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# *151 R. v Secretary of State for Trade & Industry,

Queen's Bench Division

3 October 1994

**[1995] Env. L.R. 151**

(Smith L.J. & Farquharson L.J.):

October 3, 1994

*Sections 3 and 29 Electricity Act 1989—the power of the Secretary of State to make regulations for the purpose of protecting the public from dangers from the electricity transmission system—purported risks from electric and magnetic fields arising from the transmission system—Article 130r of the E.C. Treaty as amended—the precautionary principle—whether the Secretary of State for Trade and Industry was under a duty to make regulations under section 29 of the Electricity Act 1989 in accordance with the precautionary principle.*

Section 29 Electricity Act 1989 provides (*inter alia*) for regulations to be made by the Secretary of State for Trade & Industry for the purpose of protecting the public from dangers arising from the transmission or supply of electricity and for illuminating or reducing the risks of personal injury arising from transmission or supply.

Section 3 of the 1989 Act also imposes a duty upon the Secretary of State to exercise any of the functions assigned to him by the act in a manner which is considered best calculated to protect the public from dangers arising from the generation, transmission or supply of electricity.

The applicants were three children living in an area of North East London where The National Grid Company was laying a new high voltage underground cable. The applicants alleged that the non-ionising radiation which would allegedly be emitted from the new cables when commissioned would enter their homes and schools and would be of such a level as would or might expose them to a risk of developing leukaemia.

Solicitors for the applicants wrote to The Secretary of State asking him to exercise his powers under section 29 and issue regulations to safeguard the health of the applicants and to take “a precautionary view” of the risk of damage to health.

The Secretary of State replied saying that he had never regarded it as necessary or appropriate to take specific measures to limit electric and magnetic fields to protect the public from the possibility of the very small risk of cancer.

The applicants sought a judicial review of this decision. They sought an order to compel the Secretary of State to issue regulations, guidelines or *152 some other directive to licence holders (under the 1989 Act) so as to ensure that the electric and magnetic fields associated with electric cables to be laid as part of the National Grid did not exceed 0.2 micro-teslas to the nearest point of houses adjoining the cables; or some other level at which on current research, there was no evidence to suggest or otherwise hypothesise any possible risk to the health. In the alternative they sought an order of mandamus to require the Secretary of State to advise the Crown to issue such regulations, guidelines or other form of directive. In the further alternative, they sought a declaration that, in refusing to issue such regulations, guidelines or directives, the Secretary of State had failed to comply with his duty under section 3 of the Electricity Act 1989.

The applicants argued that the Secretary of State was obliged to apply the precautionary principle as a result of either an obligation of European Community Law, under the policy of the present Government, or as a matter of common sense:

1. E.C. Law

The applicant argued that Article 130r of the E.C. Treaty as amended by the Treaty on European Union side at Maastricht was binding on Member States and that the Secretary of State was under a duty to consider his powers, and duties under the 1989 Act in the light of the article.

2. *Government policy*

The applicants argued that the Government White Paper “This Common Inheritance” Cm 1200 laid down the Government's support for the precautionary principle and in failing to issue guidelines in respect of electric and magnetic fields he was in breach of his own policy.

3. *Common sense*

The applicants referred to the judgment of Stein J. in the Land and Environment Court of New South Wales in Leatch v. National Parks & Wildlife Service and Shoalhaven City Council 81 LGERA 270 and argued that the precautionary principle should be applied as a matter of common sense and reasonableness.

The respondent argued that the resolution of the European Parliament on combatting the harmful effects of non-ionising radiation took into account the precautionary principle. This resolution strongly suggested that Article 130r was nothing more than a general principle and no policy had been formulated nor had any binding legislation been passed.

Appearing as an interested party, the National Grid Company relied upon Article 3b of the Treaty in arguing that Article 130r does not impose an obligation on member states to legislate in light of the precautionary principle or any other principle set out in the article. ***153***

Held, Article 130r did not impose an obligation on the Secretary of State to consider his duties and powers under the 1989 Act in the light of the precautionary principle. Article 130r was intended to lay down principles from which future community policy on the environment was based and not have direct effect. It was clear that the statement of principles such as the precautionary principle could not themselves create obligations on Member States to take specific action.

There was no basis upon which the precautionary principle should be taken into account in decisions involving environmental law health considerations as a matter of common sense or reasonableness.

Government policy as contained in “This Common Inheritance” was intended to protect the environment itself and was not intended to apply to damage to health caused by environmental factors unless those factors are responsible themselves for damage to the environment in the long term. The Secretary of State's conclusion that there was no significant risk of developing cancer from exposure to electric and magnetic fields could not be impugned as wholly unreasonable or perverse and the Secretary of State had acted in accordance with this general policy as set out in the White Paper.

## Cases referred to:

(1) Case 45/76 Comet (1976) E.C.R. 2043.

(2) *Case 68/88 Commission v. Greece (1988) E.C.R. 2965*.

(3) *Case C-2/90 Commission v. Belgium (1993) 1 C.M.L.R. 365*.

(4) *Garland v. British Rail [1983] 2 A.C. 751*.

(5) Leatch v. National Parks and Wildlife Service and Shoalhaven City Council 81 LGERA 270.

(6) *London Borough's Transport Committee v. Freight Transport Association Ltd (1991) 1 W.L.R. 828*.

## Representation

M. Beloff, Q.C. and J. Cameron for the applicants.

S. Richards for the respondent.

M. Newman for the National Grid Company plc as an interested party.

SMITH J.:

This is an application for judicial review of the decision of the Secretary of State for Trade and Industry whereby he declined to issue regulations to the National Grid Company plc and/or other licence holders under the Electricity Act 1989 so as to restrict the electromagnetic fields from electric cables which are being laid or are to be laid as part of the national grid. The application is brought on behalf of 3 children who live in South Woodford, an area of North East London where the National Grid Company is presently laying a new high voltage underground cable ***154*** between Tottenham and Redbridge. The applicants allege that the non-ionising radiation which will be emitted from these new cables when commissioned, which will enter their homes and schools, will be of such a level as will or might expose them to a risk of developing leukaemia. They say that the Secretary of State should issue regulations which would remove any such risk.

