alkelina Gazidedja, holds the office of the judge of the Administrative Court of Appeal. She is an assessee pursuant to Article 179/b, paragraph 3 of the Constitution.

The decision to confirm the assessee in duty was announced on July 10, 2020.

The Re-evaluation process was carried out on three criteria: assets, background, and proficiency. Upon administering reports of the auxiliary bodies, thorough investigation of the case, administering evidence obtained through the investigation process and submitted by the assessee, the Independent Qualification Commission (IQC) Adjudication Panel closed the ex-officio investigation and notified the assessee the results of the investigation.

On January 9, 2019, the first hearing session was held, and an anonymous denunciation was received with IMO and IQC. Therefore, the investigation was re-opened by IQC to extending it further. After closing the additional investigations, IQC notified the assessee on the additional results. The hearing took place on July 7, 2020 and following the deliberation as per Article 55 paragraph 5 of the Vetting Law, the Adjudication Panel decided to confirm the assessee in duty pursuant to Article 59 of the Vetting Law.

The International Observers, having reviewed the case file and the results of the public hearing, deem that a review of the case by Appeal Chamber is necessary, for the reasons explained hereinafter.

2. Summary of recommendation

The International Observers (IOs) recommend the Public Commissioners (PCs) to file an appeal against the whole IQC's decision dated July 10, 2020, which confirmed into duty the assessee, Alkelina Gazidede, and to request the Special Appeal Chamber of the Constitutional Court (Appeal Chamber) to overrule the decision of the IQC pursuant to Article 66, par. 1, sub c) of the Vetting Law. The IOs believe that a correct assessment of the evidence of the case and the correct application of the relevant legal framework should result in a dismissal of the assessee.

The IOs believe that there exist several shortcomings related to:

a) The Asset Assessment; and
b) The Proficiency Assessment;

The assessee failed to provide the evidence justifying her shortcomings in the Assets and Proficiency Assessment and, as such, this should have been considered within the framework of the assessment as per Art. 59, par. 1, sub a) and sub c) of the Vetting Law, or within the framework of the overall assessment as per Art. 4, par. 2 of the Vetting Law. The International

Observers believe that all elements should have guided the IQC to render a different decision and to dismiss the assessee from duty, pursuant to Art. 61, par. 3 and 4 of the Vetting Law and/or pursuant to Art. 61, par. 5 of the Vetting Law.

Considering the above, the Public Commissioners are hereby recommended to appeal the whole decision, in all its points and with regards to the Assets, Background and Proficiency Assessment, in order to vest the Appeal Chamber with the authority to overrule the said IQC's decision by also providing them with the indisputable possibility to rule the decision.

The Public Commissioners are also recommended to prompt the Appeal Chamber to check, without delays, whether it would be appropriate to schedule the appeal as a priority, in order to prevent the eventual decisions of the competent inspection body on the referred cases could harm the proper dealing or processing of the case by the Appeal Chamber within the framework of the re-evaluation process.

3. Basis of Recommendation and Legal Grounds

Preliminary Remarks

Art. 59, par. 4 of the Vetting Law establishes that

"Although the Commission decides to issue the decision of confirmation in duty, it has the right to transfer the file to the competent inspecting disciplinary body, if the Commission identifies reasons which constitute disciplinary misconduct in accordance with the legislation that regulates the status of judges or prosecutors, or if it identifies reasons to be consider during the periodic evaluation. This decision is not appealable. The disciplinary body begins without delay consideration of reasons in accordance with the legislation that regulates the status of judges or prosecutors."

The International Observers points towards the nature of *lex specialis* (or special law) of the applicable provisions of the re-evaluation process (Vetting Law and relevant articles in the Constitution and Annex to it) compared to the legislation regulating the status of judges and prosecutors. The nature of the special law is essential to the nature and the purpose of the vetting process, whose aims are highlighted in Art. 179/b., par. 1 of the Constitution and Art. 1 of the Vetting Law.

A constitutionally oriented interpretation of Art. 59, par. 4 of the Vetting Law should be based on a correct logical process that will prevent IQC from transferring issues to the "competent inspecting disciplinary body" which can or will have a substantial impact on the re-evaluation process whenever those issues could provide grounds for a dismissal. A different interpretation causes the incongruent result of a confirmation in duty because the IQC is unable or unwilling to (properly) consider substantial issues that might be fundamental for the outcome of the

specific case. In such a situation the International Observers believe IQC would relinquish its constitutional role.

