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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 2537 (Admin)

No. CO/2719/2019

Royal Courts of Justice
Thursday, 15 August 2019

Before:

MR JOHN KIMBELL QC
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE QUEEN ON THE APPLICATION OF
OA — Claimant

- and -

LONDON BOROUGH OF CAMDEN — Defendant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Interested Party

ANONYMISATION APPLIES

MS G MELLON (instructed by GT Stewart) appeared on behalf of the Claimant.

MS D RHEE QC (instructed by the London Borough of Camden) appeared on behalf of the Defendant.

MR A LENANTON (instructed by the Government Legal Department) appeared on behalf of the Interested Party.

JUDGMENT

JOHN KIMBELL QC (SITTING AS A DEPUTY HIGH COURT JUDGE):

1 This is an oral application for permission to bring a judicial review claim. An application for permission would ordinarily be considered by a judge on the papers, and then only if refused would there be a reconsideration at an oral hearing. However, in this case, by paragraph (1) of an order of Mr Justice Freedman made on 1 August 2019, the issue of permission has been adjourned to an oral hearing. Pursuant to paragraph 8.2.5 of the Administrative Court Judicial Review Guide this hearing has been treated as a renewed permission hearing.

2 The claimant is a four-month old baby. Pursuant to an anonymity order made by David Pittaway QC, (and indeed previously also made by Supperstone J on 11 July 2019) under CPR 39.2, the claimant is anonymised, and for that reason is referred to in this judgment as "OA". He brings this claim by his mother and litigation friend, whom I will refer to as "AA".

3 OA was born on 17 April of this year at the Royal Free Hospital in Camden. The birth was normal and he is, by all accounts, a healthy baby who is flourishing. His mother is a 38-year-old citizen of Nigeria who came to this country on a six-month visitor visa in 2015.

4 Following a return to Nigeria, AA re-entered the United Kingdom in February 2016, this time under a two-year multiple-visit visa. I have not seen those visa applications, but it seems that the visas were sponsored by AA's half-sister, who lives in England. The two-year visa expired last year.

5 AA has a 12-year-old daughter, "B", with her former partner, whom I will refer to as "NA". He is also the father of OA. Their daughter was born in Nigeria and lives there with AA's mother and another sister of AA. AA says she met the father of her two children in Nigeria in 2005.

6 NA is a 53-year-old man who comes originally from Nigeria but who has joint Finnish/Nigerian citizenship. He appears to have come to the UK in 2016. It is said, although on rather thin evidence, that he is a self-employed football coach and personal trainer, who is now living in Manchester. AA claims to have lived with OA's father in Dagenham for one or two years until October 2018. It is said that he left AA in October 2018 when he found out that she was two months pregnant with OA.

7 AA has made two applications for an EEA residence card, i.e. a card under the European Economic Area Regulations 2016. The first application was in November 2016; the other was in November 2017. Both applications were rejected by the Home Office because the Home Office considered that AA had failed to provide sufficient proof of a durable relationship with OA's father. The Home Office retained AA's passport. OA's father at that point seems to have gone to live in Stevenage with another son of his, who is therefore a half-brother both to OA and to B.

8 OA initially stayed with a friend in Dagenham who provided food and accommodation for a month, and then with a cousin in Camden until OA was born. AA's cousin said that AA could not remain living with her after OA was born, and she wrote a letter explaining that she lived in a two-bedroom flat with her partner and son and that looking after AA had been a strain on the relationship and having a baby would be too much. That letter is at bundle page 17 in section E.

9 In the face of a threat of a judicial review, the London Borough of Camden agreed on 23 April 2019 to provide temporary accommodation to OA and his mother while an assessment was carried out under section 17 of the Children Act 1989. AA and her son were provided with a flat in Belsize Park.

10 On 14 May, OA's father submitted an application for Finnish citizenship for OA. That application remains outstanding. On 27 June 2019 a certificate was provided by the Finnish immigration service that the application had been made. The date on which it is recorded as having been initiated is 14 May 2019.