By their application they seek an order to compel him to issue regulations, guidelines or some other directive to licence holders so as to ensure that the electronmagnetic fields from electric cables to be laid as part of the national grid do not exceed (i) 0.2 micro-teslas at the nearest point of houses adjoining the cables; or (ii) some other level at which on current research, there is no evidence to suggest or otherwise hypothesise any possible risk to the health of those exposed to such fields. Alternatively, they seek an order of mandamus to oblige the Secretary of State to advise the Crown to issue such regulations, guidelines of other form of directive. In the further alternative, they seek a declaration that, in refusing to issue such regulations, guidelines or directives, the Secretary of State has failed to comply with his duty under section 3 of the Electricity Act 1989.

Leave to move for judicial review was granted by Schiemann J. who also made an order for expedition. Also before the Court is the National Grid Company plc, who appear as a Party Directly

Affected.

Behind this application lies the concern of residents of South Woodford, particularly those who are the parents of young children, who saw a BBC Panoroma television programme transmitted on January 31, 1994. The programme discussed a number of epidemiological studies which examine the possible connection between exposure to high levels of non-ionising radiation in the electromagnetic fields (EMFs) created by high voltage electric cables and the incidence of childhood leukaemia. To the non-expert, some of these studies might appear to suggest that children who have substantial exposure to EMFs from high voltage cables passing near their homes face a three to fourfold (or even possibly sixfold) increased risk of developing leukaemia. However, as has been readily accepted by counsel appearing for the applicants, the study of the effects of EMFs by epidemiology is fraught with difficulty and the results of these studies, when expertly evaluated, do not allow, let alone require, any such positive or alarming conclusions to be drawn.

Understandably, the programme caused anxiety in the minds of the residents and parents of South Woodford. Some of them formed an action group and on February 15, 1994 wrote to the National Grid Company seeking information, *inter alia*, about the levels of radiation which would be emitted from the cables then being laid near their homes, when those cables were energised. On February 27, the National Grid Company ****155*** provided the information requested from which the action group perceived that their children would indeed be exposed to levels of non-ionising radiation well in excess of the average domestic level. The action group took the view that their children might be at risk of leukaemia if the cables were commissioned in the manner intended.

The action group had by this time taken legal advice and on March 15, 1994 their solicitor wrote to the Secretary of State asking him to lay down regulations to cover the alleged danger to health arising from the installation of these cables. They urged him to take “a precautionary view” of the risk of damage to health. They warned him that, if he refused, they would commence an application for judicial review. On the same day their solicitor wrote to the National Grid Company, asking it to take voluntary measures to reduce the levels of EMF exposure or alternatively to stop work until the issue had been resolved. No reply was received from the company. On April 28, the Secretary of State replied to his letter saying that he had never regarded it as necessary or appropriate to take specific measures to limit EMFs to protect the public from the possibility of a very small risk of cancer. He had reconsidered the matter in the light of the group's recent letter and application for judicial review. He adhered to his previous opinion and would oppose the application.

Hence this application comes before the court. However, it is important to make clear at the outset that it is not the function of this court to decide whether there is in fact an increased risk of leukaemia from exposure to high levels of EMFs. Still less is it for the Court to decide whether these applicants will be at any such increased risk. This court appreciates that the parents of these children are deeply concerned about these issues and it is not through any lack of sympathy with that concern that the court must decline to decide them. The only issue before the court is whether the Secretary of State, in declining to take specific measures to limit the level of EMFs, has acted unlawfully.

Before summarising the arguments advanced by the parties, it is necessary to set out the statutory framework in order to examine the Secretary of State's duty and the extent of his discretion.

Section 3(3) of the Electricity Act 1989 (“the 1989 Act”) provides that:

> “Subject to subsections (1) and (2) above, the Secretary of State . . . shall . . . have a duty to exercise the functions assigned to him by this Part in the manner in which he considers is best calculated . . .
>
> (d) to protect the public from dangers arising from the generation, transmission or supply of electricity.”

One of the functions assigned to the Secretary of State is the power to make regulations relating to supply and safety under section 29 of the 1989 Act. Section 29(1) provides that: ****156***

The Secretary of State may make such regulations as he thinks fit for the purpose of—

. . .

> (b) protecting the public from dangers arising from the generation, transmission or supply of electricity, from the use of electricity supplied or from the installation, maintenance or use of any electric line or electrical plant; and
>
> (c) without prejudice to the generality of (b) above, eliminating or reducing the risks of personal injury, or damage to property or interference with its use, arising as mentioned in that paragraph.

The Electricity Supply Regulations 1988 (as amended in 1990, 1992 and 1994) were made under prior legislation but, by virtue of paragraph 3 of Schedule 17 to the 1989 Act, take effect as if made under section 29 of that Act. The 1988 Regulations as amended do not contain specific measures to limit EMFs.

It is clear that the statutory scheme requires the Secretary of State to judge whether there exist any "dangers" or risks of personal injury and whether he ought to exercise his power to make regulations under section 29. The provisions confer a wide discretion upon him. In order to make that judgment, he must of necessity rely upon advice given to him by experts.

The applicants argue that, in considering the issue whether there exist any dangers or risks of personal injury from EMFs, the Secretary of State has approached the matter in the wrong way. They submit that he has asked himself whether there is evidence that exposure to EMF's does in fact give rise to a risk of childhood leukaemia. Because, as we shall see, the scientific evidence does not establish that is such a risk, he has concluded that he need not use his power under section 29 of the 1989 Act to regulate exposure to EMFs. They say the proper approach would be to ask himself whether there is any evidence of a possible risk even though the scientific evidence is presently unclear and does not prove the causal connection. They submit that if he had asked the question in that way, pitching the threshold for action at a lower level of scientific proof, that answer would have been "yes" and he would then have been obliged to make regulations. They say that he is required to apply that lower threshold either as an obligation of European Community law or under the policy of the present Government, as set out in a White Paper of 1990 entitled "This Common Inheritance". As something of an afterthought and in reliance upon an Australian authority to which I shall later refer, they submit that as a matter of common sense, the Secretary of State was bound to apply the lower threshold for action. They say that this error of approach leaves his decision not to issue regulations open to challenge by judicial review.