Mutatis mutandis, if an appeal lodged by the Public Commissioners is not admitted or analyzed by the Appeal Chamber with regard to the cases which were referred by the IQC to the competent disciplinary body pursuant to Art. 59, par 4 of the Vetting Law, it is the same Appeal Chamber's constitutional role which is at risk, whenever those cases should ground, in the Public Commissioners' views, a dismissal of an assessee. Eventually, even the public interest that the Public commissioner is expected to protect according to Art. C, par. 2 of the Annex of the Constitution is hampered.

Furthermore, it can also be argued that the provisions of Art. 59, par. 4 of the Vetting Law do not affect the right to appeal vested on the Public Commissioners when the latter, as a re-evaluation institution representing the public interest and for the purposes of the Art. 179/b of the Constitution, holds that the IQC's decision-making was not in compliance with the law or supported by evidence, or that the assessee is not in the situation that calls for his/her confirmation in office. It can be possible to argue that the only limitation on the right to appeal vested on the Public Commissioners is found at constitutional level, specifically in Art. F, par. 3 of the Annex of the Constitution According to this line of argument, it is only the assessee from being barred to lodge an appeal against a referral pursuant to Art. 59, par. 4 of the Vetting Law.

It is the International Observers' view that the IQC has erred in its application of Art. 59, par. 4 of the Vetting Law because the proficiency shortcomings and failures of the assessee should have a substantial impact in her negative assessment and, therefore, they had to be considered by the IQC in view of a dismissal and not referred to the competent inspection body pursuant to the said provision. Similar considerations could have an impact for the proficiency assessment pursuant to Art. 61, par. 4 of the Vetting Law as well for the overall assessment pursuant to Art. 61, par. 5, by including the application of Art. 61, par. 3 of the Vetting Law with regard to the assets.

Asset related issues

a) The residence house.

The IOs have doubts with regard to the identified issues strictly related with the residence house to the extent of the way how it is being declared during the years, the construction costs, other relevant expenses, the financial capacity as well the sources used to establish such asset.

The way how the financial analysis of IQC was performed and shifted to the assessee with the final conclusion reached by the panel needs to be properly reviewed in the light of the provisions foreseen by the Annex of the Constitution and Vetting Law as the IQC erred in its decision.

The assessee did not properly disclose this asset. More specifically she declares annually as the following:

- In the Periodic Declaration of 2003, the assessee declares a one-storey house constructed on the area 100 m^2, value 2.000.000 ALL.
- In the Periodic Declaration of 2004, the assessee declares the addition of one floor on the existing house, value 11.000 EUR.
- In the Periodic Declaration of 2006, the assessee declares the addition of one informal floor (attic) on the existing house as well declares that the whole house is in the process of legalization.

While in the Vetting Declaration, same as confirmed by LIPRO Tirana and ALUIZNI, the assessee declares a three floors house at the value of 6.000.000 ALL, with the following description:

- Ground floor 143 m^2 + terrace 20.5 m^2;
- First floor 150.5 m^2;
- Second floor 192.3 m^2;
- Building plot 437.60 m^2.

Calculation of the construction costs were performed pursuant to National Housing Entity reference price following AC's decision no. 15 dated 17.07.2019. Applying this standard, the value of the construction of the first floor was calculated at the value of 3.831.956 ALL, and for the second floor (attic) was calculated at the value of 4.120.155 ALL, leading to a lack of financial source for the years 2004 and 2006.

Notwithstanding the explanations provided by the assessee, and regardless of the fact that IQC decided to accept the calculation based on the 'construction costs' instead of the 'usage costs'; accepted the incomes of the spouse's parents, still the financial analysis for the years 2004 and 2006 remains with a negative balance.

Moreover, serious concerns stand with the way how IQC streamlined the total value of the construction costs equally for the years 2004, 2005 and 2006 without grounded reasons and by not giving value to what the assessee has declared in the Periodic Declarations. In other words, the total amount of the construction cost that resulted from the calculation, was equally divided for each year i.e. 2004, 2005 and 2006.