11 The criteria by which that citizen application is likely to be judged are set out in paragraph 43 of an unsigned but approved witness statement provided by OA's mother to her solicitors. Although I have no evidence as to whether those requirements will be met, they are fairly standard requirements for such an application and there is no reason (and certainly no one has submitted that there is any real reason) to doubt that the application will be successful in due course. In any event, the position for the purposes of the application today is simply that the application has been made and is outstanding.

12 While the assessment under section 17 was being carried out, the London Borough of Camden provided social work support and access to emergency funds to OA's mother. The result of that assessment was communicated under cover of a letter dated 25 June 2019, and it is that decision which the claimant seeks permission to challenge by way of an application for judicial review. The covering letter says as follows:

> "For the reasons set out in the CAFA [child and family assessment] Camden has concluded that if you decide to remain in the UK you will be able to continue to rely upon your support network, which includes in particular [OA's] father, your cousin and your sister, and that therefore you and your son do not need support under section 17 of the Children Act. The authority considers it is entitled to come to this conclusion because of your proven ability to manage since you arrived here from Nigeria in 2016 and because it is not satisfied with your account of how you can no longer rely on that support network, even though you now have a baby."

13 That is the first part of the decision. The second part of the decision which was communicated is as follows in the second paragraph:

> "Further, even if you are destitute Camden is prohibited from providing you with support under section 17 [of the Children Act], by reason of Schedule 3 to the Nationality, Immigration and Asylum Act 2002."

So there are two parts of the decision that was reached by the authority.

14 At the end of that letter, further details are provided of the matters that Camden has considered, including rights derived from the EEA Regulations. Then at the end of the letter, this is said:

> "I emphasise that even if you have a derivative right to reside under regulation 16(5) [of the Regulations], this does not affect Camden's decision not to continue to support you and your son because the primary reason for this is that it is not satisfied that you are destitute.

> In the circumstances the authority considers that 14 days is sufficient time for you to make alternative arrangements and so you must leave your accommodation by 4 pm on 09/07/2019." (Emphasis in original)

15 Before the signature, this paragraph appears:

> "If you disagree with any of the above or with the contents of the enclosed documents what you or your solicitors say will be taken fully into account. I would be grateful if you would peruse all the documents I have given you today and let me know by Friday 28th June in person or in writing or through your solicitor whether you have any comments on those documents as your views are also very important in ensuring that documents reflect what has been written and taken your comments on board."

It is common ground that the letter was delivered by hand to the claimant's mother on the 25th, which I think was a Tuesday, and the last paragraph of the letter is clearly giving her until the Friday of that week to provide any further comments.

16 The decision letter enclosed three documents:

(1) A child and family assessment completed, it is said, internally on 5 June 2019;

(2) A nonstandard document headed "chronology of misinformation"; and

(3) A human rights assessment form on a standard template.

17 Having received the letter by hand, on 1 July AA gave instructions to her solicitors and they then sent a pre-action protocol letter on 2 July which complained about the way in which the decision had been made. It made a number of points, but in particular of relevance for this application is that on the second page, about two-thirds of the way down, the solicitor made this point:

> "The claimant's birth was registered shortly after he was born by his mother and father. The claimant's father has applied for the claimant and the claimant's sister … to receive Finnish passports."

Attached to that letter was a printout certifying that the application for Finnish citizenship had been submitted on behalf of OA. The letter also gave an explanation of some of the matters referred to in the "chronology of misinformation". The local authority was invited to reconsider their position.

18 It is clear from the response of the local authority to the letter that I have just read that it was prepared to reconsider matters, because on 2 July it began to refer to the assessments that it had sent on 25 June as" draft assessments". In the fourth paragraph of the email sent on 2 July, this was said:

> "The local authority has considered your letter and will consider all the comments you have made and will review the assessment in light of those comments. We note that you make relevant comment on the human rights assessment. Do you wish to make any comment?"

19 Comments were submitted. The further response by the local authority sent on 3 July said that "the responses that have been received to date will be considered", and a promise was also made that final copies of any amended assessments would be provided.

20 On 4 July, the authority asked five specific questions in relation to the Finnish immigration service certificate, including who made the application, whether it had been dealt with. Those questions were answered by the claimant's solicitors on 5 July.