The basis of the applicant's argument in favour of the lower threshold ***157*** of scientific proof, is that, either under Community law or under the policy of the White Paper or as a matter of common sense, the Secretary of State is obliged to apply what is known as"the precautionary principle", when considering whether he is to take action under section 29 for the protection of human health.

There is, at present, no comprehensive and authoritative definition of the precautionary principle. It is an expression which has in recent years been used in a number of international declarations, conventions and treaties, to some of which the United Kingdom is a party. These include the Treaty of European Union, the Maastricht Treaty. In none of these documents is the principle comprehensively defined, although often the document describes what the principle is intended to mean in the context of the subject matter concerned.

The applicants referred us first to the description of the principle adopted by Australia's 1992 Inter-Governmental Agreement on the Environment, which states that:

> "where there are threats of serious of irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the Precautionary Principle, public and

private decisions should be guided by:

(i) careful evaluation to avoid wherever practicable, serious or irreversible damage to the environment; and

(ii) an assessment of the risk-weighted consequences of various options.

Secondly, we were referred to a passage in the report of a decision of Stein J. in the Land and Environment Court of New South Wales in the case of Leatch v. National Parks and Wildlife Service and Shoalhaven City Council 81 LGERA 270. After noting that reference is made to the precautionary principle in almost every recent international environment agreement and after quoting several slightly different formulations of the principle from a variety of sources including the Intergovernmental Agreement cited above, at p. 282, Stein J. said:

> "In my opinion the precautionary principle is a statement of commonsense and has already been applied by decision makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists, concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision makers should be cautious."

It appears to me, from both of those formulations, that the principle is primarily intended to avoid long term harm to the environment itself rather than damage to human health from transitory environmental ***158*** conditions. However, as we shall see, in some circumstances, the principle has been declared to be applicable for the purpose of safeguarding human health. Although it does not appear to me that either formulation of the principle supports their contention, the applicants submit that the principle requires that precautionary action be taken where the mere possibility exists of a risk of serious harm to the environment or to human health. Where this possible risk exists, a cost-benefit analysis must be undertaken so as to determine what action would be appropriate. Thus, application of the principle in this case would require the Secretary of State to conduct a cost-benefit analysis to ascertain what action could be taken and at what cost so as to reduce any possible risk to health from exposure to EMFs. This would have to be done, even though the scientific evidence does not show that the risk to health actually exists. The Secretary of State has not done this and, say the applicants, this failure vitiates the exercise of his discretion and renders his decision open to challenge.

In response, the Secretary of State argues that he has given careful consideration to his duties under the Electricity Act. He has considered the scientific evidence available and has taken advice from a special Advisory Group of the National Radiological Protection Board (NRPB) under the chairmanship of the very eminent epidemiologist Sir Richard Doll. This Group comprises highly qualified scientists who have exhaustively considered whether there is any evidence of adverse health effects from exposure to EMFs. In reliance upon their advice, which he has accepted, the Secretary of State has concluded that it is neither necessary nor appropriate to take the specific measures contended for by the applicants. As to the precautionary principle, the Secretary of State says that he is under no obligation of E.C. law to apply it. In so far as the present Government adopted as policy a version of the precautionary principle in their 1990 White Paper, the Secretary of State claims that he has acted in accordance with that policy. He also contends, in response to the applicants' third contention, that he is not required to apply the precautionary principle to his consideration of section 29 a matter of common sense.

The National Grid Company supports the submissions of the Secretary of State.

I turn now to consider briefly the nature and content of the scientific evidence of the connection between exposure to EMFs and the incidence of childhood leukaemia.

The possibility of the existence of a connection between childhood cancer and EMFs was first raised in 1979. Since that time 11 epidemiological studies have been published, most of which suggest the possibility of a link between exposure to EMFs and leukaemia. It is common ground that the early studies were unsatisfactory, in that the ***159*** methodology was seriously flawed. There are real difficulties in measuring or assessing the extent of the subjects' exposure. The more recent studies, which emanate from Scandinavia, are said to be more reliable in that the methodology is improved, but the numbers of cases studied are very small and many of the results do not carry statistical significance. More research is needed and is presently in progress.

It is not necessary for the purposes of this judgment to examine the epidemiological studies themselves. They have been expertly evaluated by two experts on behalf of the applicants. The conclusions of the Advisory Group, who have also examined the studies and reports of experimental work, are set out in various reports from which it is only necessary to quote brief extracts.

At paragraph 17 of his affirmation dated June 8, 1994, Dr J. A. Dennis, a former member of the NRPB who has advised the applicants in the present proceedings, summarises the combined effect of the epidemiology so far published in this way:

> "The totality of the scientific evidence points to the weak possibility that prolonged exposure to power frequency magnetic fields, while not a direct causal factor in inducing human leukaemias, may enhance the risks of these cancers especially in young children when acting in conjunction with other social and environmental factors. The degree of this enhancement for prolonged exposure to fields in excess of 100 to 300 nanoteslas may be about 1.5 to 4."

Pausing there, it is necessary to explain that the nanotesla and the microtesla are the usual units of measurement of EMFs. A microtesla is equivalent to 1,000 nanotesla. Ordinary domestic exposure is said to be in the range of 30 to 150 nanotesla. The children of South Woodford will, according to the figures provided by the National Grid Company, be exposed to fields well in excess of 300 nanotesla, possibly as much as 3,740 nanotesla or 3.74 microtesla.