In the Periodic Declaration of the year 2005, the assessee did not declare any construction costs and/or expenses. The assessee declares costs only in 2004 and 2006. Therefore, IQC arguments are not grounded.

There are also doubts regarding the physical condition of the building, if completed or not, doubts which are raised on the basis of what the assessee declares over the years in the Periodic Declaration and what she declares in the vetting declaration. More specifically, the issue is extended to the way how IQC considers the construction status of the second floor (known as the 'attic') which despite of establishing a failure of the assessee to disclose in 2006 the surface area and the value, impacts as well the financial analysis of 2006.

In the decision, the panel of IQC considers the second floor of the building as not completed, also known as 'karabina'. Based on such ungrounded argument, IQC automatically reduces the construction costs by 40% which consequently directly impacts the financial analysis of the assessee for the year 2006. Notwithstanding the explanations provided by the assessee and IQC reasoning, there is no document neither from LIPRO nor from ALUIZNI proving that the construction of the second floor is not completed.

It seems that there are discrepancies between the disclosures and the documentation submitted by the assessee with the documentation administered during the administrative investigation. Explanations of the assessee remain in a contradictory level, circumstantial and without probative value as long as the applicable legal framework is clear.

Pursuant to the provisions of the Annex of the Constitution and the Vetting Law, for the purposes of this process, assessees in the vetting declaration should declare all assets accumulated until the time of declaration, so that the verification of the veracity and the accuracy of the declarations could be implemented by comparing them with other declarations filed before taking office and continuing with the periodic annual declarations. It is precisely the compatibility of these statements, which constitutes the veracity and accuracy required by law, so that this process shall fulfill its purpose.

b) Other issues

The IO's are aware that the appeal on the assets should not be limited to the main points as abovementioned. During the administrative investigation, several shortcomings were identified within the asset pillar, that need to be properly re-analyzed and legally re-qualified in the light of the Annex of the Constitution and of the vetting law, differently from what the panel of IQC concluded. These shortcomings should be viewed not only in the context of the Asset Assessment, but they should also amount to the overall assessment towards the assessee Alkelina Gazidedja.

A remarkable moment about the assets that needs to be contextual viewed withing the scope of this recommendation stands for the cash deposits during the period 2003-2015, which were not declared.

Furthermore, from the administrative investigation it was found a cash deposit from assessee's spouse with *** Bank on*** .01.2010, in the amount of 1 000 000 ALL. By having in regard that no cash balance was declared for the year 2009 in the respective annual declaration of 2010, consequently, the assessee was asked about the source of such amount.

The assessee argues in her explanations, that the source for creating this deposit was originating from the closure of another bank account with *** Bank but in fact it results that she has declared in the periodic declaration of 2010 nothing more than *"closed the deposit in* *** *Bank and opened it in* *** ". The assessee's explanations do not satisfy the content of what it was asked to prove because the assessee's spouse has closed the deposit with *** Bank on *** 02.2009 and opened a new deposit with *** on *** 01.2010 in the amount of 1.000.000 ALL. No cash balance is being declared for the year 2009 in the respective Periodic Declaration submitted on 2010.

Notwithstanding the explanations of the assessee, the IOs believe that IQC's conclusion on this item for accepting this cash amount as lawful, does not correspond to the factual circumstances and lead to an erroneous application of the vetting provisions. According to the Periodic Declaration it is proven that the assessee did not disclose any cash balance for 2009. Therefore, the amount of 1.000.000 ALL should not be considered in the financial analysis of 2010 same as they did with non-declared cash situation for the period 2003-2015. The amount of 1.000.000 ALL might have a direct impact in the financial analysis of the year 2010, as well the financial capability of the assessee to purchase the land surface area of 437.6 m^2. This ground should have led the panel of IQC to render a different decision on this item.