21 On the same day (i.e. 5 July 2019), a response to the pre-action protocol letter was received. This dealt with the points that had been raised, with the exception of the existence of an application for Finnish citizenship for the claimant, notwithstanding that questions had been asked and answers provided on the same day. So although the promise had been made to the claimant that the matters raised in the pre-action protocol letter would be dealt with and responded to, in relation to one matter, namely an impending application for EU citizenship, that matter was not even referred to in the letter dated 5 July. It is all the more strange, it seems to me, that this was not dealt with, because on page 4 of the letter, under the heading "exclusion from support", the local authority deals in a long paragraph with its response to the news that an application might be made for the claimant's sister in Nigeria to become a Finnish national. The authority then deals with possible implications of this, including in relation to regulation 16(4) of the EEA Regulations, and whether it is an outstanding application for the purposes of *Birmingham City Council v Clue* [2010] EWCA Civ 460. So although it deals with an application for Finish citizenship made on behalf of the claimant's sisters, for reasons which have not been explained it did not deal at all with the potential consequences of the claimant himself acquiring EU citizenship.

22 On 9 July, AA, vacated the flat that she had been allocated. She originally, it seems, approached the same friend that she had stayed with previously who by then had moved to Kent. However, that arrangement fell through and she ended up being reliant on charity, a charity called Project 17 which arranged bed and breakfast accommodation for three nights.

23 On 11 July, this claim for judicial review was made and combined with an application for urgent interim relief. On the same day, four witness statements were sent by solicitors acting for the claimant to the local authority in an attempt to persuade the local authority to reconsider the matter and avoid judicial review.

24 Of particular relevance, and particularly relied upon by counsel who appears on behalf of the claimant, is one of the exhibits, namely a two-page table of responses to the chronology of misinformation. It is said by counsel for the claimant that, had AA been given an opportunity to respond to the allegations in the chronology of misinformation before the decision letter had been sent, these are the answers that she would have provided. On the face of it, the answers seek to negate any adverse inference that the local authority might have otherwise, and in fact did, draw.

25 The letter prompted an offer of accommodation for two to four weeks. But the offer came with a condition that, if it was accepted, the claimant's mother should sign an undertaking to leave the country at the end of that period and to return to Nigeria.

26 The application for interim relief came before Supperstone J on the papers who refused it. It was renewed before David Pittaway QC four days later on 15 July. He granted the application for interim relief. Although I have not seen a full transcript of that judgment, it is clear that he thought there was an arguable case for a judicial review and the balance of convenience favoured an order being made. The practical result was that that same day, namely 15 July 2019, AA moved back into the same flat she vacated six days earlier, and, in

accordance with that order, the London Borough of Camden has lodged the acknowledgement of service and grounds of defence. So that is the background and the circumstances in which the matter comes before me.

27 There are three grounds advanced by way of attack on the decision.

Ground 1

28 The first ground is that there was a failure to undertake a lawful section 17 assessment and/or human rights assessment. In particular, the point that is relied upon is the procedural unfairness in drawing adverse inferences that were made against the claimant's mother without affording an opportunity for proper explanation. That is ground 1. Although other matters which were relied upon (failure to make reasonable enquiries and that the conclusions reached were irrational and unlawful), it seems to me the way it is certainly put today the main ground is a procedural one: that adverse inferences were drawn in circumstances where no opportunity was given to respond to them.

Ground 2

29 The second ground was that it was unreasonable of the Council not to review the assessment, i.e. genuinely reconsider the decision they had made in June. In particular, there it is said that the defendant failed to consider the fresh evidence that had been supplied by the solicitors acting for the claimant.

Ground 3

30 The third ground is breach of duty to act reasonably when terminating the provision of accommodation and other support. It was said, in particular, that the period of notice of 14 days was unreasonably short.

Analysis

31 I will deal with the third ground first of all. I decline to give permission for ground 3. It seems to me that if the Council is otherwise entitled to reach the decision that it did in June, then 14 days seems to me a not unreasonable period to give to someone to vacate a property, in particular in circumstances where there is such a great demand and need for accommodation. In any event, in terms of judicial review it seems to me that this ground did not really take the matter very much further, and really the nub of the dispute was in relation to grounds 1 and 2.