Dr Dennis also expressed the opinion that:

> ". . . if there is a real risk of enhancement of the incidence of human leukaemias by prolonged exposure to magnetic fields, it is not possible to say that there are threshold levels below or above which the enhancement would not occur. Such epidemiological evidence as exists indicates that the enhancement increases progressively with the intensity of the field."

He concluded:

> "The question as to what level magnetic fields should be reduced must depend on a detailed cost-benefit analysis. In view of the wide range of sources of magnetic fields and their benefits to society it will probably not be possible to determine a simple value."

In his review of the epidemiological studies published to date, Professor ***160*** Scott Davies, the other expert relied on by the applicants, concludes by saying:

> "Thus on balance it is my judgment that at present it is not possible to conclude with certainty that residential EMF exposure causes leukaemia in childhood. In other words, I do not believe that a causal relationship has yet been established. Nevertheless it is also my judgment that the most important criteria of causation . . . have largely been met: strength of association, temporality, biological gradient and to a fair degree consistency. Thus, in my judgment that such exposures may increase the risk of childhood leukaemia cannot be dismissed, given the current evidence. Furthermore, it is my opinion that the epidemiological evidence to date is more consistent with the possibility that residential EMF exposure increases the risk of childhood leukaemia than with the possibility that

there is no association between the two."

Those two expressions of opinion summarise the applicants' case that there is an increased risk of developing cancer from exposure to EMFs. Neither opinion, it will be observed, suggests that a causal link has yet been established between EMFs and cancer. Neither supports the applicants' claim for the limitation of EMFs to 0.2 microtasla or indeed any particular level.

The Advisory Group of the NRPB which has advised the Secretary of State has reached slightly different conclusions. The Group has reported on several occasions during the past two years. In 1992, after reviewing the experimental and epidemiological data concerning the possibility that electromagnetic fields might be a cause of cancer, the Group concluded that:

> ". . . the epidemological findings . . . provided no good evidence of a cancer risk, to either children or adults, from normal levels of power frequency electromagnetic fields. The experimental evidence strongly suggested that these radiations did not harm genetic material and so would not initiate cancer. The only possibility was that they might act as promoters, that is, they might increase the growth of potentially malignant cells. The epidemiological evidence for such an effect was however, weak, with the least weak evidence pointing to the possibility of causing tumours of the brain. In the absence of unambiguous experimental evidence to suggest that exposure to these EMFs was likely to be carcinogenic, the findings could be regarded only as sufficient to justify formulating a hypothesis for testing by further investigation."

In March 1993 the Advisory Group published a summary of its views on the studies published since their 1992 Report. They considered three new studies relating to occupational exposure to EMFs but said that these produced conflicting and inconclusive results. Two recently published ***161** Scandinavian residential studies were also reviewed. The Group considered:

> ". . . that these studies were well controlled and substantially better than those that previously reported associations with childhood cancer. However, the new studies reported few cases. They do not establish that exposure to electromagnetic fields is a cause of cancer, although they provide weak evidence to suggest the possibility exists. The risks would however be small. In the absence of any convincing experimental support, the Group stresses the urgent need for epidemiological studies based on objective measurements of exposure to electromagnetic fields and the need to investigate further the basis for any interactions of environmental levels of electromagnetic fields within the body."

They concluded:

> "The views of the Advisory Group have been noted in the formulation of restrictions on human exposure to EMFs developed by the Board (that is the NRPB), although at present epidemiological studies do not provide an effective basis for quantitative restrictions on exposure to electromagnetic fields."

Later that year, in the 1993 Board statement, the Group said:

> "It can be concluded from these reviews that there is no clear evidence of adverse health effects at the levels of electromagnetic fields to which people are normally exposed. In particular, the epidemiological data do not provide a basis for restricting human exposure to electromagnetic fields and radiation . . ."

In 1994 the Group's most recent conclusion was that:

> "The studies do not establish that exposure to electromagnetic fields is a cause of cancer but, taken together, they do provide some evidence to suggest that the possibility exists in the case of childhood leukaemia. The number of affected children is however very small.
>
> Experimental studies to date have failed to establish any biologically plausible mechanism whereby carcinogenic processes can be influenced by exposure to the low levels of EMFs to which the majority of people are exposed."

They continue:

> "Thus at present, there is no persuasive biological evidence that ELF (extremely low frequency) electromagnetic fields can influence any of the accepted stages of carcinogenesis. There is no clear basis from which to derive a meaningful assessment of risk, nor is there any indication of how any putative risk might vary with exposure."

The Group stresses the urgent need for large and statistically robust studies based on objective measurements of exposure. ***162**

It will be seen that there is not a great difference of opinion between the experts who have provided advice to the Secretary of State and the experts who have advised the applicants in these proceedings. The NRPB Advisory Group accepts that there is a possibility of a connection between EMFs and childhood leukaemia. They see the need for further research. But they regard the connection as biologically implausible and they see no basis for placing a quantitative restriction on human exposure to EMFs. The applicants accept that unless the Secretary of State is bound to apply the precautionary principle, his acceptance of the advice that there is no basis on which to restrict human exposure to EMFs and the consequent exercise of his discretion to decline to issue regulations or other directives cannot be impugned by judicial review. Still less, in the light of the advice, could there be any basis for criticising his refusal to restrict exposure to 0.2 microtesla or indeed to any other specific level.

The applicants submit however, that if the Secretary of State is under a duty to take account of the precautionary principle when considering his duties under the 1989 Act, the basis for its application is laid, even on the advice given by the NRPB. That is so because the NRPB has advised that there is a possibility that there exists an increased risk of leukaemia from exposure to EMFs. That submission appears to me to be correct, especially now that the Secretary of State is aware of the levels of EMFs to which these applicants will be exposed when the Tottenham to Redbridge cable is energised. No challenge was offered to the applicants' calculation, based on National Grid Company data, that some residents could be exposed to as much as 3.74 microtesla or 3,740 nanotesla. The effects of this level of exposure are not known but the exposure is significantly greater than the ordinary domestic levels of exposure, of up to 150 nanotesla. I am prepared to accept that, if the Secretary of State is shown to be under a legal obligation to apply the precautionary principle to legislation concerned with health and the environment, the possibility of harm raised by the existing state of scientific knowledge is such as would oblige him to apply it in considering whether to issue regulations to restrict exposure to EMFs. He would at least in my view be obliged to conduct the cost-benefit analysis necessary for the proper application of the principle. The Secretary of State accepts that he has not considered the precautionary principle, except to the limited extent required by the policy set out in the 1990 White Paper. If he were to be under an obligation to apply the principle, I would be in favour of granting relief limited to requiring the Secretary of State to reconsider the need for the regulation of EMFs in the light of that principle.