Additionally, based on the information administered by the Financial Supervision Authority, it was found the usage of a vehicle plate no. AA*** . Pursuant to the contract no. *** dated *** 08.2016, found from the administrative investigation, it is proven that the assessee's spouse received the Ford vehicle with license plate no. AA *** , for an undefined term from citizen ***.*** . Moreover, it was found that the assessee's spouse has had an insurance policy in his name for the same vehicle *(by being registered as a user)* for the period *** 04.2017-*** 04.2018; *** 08.2017-*** 08.2017 and *** 08.2016-*** 08.2016. The assessee failed to disclose it with the vetting declaration accordingly with the requirements and the panel of IQC should have assessed this item in line with the other shortcomings.

The assessee is in the situation of lack of declaration of the asset over the years. Failure to declare it over a certain period cannot be considered a material mistake. The assessee failed to declare and this behavior does not establish an oversight on her part, but a pattern because the same issues are consecutively present in the declarations.

Pursuant to the provisions of the Annex of the Constitution and the Vetting Law, for the purposes of this process, assessees in the vetting declaration should declare all assets accumulated until the time of declaration, so that the verification of the veracity and the

accuracy of the declarations could be implemented by comparing them with other declarations filed before taking office and continuing with the periodic annual declarations. It is precisely the compatibility of these statements, which constitutes the veracity and accuracy required by law, so that this process shall fulfill its purpose.

Proficiency related issues

The IOs have doubts whether rating the assessee as 'competent' is appropriate. Several proficiency shortcomings were found by the auxiliary body inspection in the way how the assessee handled cases.

A serious pattern behavior was found due to the public denunciations from which it resulted *interalia* that the assessee was found in a situation of the conflict of interest.

The IOs believe such repetitive failures should be viewed as an interrelated cluster to the proficiency assessment along with the other deficiencies (as described in the following paragraphs) dealing exclusively with this pillar in a way to amount them properly and accordingly to the provisions foreseen by the Status Law.

Notwithstanding the explanations and reasoning of the IQC, the IOs have doubts whether these findings were fully addressed and properly evaluated by the panel of IQC. More specifically the issues at stake are related to:

a) **Shortcomings found by the auxiliary body**

Several deficiencies were flagged in the proficiency report by including and not limited in the archive source data and other relevant evaluation reports issued after some assessment controls performed with the Administrative Appeal Court *(details are found in the file)*.

The explanations of the assessee did not clearly and fully answered to the identified issues of the auxiliary body which were integral part of the administrative investigation of IQC and incorporated in the results sent to the assessee. The assesee's explanations ain't no probative value towards what it was shifted. The panel of IQC did not gave the right value to this part as well did not entered at all into details.

b) **Cases triggered by the public denunciations until the closure of the first administrative investigation.**

The IOs believe that some of public denunciations were reasonably indicating facts in a way that might seriously have had a huge impact on the proficiency pillar.

In line with the above, on cases for which the burden of proof was shifted, sever failures of the assessee were found many times in terms of legal knowledge, organizational skills, and unjustifiable delays. The panel of IQC did not gave the right value to this part as well did not entered at all into details.

c) The adjudications of two cases when the company * sh.a. was one of the parties related to the conflict of interest.**

Severe indications and facts were revealed in the anonymous denunciation *(received at the same date when the first hearing took placed)* flagging two situations of conflict of interest where Alkelina Gazidedja was exposed by adjudicating two cases with the company *** sh.a., at the same time when she owned part of the company's shares. Following the above facts, for a fair and unbiased process a thorough investigation was performed from which it was confirmed that the assessee Alkelina Gazidedja has been part of the trial in the cases no. *** and no. ***

The explanations of the assessee did not clearly and fully answered to the real point of this item. The assesee's explanations have no probative value towards what it was shifted. The panel of IQC did not gave the right value to this part as well did not entered at all into details, regardless of her withdrowal from the shares.

This context should have been taken highly into consideration by IQC different from other cases when the assesses and/or related persons used to own shares but not being involved in adjudications. Even though no preferential treatment was proven, this is a situation that seriously affects the ethical part of a magistrate, especially in a repetitive context like this.

d) Cases reviewed by the High Court establishing the violation of the law and of the fair process by the assessee.

The same anonymous denunciation envisages two decisions issued from the High Court stating that assessee has jeopardized the due process by rendering a biased decision and seriously violating the law. The submitter alleged that assessee Alkelina Gazidedja has adjudicated two cases in the first and second instance by explicitly indicating them.