32 In relation to ground 1, the first thing that needs to be said is that, as was stated in *R (on the application of O) v London Borough of Lambeth* [2016] EWHC 397 (Admin) at [17], Helen Mountfield QC sitting as a deputy High Court judge, the court must bear in mind when considering applications of this sort that:

> "Whether or not a child is 'in need' for [the purposes of the Children Act 1989] is a question for the judgement and discretion of the local authority, and appropriate respect should be given to the judgements of social workers, who have a difficult job. In the current climate, they are making difficult decisions in financially straitened circumstances, against a background of ever greater competing demands on their ever-diminishing financial resources."

33 I wholeheartedly agree. Social workers and those working in the local authority deserve great praise and support for the very difficult work that they do. It is the role of the courts, though, to ensure that in particular in the case of vulnerable children that the decisions are properly reasoned and articulated. The courts must, as Helen Mountfield said:

> "... satisfy themselves that there has been sufficiently diligent enquiry before those conclusions are reached, and that if they are based on rejection of the credibility of an applicant, some basis other than 'feel' has been articulated for why that is so."

34 Essentially the role of the courts is to ensure that a fair procedure has been followed. In particular, one of the things said by Helen Mountfield QC in that case at [20]:

> "Fairness of course demands that any concerns as to [whether or not previous support is available any longer or why it has disappeared, and any conclusions that the local authority have drawn about this] are put to the applicant so that she has a chance to make observations *before any adverse inferences are drawn* from gaps in the evidence, but otherwise, the local authority is entitled to draw inferences of 'non-destitution' from the combination of (a) evidence that sources of support have existed in the past and (b) lack of satisfactory or convincing explanation as to why they will cease to exist in future." (Emphasis added)

35 What was said by the deputy High Court judge in that case, is supported by a number of earlier authorities which are listed in the Judicial Review Handbook (6th edition) by Michael Fordham QC at paragraph 60.7.8. For example, in *R (on the application of FZ) v Croydon LBC* [2011] EWCA Civ 59, an age assessment case. As Sir Anthony May, in the Court of Appeal said:

> "... it is axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him."

36 Similarly, in another case, *Interbrew SA & Anor v Competition Commission* [2001] EWHC Admin 367, Moses J said:

> "... generally [the duty of fairness] will require the decision maker to identify *in advance* areas which are causing him concern in reaching the decision in question." (Emphasis added)

37 I am accordingly satisfied that there is a general principle of fairness in public decision-making which requires the person affected by the decision to be informed of the matters which are being held against him or her in advance of the decision actually being made. In my judgment, that is all the more important where the points which the local authority are intending to rely upon, amount either to allegations of dishonesty or akin to dishonesty.

38 In response to an enquiry from the court this morning, it was confirmed that the document called "chronology of misinformation" that was generated by the local authority in this case was a non-standard document. It reflected, as its name suggests, not only that there were inconsistencies which the Council were concerned about, but they considered on analysis

that those inconsistencies between what had been said by the applicant and what they understood the position to be on analysis was such as to amount to deliberate supply of false information.

39 In those circumstances, it seems to me that the principle of fairness I have referred to above is clearly engaged and the only fair way to proceed was to send some sort of communication to the claimant's mother to say that the Council considered that she had misinformed them about certain things and to give her an opportunity to comment on those adverse inferences before any decision was made.

40 In this case, I am afraid I have to say it seems to me totally artificial to suggest, as counsel for the Defendant did, that the decision letter that was sent on 25 June requiring, as it did, at the very end that the accommodation currently being lived in by the claimant and her baby should be vacated within 14 days, was not a decision letter. True it is that it said that the Council remains open to reconsider the matter, but it seems to me it was a decision, and there is all the difference in the world between having made a decision and then allowing the authority's lawyers to consider any representations and actually making the primary decision itself.

41 It seems to me it plainly was arguable in the circumstances of this case the decision makers themselves, that is to say the social workers, should have put their concerns together about any alleged misinformation and allowed the claimant an opportunity to respond in detail to those before drawing the adverse inferences and before making their decision.

42 The response to this point by counsel who appears on behalf of the authority is to say, well, it is semantic and really the fact is that the 5 July letter is the final decision and all matters were considered. It seems to me, as I have said, that adverse inferences were plainly drawn, and not just adverse inferences but inferences of dishonesty in circumstances where much of the objective evidence pointed to the total absence of support from after the birth of the baby, either from the father, from the cousin, from the sister or the friend, for various reasons.