Before turning to consider whether the Secretary of State is obliged by EEC law to apply the precautionary principle, it is convenient to deal with the applicants' other submissions. ***163**

The 1990 White Paper "This Common Inheritance" Cm 1200 was presented to Parliament as a statement of Britain's environmental strategy by several Secretaries of State including those for the Environment, Health and Trade and Industry. It explained that the foundation of Government policy was the ethical imperative of stewardship which should underlie all environmental policies. Mankind, as custodian of the planet, has a duty to look after the world prudently and conscientiously. This entailed a responsibility to future generations to preserve and enhance the environment. It continues at paragraph 1.15:

> "In order to fulfil this responsibility of stewardship, the Government has based the policies and proposals in this White Paper on a number of supporting principles. First we must base our policies on fact not fantasy, and use the best evidence and analysis available. Second, given the environmental risks, we must act responsibly and be prepared to take precautionary action where it is justified. Third, we must inform public debate and public concern by ensuring publication of the facts. Fourth, we must work for progress just as hard in the international arena as we do at home. An fifth, we must take care to choose the best instruments to achieve our goals."

It continued:

> "We must act on the facts and on the most accurate interpretation of them, using the best scientific and economic information.
>
> That does not mean we must sit back and wait until we have 100% evidence about everything. Where the state of our planet is at stake, the risks can be so high and the costs of corrective action so great, that prevention is better and cheaper than cure. We must analyse the possible benefits and costs both of action and inaction. Where there are significant risks of damage to the environment, the government will be prepared to limit the use of potentially dangerous materials or the spread of potentially dangerous pollutants, even where scientific knowledge is not conclusive, if the balance of likely costs and benefits justifies it. This precautionary principle applies particularly where there are good grounds for judging either that action taken promptly at comparatively low cost may avoid more costly damage later, or that irreversible effects may follow if action is delayed."

As with the precautionary princple itself, it appears to me that this policy is intended to protect the environment itself and is not intended to apply to damage to health caused by environmental factors unless those factors are or might in themselves be damaging to the environment in the long term. However, the Secretary of State has accepted that the policy does apply to cases such as the present and he claims that he has acted in accordance with it.

The applicants submit that the White Paper has misunderstood the ***164*** precautionary principle. They observe that it seeks to set the threshold for action where a significant risk of damage arises, whereas, say the applicants, the precautionary principle requires action as soon as any possible risk is demonstrated. As I have already said, there is no single authoritative definition of the principle and the none of formulations we have seen is couched in the very wide terms contended for by the applicants. In any event, this argument appears to me to be of no relevance. If the Government announces a policy which it intendes to adopt without being under any obligation to do so, it must be entitled to define the limits of that policy in any way it wishes. If the Government says it will apply a precautionary policy when it perceives a significant risk of harm, it must, in my view, be entitled to apply that threshold for action. The Secretary of State says that he has considered the need for regulations in the light of this policy and has concluded that such are neither necessary nor appropriate. In my judgment, on the basis of the advice he has received, his conclusion that there is no significant risk of developing cancer from exposure to EMFs cannot be impugned as wholly unreasonable or perverse.

The applicants' third submission, that the Secretary of State should apply the precautionary principle as a matter of common sense and reasonableness was not argued with any great vigour by Mr Beloff, Q.C. who appeared for the applicants. It did not feature in either the original or amended versions of his most helpful skeleton argument. I think it is not unfair to him to suggest that it occurred to him as a possible argument as he read to the Court the above citation from the judgment of Stein J. in Leatch. Even if Stein J. were purporting to make a general statement that the precautionary principle is of universal application on the ground that it comprises "common sense", his statement would not be binding on this court although it would, of course, command respect. However, Stein J.'s reference to the principle as "a statement of common sense" was made in the context of his refusal to decide whether the principle (as annunciated in the 1992 Convention on Biological Diversity, which Australia had ratified and the scope of which was directly relevant to the case in point) had been imported into domestic law. He said he need not decide that issue as the precautionary principle was "a statement

of common sense". But the statute under consideration, the National Parks and Wildlife Act 1974 (NSW) permitted the Court to take into consideration "any other matter which the court considers relevant". It is clear from the judgment that Stein J. regarded the precautionary principle or "what I have stated this may entail" to be relevant to the issues of preservation of fauna which were then under consideration. He had the power to take it into account and he chose to do so. The decision is of no relevance in English law and in any event gives no support for the proposition that the Secretary of State (or any other decision-maker) is obliged to take the principle into account in all decisions ***165*** involving environmental or health considerations. I find the suggestion that the Secretary of State's decision may be impugned on Wednesbury grounds, because he has failed to apply the principle under the dictates of commonsense to be a startling proposition and I have no hesitation in rejecting it.

It follows that this application can only succeed if the applicants satisfy the court that the Secretary of State is under a duty imposed by E.C. law to apply the precautionary principle.

The applicants' argument is based on Article 130r of the E.C. Treaty as amended by the Treaty of European Unity, the Maastricht Treaty, which came into effect in November 1993. They submit that Article 130r is binding on Member States and that the Secretary of State must therefore consider his powers and duties under the 1989 Act in the light of the duties imposed by Article 130r. It is common ground that some articles of the Treaty have direct effect and confer personal rights on individual citizens of the Community. Other articles impose an immediate duty of compliance upon Member States. Others impose no obligation at all unless and until the Community, acting through its institutions, promulgates a measure which imposes binding obligations on Member States. It is necessary therefore to construe Article 130r so as to decide into which category it falls.

