Federal Court  Cour fédérale

Date: 20170314

Docket: IMM-2695-16

Citation: 2017 FC 275

Ottawa, Ontario, March 14, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

EMAN MAJALI, ABDELAZEZ MJALLI AND RIDA ALLAH MAJDI AHMED MJALLI, BY THEIR LITIGATION GUARDIAN EMAN MAJALI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Senior Immigration Officer of Citizenship and Immigration Canada ("Officer"), dated April 29, 2016, denying the Applicants' Pre-Removal Risk Assessment ("PRRA") application.

Background

[2] The Applicants are a 50 year old woman ("Principal Applicant") and her two minor children, aged 13 and 17, who are Stateless Palestinians from the West Bank.

[3] The Principal Applicant alleges that her husband is a moderate Muslim and teacher who believes in a peaceful solution to the conflict between Palestine and Israel and between different Palestinian factions. As such, he does not believe in violence and conveyed that belief to his students. Hamas did not like that way of thinking and tried to recruit the Principal Applicant's husband to advocate for their ideology, he refused, making the family a target. Hamas then accused the Principal Applicant's husband of collaborating with Israel, which justified him being killed, and the family were threatened many times by Hamas militants. In 2008, the Principal Applicant's husband was shot in the leg by Hamas militants as a warning, and his life threatened unless he agreed to cooperate with them. In 2012 one of their sons, Oday, was beaten by Hamas people which necessitated surgery on his eye. In 2014 the Principal Applicant's husband was approached by two masked people who accused him of being a collaborator and threw burning material on his neck. Her husband went into hiding, and his whereabouts are not known. Hamas men came to their home looking for the Principal Applicant's husband, they threatened her and the children with violence and the sexual assault of her daughters if he did not surrender. The Principal Applicant claims that she decided to flee because she feared that Hamas militants would hurt or kill her and her family.

[4] The Principal Applicant and two of her sons obtained visas to the United States and arrived there on August 20, 2014. On August 21, 2014 the Applicants made a claim for protection in Canada. However, they were considered not to be exempt from the Canada-US Safe Third Country Agreement, deemed ineligible and issued a removal order because, at that time, the Principal Applicant's brother, who is a Canadian permanent resident, was briefly out of the country (*Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), s 101(1)(e); *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRP Regulations"), s 159.5(b)(ii)).

[5] Their removal order stated that they could not return to Canada for 12 months and, believing that they could return at that time and make another refugee claim, the Applicants sought to do so on September 17, 2015. However, because their previous claim had been deemed ineligible, they were not permitted to make a second claim (IRPA, s 101(1)(c)). They were permitted to remain in Canada in order to file a PRRA application.

Decision Under Review

[6] The Officer listed the documents submitted in support of the PRRA but noted the absence of important documentary evidence. Specifically, the Principal Applicant did not submit documents to show that her husband was a teacher, that he was threatened by Hamas, is currently in hiding or that the family had experienced ongoing and increasingly violent harassment by Hamas between 2008 and 2014.

[7] The Officer found a medical report of an orthopedic surgeon provided by the Principal Applicant concerning her husband's 2008 gunshot wound which the Principal Applicant claims was inflicted by Hamas; a medical report from an ophthalmologist concerning injury to her son's eye that the Principal Applicant claimed was the result of an altercation with Hamas; and, a third medical report which the Principal Applicant stated pertained to an attack on her husband causing him to be burned, had little probative value in substantiating the Applicants' allegations of risk from Hamas and afforded them little weight.

[8] The Officer also stated that the Principal Applicant's affidavit contained minimal details, for example, the dates of assaults and threats, the date of her husband's disappearance, whether she or the rest of her family have contact with him, and how and why the medical certificates were obtained. The Principal Applicant's mother, sister, two brothers, son and three daughters all still reside in the West Bank and while she claims that they are in hiding, little further information was provided.

[9] Further, that the most recent Immigration and Refugee Board report indicates that even the families of known Israeli collaborators are not routinely targeted by Hamas. The Officer concluded that the Applicants had adduced insufficient evidence to meet their evidentiary burden and stated that this was not an issue relating to credibility; rather it was an issue of insufficient objective evidence to demonstrate the allegation of risk on a balance of probabilities.