43 The main basis for the decision that the claimant's mother was not destitute seems to have been based on disbelieving the information provided by the claimant's mother. In those circumstances, it seems to me at the very least arguable that a different course should have been followed and she should have been given an opportunity to respond before being asked to leave the accommodation.

44 This is more than a mere matter of procedure without any potential impact. Having received the chronology of misinformation and having looked at it and considered it, she did provide a substantive response to each of the points. I am not in a position to decide whether her responses are correct in fact, that is not for this court, but the annex that I referred to attached to her witness was it seems to me a document which she was entitled to produce before the decision was made against her. It is a tragic waste of time and money on the part of all involved that what has happened is that we have had to wait until a long witness statement is prepared before the points in that chronology of misinformation were responded to. They should in my judgement have been dealt with at the time the decision was made. So, I have no hesitation in granting permission on ground 1, in particular on the basis that there was a failure to follow a fair procedure.

45 I grant permission on ground 2 as well, for this reason: it seemed to me that substantive points were raised in the letter drafted on 2 July 2019 and in particular the point was made and evidence was sent to the authority that the claimant's father had made an application for Finnish citizenship. It seems to me arguably irrational that the Council did not just take

a step back and say, "Well, hold on a second: if the child is going to become an EU citizen, how might this impact on our proposed approach?" It seemed to me very surprising indeed that when the final letter was sent on 5 July 2019 this aspect of the case was not even referred to.

46 It may be that if this matter goes further it will be shown that has no effect and produces no result, but, as a matter of process, it seems to me highly undesirable that that matter and the other matters raised in the 2 July letter were not dealt with fully the first time round. In fact, it would have been better had there been a "minded to" letter or a provisional letter sent before a final decision, then that could have all been dealt with in one decision. As it was, there is a sort of half-review and then a final decision. As I mentioned in the course of argument, it may be the case that, should the matter go further, the claimant may wish to consider whether, as an alternative, the claimant ought to amend the grounds of judicial review in the alternative to challenge the final decision which confirmed the previous decision. But that is a matter entirely for the claimant's legal advisors.

47 I now move onto the human rights aspect of the case, because it is said in relation to this that, even if the claimant is destitute, what is said on behalf of the Council is that it had no duty; in fact, it was prohibited from providing any support because of schedule 3 to the Nationality, Immigration and Asylum Act 2002.

48 In response in relation to that, the claimant says that it is arguable that under the Immigration (European Economic Area) Regulations 2016 SI 2016/1052, the claimant had a right to reside in the United Kingdom. This is said to be derived from the fact that (a) his father was a qualified person in that he was a self-employed person and an EEA national (it is not in dispute he has Finnish citizenship) and (b) that the claimant is a family member within the meaning of regulation 7(1)(b) because he is a direct descendant of NA and is aged under 21.

49 The claimant submits that these are conditions are the only conditions in the Regulations for being a family member. Under article 14(1) of the Regulations there is an extended right of residence given to a qualified person as long as that person remains a qualified person. Regulation 14(2), says:

> "A person ('P') who is a family member of a qualified person residing in the United Kingdom under paragraph (1) ... is entitled to remain in the United Kingdom for so long as P remains the family member of that person or EEA national."

So on the face of those Regulations it would appear that, as long as it is arguable that the claimant's father is a self-employed person or someone seeking work or otherwise a qualified person, then it would appear on the face of the Regulations that the claimant had a right to stay and reside in the United Kingdom.

50 In relation to the claimant's father, there is not much evidence. It is stated on the birth certificate is that he is a football coach and a personal trainer. There are various references in the documents that I have seen which suggest that he has been exercising EEA rights of one sort or another since he arrived in the country in either 2016 or 2017. For the purposes of today, it has not really been suggested that it is somehow a sham or a fraud and that he is not in fact exercising those rights.