Article 130r, as amended, provides:

> "1. Community policy on the environment shall contribute to pursuit of the following objectives:
>
> — preserving, protecting and improving the quality of the environment;
>
> — protecting human health;
>
> — prudent and rational utilisation of natural resources;
>
> — promoting measures at international level to deal with regional or worldwide environmental problems.
>
> 2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies. In this context, harmonisation measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures for non-economic environmental reasons, subject to a Community inspection procedure.

3. In preparing its policy on the environment, the community shall take account of:

— available scientific and technical data;

— environmental conditions in the various regions of the Community; ***166**

— the potential benefits and costs of action or lack of action;

— the economic and social development of the Community as a whole and the balanced development of its regions.

4. Within their respective spheres of competence, the Community and the Member States shall co-operate with third countries and with the competent international organisations. The arrangements for Community co-operation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.”

In order properly to construe the effect of Article 130r, it must be read together with Article 130s and Article 130t. Article 130s provides:

“1. The Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 130r.

2. By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 100a, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee shall adopt:

— provisions primarily of a financial nature;

— measures concerning town and country planning, land use with the exception of waste management and measures of a general nature and the management of water resources;

— measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

> The Council may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.
>
> 3. In other areas, general action programmes setting out priority objectives to be attained shall be adopted by the Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee.
>
> The Council, acting under the terms of paragraph 1 or paragraph 2, according to the case, shall adopt the measures necessary for the implementation of these programmes.
>
> 4. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy.
>
> 5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that measure, lay down appropriate provisions in the form of:
>
> — temporary derogations and/or ***167**
>
> — financial support from the Cohesion Fund . . .”

Further, Article 130t provides:

> “The protective measures adopted pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.”

Finally, Article 130r should be read subject to Article 3b of the Treaty which contains what is known as the Subsidiary clause and provides:

> “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.”

My initial reaction to these provisions is that if the applicants submission be right that Article 130r imposes an immediate obligation upon Member States, it would follow that since November 1993, Secretaries of State in several government departments and their counterparts in every other country within the Community, have been obliged to apply the precautionary principle to a wide range of legislation. That would entail the need to conduct cost-benefit analyses in respect of every known risk of damage to the environment and every known risk to human health from the environment. They would then be obliged to legislate in every case in which the cost-benefit analysis showed that action would be reasonable. All this would be obligatory as a matter of national initiative, in the absence of any definition of the precautionary principle and before any formulation of a coherent policy on the environment. I find quite remarkable the proposition that each state should be obliged to act alone on the basis of so general a statement of objectives and considerations.

Mr Richards for the Secretary of State submits that when Article 130r is examined in context and in particular in the light of Articles 130s and 130t, it can be seen that it lays down principles upon which Community policy on the environment will be based. It does not impose any immediate obligation on Member States to act in a particular way. For the reasons which follow, I accept Mr Richards' submission.

First, it seems to me that the ordinary sense of the words of the Article itself shows that it is intended that a policy for the environment will be ***168*** formulated at some future time. Paragraph 1 provides the objectives; paragaph 2 is mainly concerned with the principles which will underlie the policy; and paragrah 3 describes some of the factors which must be taken into account.

Secondly, examination of Article 130s reveals that it is the clear intention that the policy envisaged in Article 130r shall be brought into effect by the introduction of measures by the various Community insitutions. The Council will decide what action is to be taken. The Council acting unanimously or in some cases by a qualified majority will, after consultation, adopt provisions and measures. The Council, after consultation will adopt general action programmes setting out priority objectives. Some of those measures may well be binding on Member States, who will, in general, have to pay the costs of implementation. Whether the measure will be binding on Member States will depend upon the nature of the measure. Article 189, which describes the binding force of each type of measure, provides:

> "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force."

In my judgment it is plain from that recital of the varying effects of different types of measure that it is not intended that a statement of policy or, still less, a statement of the principles which will underlie a policy should in itself create an obligation upon a Member State to take specific action. It seems to me that in accepting the provisions of Article 130r, a Member State has done no more than to indicate in advance its consent in principle to the formulation of a policy governed by the objectives there stated and to the introduction of measures designed to implement that policy. The status of the precautionary principle would appear to be no more than one of the principles which will underlie the policy when it is formulated.

Unless by other argument, the applicants are able to cast doubt on the construction of Article 130r contended for by Mr Richards, I would not be prepared to hold that Article 130r creates any obligation upon the ***169*** Secretary of State to apply the precautionary principle to his consideration of his duties under section 3 of the 1989 Act.

The applicants have raised a number of other arguments in support of their contention. First they rely on Article 5 of the Treaty of Rome which provides:

> "Member States shall take all appropriate measures, whether general or particular to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty."

Mr Beloff submits that this Article has been relied upon in a variety of situations to enforce compliance with Community obligations. He cited or referred to a number of cases but in my view they do not support his contention. The various cases, (which include Case 45–76 Comet (1976) E.C.R. 2043, *Case 68/88 Commission v. Greece (1989) E.C.R. 2965* and *Case C-2/90 Commission v. Belgium (1993) 1 C.M.L.R. 365*), to the detail of which I do not propose to refer, are merely examples of the way in which Article 5 has been relied upon to enforce an established obligation of E.C. law. None of them assists in determining whether a particular Treaty provision imposes a binding obligation. I conclude that Article 5 is of no assistance to the applicants. It begs, but does not answer, the question as to whether Article 130r creates an obligation on Member States.

A similar objection must be taken to Mr Beloff's argument that section 2(2) of the European Communities Act 1972 imposes on the Secretary of State a duty to apply the precautionary principle. In my view, section 2(2) does no such thing. It empowers the Queen by order in Council and Ministers or departments by regulation to implement Community obligations or to enable Treaty rights of the United Kingdom or its citizens to be enjoyed. It also provides that in the exercise of any statutory power or duty, including the power or duty to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligations and rights as mentioned. Section 2(2) empowers, enables and permits. It does not impose any duty and it does not assist in determining whether Article 130r imposes obligations upon Member States.