[10] As to the claimed risk to the minor Applicants of being forcefully recruited by Hamas, the Officer found that credible independent sources suggested that there was very little evidence

of forced recruitment and that the minor Applicants had not indicated ever being pressured to join Hamas in the past, nor was there any indication of other family members being pressured or forced to join Hamas. The Officer was unable to conclude that the minor Applicants faced this risk upon return to the West Bank. Similarly, that the information before the Officer did not demonstrate that young Palestinian males are systemically targeted or mistreated by either the Israeli army or Israeli settlers in the West Bank.

[11] Finally, the Officer found that the documentary evidence confirmed that general country conditions were far from perfect but applied to all residents and are not unique to the Applicants. There was insufficient evidence to conclude that the Applicants would be singled out.

Issues and Standard of Review

[12] I agree with the Applicants' description of the issues as follows:

1. Was the Applicants' right to procedural fairness breached by failing to provide an oral hearing?
2. Were the Officer's findings erroneous and unreasonable, particularly the findings made about the medical reports?

[13] The Applicants submit that the Officer's findings of fact or of mixed fact and law in the context of a PRRA application are reviewed on a standard of reasonableness and that errors of law or violations of procedural fairness are reviewable on a standard of correctness. While the jurisprudence is mixed on the standard of review of a PRRA officer's decision of whether to hold an oral hearing under s 113(b) of the IRPA, this is a question of procedural fairness and, accordingly, that deference should not be shown to the Officer regarding this decision.

[14] The Respondent submits that the Officer's decision is reviewable on the reasonableness standard including the decision not to hold an oral hearing.

[15] I agree with the parties that the standard of review that applies to the Officer's decision as a whole is reasonableness (*Wang v Canada (Citizenship and Immigration)*, 2010 FC 799 at para 11; *Chen v Canada (Citizenship and Immigration)*, 2016 FC 702 at para 13).

[16] While the jurisprudence remains divided on the standard of review applicable to a PRRA officer's decision respecting an oral hearing (*Khatibi v Canada (Citizenship and Immigration)*, 2016 FC 1147 at para 13), I have previously found that this is reviewable on the reasonableness standard as a PRRA officer decides whether to hold an oral hearing by considering the PRRA application against the requirements of s 113(b) of the IRPA and the factors in s 167 of the IRP Regulations which is a question of mixed fact and law (*Chekroun v Canada (Citizenship and Immigration)*, 2013 FC 738 at para 40 ("*Chekroun*"); *Seyoboka v Canada (Citizenship and Immigration)*, 2016 FC 514 at para 29; *Ibrahim v Canada (Citizenship and Immigration)*, 2014 FC 837 at para 6 ("*Ibrahim*")). I have not been persuaded differently in this matter.

ISSUE 1: Was the Applicants' right to procedural fairness breached by failing to provide an oral hearing?

Applicants' Position

[17] The Applicants submit that the Officer breached the duty of procedural fairness by failing to hold an oral hearing in accordance with s 113(b) of the IRPA and s 167 of the IRP Regulations. Where a serious issue of credibility arises in the determination of a PRRA

application, an oral hearing is required (*Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at para 105; *Tekie v Canada (Citizenship and Immigration)*, 2005 FC 27 at paras 15-17; *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at paras 17-18 ("*Zmari*")). And, because credibility findings may be disguised in language the Court must go beyond the language used by the PRRA officer to determine whether credibility findings were being made (*Hurtado Prieto v Canada (Citizenship and Immigration)*, 2010 FC 253 at para 33; *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 16 ("*Ferguson*")).

[18] The Applicants submit that where a claimant swears to the truth of his or her testimony, that testimony is presumed to be true unless there is a valid reason to doubt its truthfulness and that this presumption applies equally in the context of a PRRA. The Officer's reasons for discounting the three medical reports, particularly when considered against the evidence provided by the Principal Applicant in her sworn affidavit, illustrate that the Officer was really making adverse credibility findings. And, given that the Applicants did not have an opportunity to appear before the Refugee Protection Division ("RPD"), the failure to grant an oral hearing was particularly problematic.

[19] The Applicants submit that the Officer made veiled credibility findings disguised as insufficiencies in their evidence or as assignments of little probative value to the documents they submitted to substantiate their claim. Further, that veiled credibility findings can be said to have been made by a PRRA officer's "implicit rejection" of an applicant's story, which is apparent in this case (*Zmari* at para 20). Here the Applicants adduced sufficient evidence, however, the

Officer chose not to believe it. Had the Officer believed their evidence, which documented serious injuries to the Applicants' immediate family members and included sworn testimony as to how these injuries were received, it could have grounded a claim for protection.