51 So on the basis that it is, at least on the evidence I have seen, arguable that he is exercising EEA rights, the question is 'What, if anything flows from that?' What is said on behalf of

the Council is that the Regulations need to be read down by reference to the Directive which they are intending to implement, Directive 2004/38/EC ('the Directive'). What is said is that what appears to be otherwise a simple requirement of being a descendant and under the age of 21 is not the only requirement: what is said by counsel is that there is a further requirement that the family member must be accompanying or joining a Union citizen i.e. to form a family unit. That is not something that appears in the Regulations and counsel who appears on behalf of the Secretary of State for the Home Department does not support that interpretation.

52 Counsel for the Secretary of State for the Home Department submits that a proper reading of the regulation, as does counsel who appears on behalf of the claimant, is to read it in plain and simple terms, which is to say that the only conditions on having the right to reside are to be a family member of a qualified person as that it defined in the regulation itself, namely by being a descendant and under the age of 21 (without any further gloss). I accept the submissions by the Secretary of State for the Home Department, which accord with my own reading of the Directive and Regulation. It is not for me to come to any final conclusions on it: all I have to decide is whether or not the interpretation that is proposed by the claimant is an arguable one, and I certainly do find that it is.

53 What is then said on behalf of the claimant is that there are cases in which it has been recognised that a derived right for the mother or carer has been recognised in cases arising out of Article 7(1)(b) of the Directive. She says it is arguable, and I agree, that under EU law one should apply the same derivative right where Article 7(1)(d) is engaged. If that is right, then it means not only that the claimant has a right to reside here under the Regulations, but there is at least an arguable case that the claimant's mother has a right too. It has helpfully been conceded on behalf of the Council that if there is such a right for the mother, then that takes the matter entirely outside schedule 3 and subject to reaching a valid conclusion on the destitution question then there is an obligation to provide support to the child.

54 There is another route to the same conclusion, which is that if the application for citizenship of Finland is successful (I have to say I cannot see any reason why it should not be) then there may be another derivative right that derives from the ECJ decision in *Zambrano* and the subsequent case law in the European Union. For the purposes of dealing with an application for permission, it seems to me that it is not necessary for the claimant to prove more than one EU right is engaged, but if, having heard the argument this morning, I am more than satisfied that it is arguable that the claimant's mother had a derivative right or would have a derivative right under what has been known or generally put as an extended *Zambrano* right on the basis of Finnish citizenship. I cannot see any reason why there should not be a derivative right by analogy with those cases where it has been recognised under Article 7(1)(b), and that is, it seems to me, an alternative ground for giving permission for this matter to go forward.

55 The Secretary of State for the Home Department has accepted, and this must be the correct position, that in light of the application for Finnish citizenship, certainly the Home Office would not be taking any active steps to remove the claimant's mother from the United Kingdom until that is resolved. I am sure that the local authority, were it considering the matter afresh today, would give careful consideration to *KA v Essex County Council* [2013] 1 WLR 1163 which deals with the interaction between applications of that sort and schedule 3 of the 2002 Act. In that case Leggat J (as he then was) applied the following dicta of Dyson LJ in *Birmingham City Council v Clue* [2010] EWCA Civ 460 at [63]:

> "I accept the submission of Mr Knafler that, in enacting Schedule 3, Parliament cannot reasonably have intended to confer a general power on local authorities to pre-empt the determination by the Secretary of State of applications for leave to remain. In my judgment, save in hopeless or abusive cases, the duty imposed on local authorities to act so as to avoid a breach of an applicant's Convention rights does not require or entitle them to decide how the Secretary of State will determine an application for leave to remain or, in effect, determine such an application themselves by making it impossible for the applicant to pursue it.

56 It seems to me by analogy the same must apply here where you have a situation where a person residing in this country and on one view already with the right to reside here is applying for EU citizenship. In those circumstances, unless the view was formed that the application was hopeless or doomed to failure, and if it were granted it would lead to a situation which gave rise to new and different Article 8 considerations as a result, the position ought to be that the local authority should stay its hand to possibly bring about a situation where the person has to leave the jurisdiction before the application is determined. It seems to me at the very least it is arguable that that applies to the situation of the claimant in this case.

Conclusion

57 In summary, for all of those reasons, I grant permission for this judicial review claim to proceed on grounds 1 and 2 but not on ground 3. I order that the standard directions should apply.

CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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This transcript has been approved by the Judge