Next, Mr Beloff seeks to rely on the well-established principle that there is a duty upon the national courts of Member States to interpret a national structure so as to accord with relevant Community law: see *Garland v. British Rail 1983 2 A.C. 751*. Mr Beloff seeks to extend this proposition to establish a duty on the Secretary of State to take the precautionary principle into account in considering the 1989 Act. ***170**

The argument comprises two propositions. The first is that there is a duty to interpret a national statute so as to accord with E.C. law. In fact, Garland dealt with the duty of the courts in that regard. Even assuming that there is a corresponding duty on Ministers to interpret their statutory powers and duties so as to accord with E.C. law, it does not follow that there is a duty to interpret national statutes in accordance with Community policy as opposed to a Community obligation. In Garland, the European Court of Justice had held, on a reference from the House of Lords, that Article 119 of the Treaty conferred directly enforceable Community rights on individual citizens. Thus, it dealt with an obligation of Community law, not a statement of policy, still less a statement of principles to underlie a future policy.

The second proposition is that there is nothing which would prevent the Secretary of State from taking the precautionary principle into account when he considers his duties under the 1989 Act. Application of the principle to the 1989 Act would not in any way distort the Secretary of State's powers and duties to protect the public from harm. That proposition seems to me to be correct but the fact that the Secretary of State could, if he wished, lawfully apply the precautionary principle to the 1989 Act does not impose upon him a duty to do so.

Mr Beloff has, as it appears to me, enunciated two correct propositions. However, in my judgment, the two propositions do not logically connect so as to impose a duty on the Secretary of State to apply the principles enunciated in Article 130r. There is no obligation unless Article 130r itself imposes one. We are back to the same question, but we have not been provided with an answer.

Next Mr Beloff sought to rely on *Commission v. Belgium 1993 1 C.M.L.R. 365* (the Walloon Waste case). In that case Belgium had forbidden the importation of waste into Wallonia. The Commission

alleged, *inter alia*, that this was a breach of Article 30, which prohibits restriction on the free movement of goods. Belgium argued that the restriction was justified on environmental and health grounds. At p. 397, the Court held that:

> "The principle that environmental damage should as a priority be rectified at source—a principle laid down by Article 130r(2) EEC for action by the Community relating to the environment—means that it is for each region, Community on other local entity to take appropriate measures to receive, process and dispose of its own waste. Consequently waste should be disposed of as close as possible to the place where it is produced in order to keep the transport of waste to the minimum practicable."

The Court held that Belgium's actions were consistent with the policy of Article 130r. That decision does not in any way assist Mr Beloff to show that Belgium was under a duty to apply Article 130r. It only established that if Belgium chose to do so and thereby contravened the requirement of Article ***171*** 30 not to restrict the movement of goods, that contravention would be justified.

Mr Beloff also relied on the case of *London Borough's Transport Committee v. Freight Transport Association Ltd (1991) 1 W.L.R. 828* in support of the proposition that Article 130r imposed an obligation to act upon Member States. The reference to Article 130r in Lord Templeman's speech, with whom all four other Lords of Appeal agreed, was a reference to the pre-Maastricht version of the Article, but nothing turns upon the differences between the two. Under their statutory power, one of the objects of which was the protection of the environment of Greater London, the appellants had made an order prohibiting the driving of goods vehicles over a certain weight in certain restricted streets during prescribed hours unless a permit had been issued. From January 1, 1988, all permits issued contained a condition requiring that the vehicle be fitted with an air break noise level suppressor. The respondents argued that this condition was unlawful as being incompatible with certain Council Directives governing technical aspects of braking devices and permissible sound levels of vehicles.

The House of Lords held that the condition did not prohibit the use of vehicles on grounds relating to their braking devices or to their permissible sound levels. Therefore it did not conflict with the directives on those topics. It sought to regulate traffic in certain places and at certain hours for the purpose of protecting the environment. As such it was consistent with Community policy on the protection of the environment. Thus it was lawful under Community law.

The passage upon which Mr Beloff relied is found at p. 838E where Lord Templeman says:

> ". . . the Council has issued 140 Directives prescribing technical requirements and safety and environmental standards for vehicles, their components and spare parts, so that national requirements and standards shall not infringe Article 30 or obstruct the free flow of goods and services throughout the Community. But paragraph 4 of Article 130r (which is predecessor of Article 3b which now embodies the principle of subsidiarity) recognises that London's environmental traffic problems cannot be solved, although they can be ameliorated by Council Directives to control every vehcile at all times throughout the Community. The attainment of the Community object of preserving, protecting and improving the quality of the environment requires action at the level of individual Member States."

Pausing there it is upon that sentence Mr Beloff relies as demonstrating that Article 130r is intended to impose an obligation upon Member States to act. The fallacy of his argument is clearly seen by continuing with Lord Templeman's speech. He goes on:

> "A vehicle which complies with all the . . . technical requirements and standards of Directives issued by the Council . . . and is therefore entitled to ***172*** be used . . . throughout the Community is not thereby entitled to be driven on every road, on every day, at every hour throughout the Community. In the interests of the environment, the traffic authorities of Santiago de Compostela may ban all or some Community vehicles from medieval streets. The traffic authorities of Greater London may ban all or some Community vehicles from residential streets at night."

From this passage, it is clear that Lord Templeman was not suggesting that Article 130r imposed a duty upon Member States to protect their environment by regulating traffic or indeed by any other means. He was saying that Article 130r permitted them to do so if they chose.

In my judgment, none of the cases cited to us by Mr Beloff gives any support for the essential proposition that Article 130r imposes upon Member States an immediate obligation to apply the precautionary principle in considering legislation relating to the environment or human health.