*(the case of the company *** shpk vs. INUK)*

The case initiated by the company *** shpk, against the Inspectorate of National Urban Construction (INUK), claiming an administrative fine issued by the latest.

At its earliest stages, it was the assessee Alkelina Gazidedja who adjudicated the case and rendered decision no. *** dated *** 09.2009, by partially accepting the claim. After an appeal was filed, the Appeal Court of Tirana by decision no. *** dated *** 09.2010, quashed the first

instance decision and sent the case for retrial with another judge. After several hearings, the stay of proceeding was decided. As such, having into account that a 'stay of proceeding' cannot dismiss the lawsuit on July 2012, the case was reactivated by the company *** shpk, resubmitting the lawsuit against INUK for the same subject matter. Starting from this moment the court case file has been subject to different tries by different judges and instances *(details are in the file)*.

However, the case boils down to the fact that the company *** shpk filed the appeal with the Administrative Appeal Court and the case was through a manual lot was assigned to the panel composed by ***.*** (rapporteur), ***.*** (member) and Alkelina Gazidedja (member). By decision no. *** dated *** 04.2014 held in the consultation room, the panel rejected the appeal.

When the case was sent to the High Court (administrative chamber), by decision dated *** 07.2016, was clearly stated that the judge Alkelina Gazidedja has been acting in violation of the law, jeopardizing the due process, rendering a biased decision and violating principles regulated by ECHR given that she was the judge who adjudicated this case in the first instance. As a result, the case was sent for retrial at the Administrative Appeal Court of Tirana but with a different panel presuming that it was tried again even though there is no data.

*(the case of ***.*** and others vs. the Prefect of Tirana)*

The case initiated by the plaintiff ***.*** and others, claiming the nullity of the administrative act and property restitution. After several adjudications, when the case was served in the Administrative Appeal Court, Alkelina Gazidedja was one of the panel's member.

It was found that this case was adjudicated in the first instance by the same judge i.e. Alkelina Gazidedja, starting from the moment of its registration until the moment she was transferred in the criminal section. Based on the verification and examinations of the court case file, it resulted that:

- on *** 03.2010, the assessee rendered the decision on the preliminary hearing date;
- on *** .04.2010, the preliminary hearing took place in the presence of the assessee and the next hearing was set on ***.05.2010;
- from *** 04.2010 and onwards the assessee was transferred to the criminal's section;
- this case was subject to a new lot and another judge continued the trial.

It is proven that the assessee's active role and involvement by giving decisions related to the preliminary hearing according to the applicable provisions of the Civil Procedural Code.

The case was sent to the High Court (Administrative Chamber) and by decision dated *** 12.2016, it is clearly stated that judge Alkelina Gazidedja has been acting in violation of the

law, jeopardizing the due process, and rendering a biased decision. In view of the above, the Administrative Chamber of the High Court considered that the decision of the Administrative Appeal Court should be overturned and the case should be sent for retrial to the same court but with another adjudication panel, creating the procedural guarantees for respecting the impartiality of adjudication panel. From the court records, it was found that this case was tried again by a different panel of the Administrative Appeal Court accordingly.

Notwithstanding the excuses of the assessee and the reasoning of IQC in relation with this matter, every judge has the obligation to examine the file; a judge has the duty to assess and analyze every document in the file regardless of who the rapporteur is.

The documents in the administered files, prove the contrary of what assessee claimed in her written explanations and/or in the hearings. Arguments provided by the assessee remain circumstantial, erratic, and not grounded towards this proven fact. Different from IQC's interpretation, the applicable provision of the Civil Procedure Code, clearly states that *"he has given advice or has expressed opinion on the case in trial or has participated in the trial of the case in a different level of the process..."*.

Taking into consideration the factual background as above, a serious procedural violation is committed which relates to the obstacle of one of the judges of the trial panel to be a member of this panel. Notably the judge has failed to comply with the requirements of the procedural law regarding composition of the trial panel more than once.