The Secretary of State's submissions are given support by the Resolution of the European Parliament passed on May 5, 1994 entitled “Resolution on Combating the Harmful Effects of Non-ionising Radiation.”The Resolution took into account the precautionary principle included in Article 130r; it recognised that the reports of harmful effects of EMF's were scientifically unconfirmed; it recognised the difficulties of interpretation of epidemiological studies and of establishing a relationship between dose and effect so as to quantify the effects of exposure. It then called upon the Commission to propose measures for the various technologies generating EMF's seeking to limit the exposure of workers and the public to such radiation. It expressed the view that corridors must be recommended for high tension transmission lines, within which there should be a ban on dwellings. It considered that any proposal to set up new transmission lines must be subjected to environmental impact assessment and calls on the Commission to provide for this requirement in the next amendment of the relevant Directive. It called on the Council to issue recommendations to Member States with a view to the introduction of measures to protect the population in areas crossed by high tension lines. The premise upon which this resolution rests is that the development of Community policy in this field requires the adoption of specific measures to that end. No one suggests that a resolution of the European Parliament is itself binding upon Member States. That the European Parliament should have passed such a resolution in consistent with the Secretary of State's submission that Article 130r does not impose an obligation to act of its own initiative before such time as regulations or directives are issued by the Council.

Mr Richards submits that the status of the precautionary principle in Article 130r is well summarised in a book edited by Tim O'Riordan and ***173*** James Cameron (junior counsel for the applicants) entitled Interpreting the Precautionary Principle to which we were introduced by Mr Beloff. In a chapter written by Nigel Haigh, whose credentials are not stated but who we understand is not a lawyer, we find, at p. 237:

> “Now that the Maastricht Treaty is ratified the precautionary principle will apply to a British Minister when, as a member of the Council, he contributes to the formulation of EC policy by agreeing the form of words in an item of EC legislation. The principle applies to Community policy and does not apply to any aspects of purely national policy which are not part of EC policy.”

Mr Beloff described Mr Richards' reference to that passage as “teasing”. Perhaps it was. Certainly the book carries no great authority. The passage is of interest only in that it demonstrates the conclusion which an interested commentator had reached when considering the question other than in the course of litigation.

I have so far said nothing of the submissions of Mr Newman, Leading Counsel for the National Grid Company, save that they supported those made on behalf of the Secretary of State.

Mr Newman's first submission was to the effect that any proposal would be unrealistic which required the National Grid Company to abandon an installation which had cost £25 million and possibly even to shut down substantial sections of the national grid. His second was that any restrictions upon the use of an electric cable which was already installed would be unlawful as being contrary to the principle of E.C. law that regulations should not have retrospective effect. In view of the conclusions which I have reached, it is not necessary for me to deal in detail with these submissions. I say only that I am not at present convinced that they are correct. In the field of health and safety, if the existence of danger is sufficiently well established, regulations have been made which have had far-reaching and very costly effects upon operators in the industries affected. The example of asbestos springs to mind. However, given the uncertain state of scientific knowledge about the effect of EMF's, it would be sterile to debate whether regulations could lawfully be imposed which applied to existing installations.

Of greater interest and assistance to the Court was Mr Newman's reference to the recent judgment of the European Court of Justice in the case of Peralta , Case number C-379/92, as yet unreported. Mr Peralta, an Italian national and Master of a ship flying the Italian flag, had been prosecuted for discharging caustic soda into the sea outside Italian territorial waters. The relevant provision of Italian law prohibited the discharge of such substances within territorial waters by ships of any flag and also prohibited such discharges by Italian ships on the high seas. Mr ***174** Peralta sought to argue that the relevant provision of Italian law was inconsistent with the principles of prevention referred to in Article 130r and could therefore be challenged. In rejecting this submission on two grounds, the Court said at paragraph 57, in respect of its second reason:

> "Furthermore Article 130r confines itself to defining the general objectives of the Community in environmental matters. The responsibility for deciding upon the action to be taken is entrusted to the Council by Article 130s. Article 130t specifies, in addition, that the protective measures adopted in common pursuant to Article 130s shall not prevent any member state from maintaining or introducing more stringent protective measures compatible with the Treaty."

This statement of the effect of Article 130r is entirely consistent with and supportive of the arguments advanced by the Secretary of State in the present case. Mr Beloff contended that Peralta's case was concerned with the question of whether Article 130r had such qualities as made it directly effective as an E.C. provision in the Italian Courts and not with the question of whether it imposed an obligation on Member States. It appears to me that paragraph 57 answers both questions in the negative and provides direct support for the Secretary of State's submissions.

Finally Mr Newman relied upon Article 3b, the subsidiarity provision, as supporting the contention that Article 130r does not impose an obligation on Member States to legislate in the light of the precautionary principle or any other principle set out in the Article. Mr Newman submits that the Community policy on the environment is not or will not be an area which is reserved for the exclusive competence of the Community. Thus, under the principle of subsidiarity, it is open to Member States to take such steps by way of legislation as they think right in connection with environmental and health issues until such time as the Community, acting through its institutions, produces a harmonising measures, such as a directive or regulations to give effect to the Community policy on the environment, which by that time will have been formulated. Mr Richards expressly associated himself with Mr Newman's submissions on this point. This proposition appears to me to be correct. It makes sense of the rather difficult language of Article 3b and it is consistent with the Secretary of State's other submissions which I have already indicated I regard as being well-founded.

For the several reasons which I have outlined, I have reached the clear conclusion that Article 130r does not impose an obligation upon the Secretary of State to consider his duties under the 1989 Act in the light of the precautionary principle. It follows that the applicants have failed to show any ground upon which the Secretary of State's refusal to issue regulations may be impugned. It will not therefore be necessary to consider any form of relief. ***175**

FARQUHARSON L.J.:

I agree and, for the reasons given in the judgment just delivered, this motion is dismissed.

## Representation

Solicitors—Leigh Day and Co. for the applicants; the Treasury Solicitor for the respondent; Freshfields for the interested party.

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