Referring to the legislation, one of the important elements of the fair trial, which is guaranteed also by the Article 42 of the Constitution and the Article 6 of the ECHR, is the adjudication of the case by an impartial court. The judges of the trial panel, who fail to provide the prerequisite guarantees regarding impartiality in the objective sense, should recuse themselves or should be disqualified from adjudication of the case. The principle of impartiality includes the subjective element, which is closely linked to the inner conviction of the judge to provide a solution to the case that is being adjudicated, as well as the objective element, which implies providing the prerequisite guarantees for an impartial trial by the court itself, by avoiding any justified suspicion in this direction.

Referring to the procedural provisions stipulated by the Civil Procedure Code, which are included also in the Law No. 49/2012 "On the Organization and Functioning of the Administrative Courts and adjudication of Administrative Disputes", the composition and impartiality of the trial panel constitute a guarantee for the parties to the lawsuit in delivering justice.

In any case, when there exist grounds that justify a suspicion regarding bias during adjudication or there exist inconsistencies provided by the procedural law, it is the duty of every judge to

recuse himself/herself from adjudication in order not to violate the rules of judicial process regarding the aspect of impartiality of the court.

Additionally, the European Court of Human Rights in Strasbourg, in its jurisprudence concerning the impartiality of a court, stated that:

"*Nevertheless, there is no strict division between subjective and objective impartiality, as the behavior of a judge may not only raise objective doubts about his impartiality from the view of an external observer (objective test), but it may affect also the issue of his personal convictions (subjective test (Kyprianou vs. Cyprus [GC], no.73797/01, § 119, ECHR, 2005 XIII). So, in some cases, when it may be difficult to secure evidence for refuting the presumption of the judge's subjective impartiality, the requirement for objective impartiality provides a further important guarantee (see Pullar vs. United Kingdom, June 10, 1996, § 32, Reports 1996-III). In this regard, even appearance may have a certain importance or, in other words, "justice should not only be made, it has to be seen being made." What is at stake is the trust that courts in a democratic society should inspire amongst the public (see De Cubber vs. Belgium, October 26, 1984, § 26, Series A no. 86.)*

The provisions in force regulate the recusal as a preliminary issue to examination of the case, as one of the legal requirements for a judge to participate in the case. This kind of approach seems to be in line with the functioning of the Administrative Appeal Court having a deadline of 30 days to examine a case from the date of its registry but also with the protection of the right of the parties for a due process and an unbiased justice as explained.

The IOs are of the opinion that the assessee has not been sufficiently conscious and sensitive to the possibility that she would appear to be inappropriate in adjudicating a specific case due to the fact that she has given advice or has expressed opinion on the case in trial or has participated in the trial of the case in a different level of the process. Moreover, as the Special Appeal Chamber has ruled on impartiality, "*judges must perform their functions in full impartiality and guarantee the appearance of impartiality*".

It is essential that negative evaluation follows only in cases of fundamental and serious errors and/or when there is clear and consistent pattern of erroneous judgements that indicate lack of proficiency as it set by Decision no. 2, dated 18.01.2017 of the Constitutional Court and by Venice Commission Opinion CDL-AD (2016)036. Consequently, the identified deficiencies within the proficiency pillar as addressed above, are such that they do not match the conclusion reached by the panel of IQC.

The IOs believe that IQC's conclusion do not correspond to the factual circumstances and it was reached as a result of incorrect application of Article 59 paragraph 4 of the Vetting Law, at a time when the assessee has shown repetitive pattern at work with similar issues in the identified cases.

Due to all introductory facts as abovementioned, it seems that a serious pattern is established by affecting one the main sources used as a basis of the proficiency assessment. Based on the Status Law (Art. 71/c; 72/2; 75/3/ 75/4 and generally 77) are provisions that might constitute relevant basis to be used as a reference. Is highly important to combine the abovementioned provisions of the Status Law with relevant provisions of Vetting Law (Art. 40; 41/4; 42; 44/c; 59/c; 61/4).

4. Recommendation

The IOs recommend the Public Commissioner to file an appeal against the IQC decision confirming the assessee in duty.

This appeal would enable the Appeal Chamber to:

- perform an accurate financial analysis where all issues at stake are clearly and duly evaluated.
- assess assets related issues in the light of the Annex of the Constitution and Vetting Law.
- perform a thorough and comprehensive proficiency assessment).
- take into consideration any possibility unresolved issues that can have impact in an overall assessment of the assessee.

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