[20] Further, questioning the origin and content of the medical documents and the information provided in the sworn affidavit clearly amounts to a credibility finding (*Shaiq v Canada (Citizenship and Immigration)*, 2009 FC 149 at para 77), despite the language used by the Officer in the decision. And, had the Officer accepted the credibility of the Applicants' narrative, there would have been no need for corroborating evidence. Further, a negative inference cannot be drawn from the absence of corroborative evidence unless there are valid reasons for doubting an applicant's credibility and an applicant has been unable to provide a reasonable explanation for the lack of corroborative material (*Dundar v Canada (Citizenship and Immigration)*, 2007 FC 1026 at paras 21-22).

[21] The Applicants submit that the Officer also raised a number of peripheral issues including how the Principal Applicant obtained the medical reports and where the remainder of her family members were living. The Applicants say that these could have been addressed by way of an oral hearing and that they could not have anticipated them.

[22] The Applicants' evidence that they were threatened and harmed by Hamas was central to their application and to the Officer's decision. The Officer's finding that families of known collaborators with Israel are not routinely targeted is irrelevant in the face of the Applicants' evidence that they have been personally targeted.

Respondent's Position

[23] The Respondent submits that no oral hearing was required as the Officer's findings were clearly based on insufficiency of evidence and not on credibility. In that regard, it is well established that there are two separate assessments that can be made of evidence tendered before a PRRA officer: one for weight and one for credibility and it is open for an officer to assess evidence for weight before considering credibility. The question, irrespective of whether the evidence is from a credible source, is whether the evidence if taken to be true, is capable of persuading the officer on a balance of probabilities that the applicant faces a risk under ss 96 or 97 of the IRPA (*Ferguson* at paras 25-26; *Ozomma v Canada (Citizenship and Immigration)*, 2012 FC 1167 at para 49; *Ibrahim* at para 23). Further, that this principle applies equally to sworn statements made by applicants (*II v Canada (Citizenship and Immigration)*, 2009 FC 892 at paras 21-24). Evidence tendered by persons with a personal interest in the outcome of the case, such as the Principal Applicant's evidence, may also be examined for its weight before considering its credibility because typically this kind of evidence requires corroboration if it is to have probative value. If there is no corroboration then it may be unnecessary to assess credibility (*Ferguson* at para 27). The Respondent submits that it is open for the PRRA Officer to require corroboration to satisfy the legal burden.

[24] Further, that the burden of proof rests with the Applicants to tender evidence proving on a balance of probabilities that they would be subject to a risk under s 96 or s 97 of the IRPA. The fact that they have not discharged the burden of proof does not mean that they lack credibility but rather that they have not provided sufficient evidence to support the proposition advanced.

[25] The Officer found that the Applicants' evidence was insufficient to prove on a balance of probabilities that Hamas was interested in harming them and pointed out the deficiencies in the evidence, being the lack of detail. The Principal Applicant's affidavit did not include the dates of the assaults or when her husband went into hiding, whether she has contact with her husband, how the medical certificates were obtained and there was minimal information about her other family members who were still living in the West Bank. The medical reports only established that the Principal Applicant's husband and son were injured. There was no corroborating evidence to show that her husband was a teacher, that he was in hiding or that Hamas visited the family. In addition, the Officer examined the documentary evidence and found it did not demonstrate that Hamas used forcible recruitment or that it was likely to pursue someone who did not want to recruit students on its behalf and there was no evidence that the minor Applicants or other family members had been forced to join Hamas or that it targeted families of known collaborators. In any event, the Applicants are not known collaborators.

[26] Under these circumstances, it is clear that the Officer's decision was properly based on insufficiency of evidence and there is no indication that the Officer thought that the Principal Applicant was lying.

Analysis

[27] An oral hearing is not required in the normal course of deciding a PRRA application and, in this case, it appears that the Applicants did not request one when making their PRRA application. However, s 113(b) of the IRPA states that a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required.

[28] The prescribed factors are set out in s 167 of the IRP Regulations:

167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[29] This Court examined s 113(b) of the IRPA and s 167 of the IRP Regulations in *Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984 and held:

> [34] This has been interpreted to be a conjunctive test: therefore, an oral hearing is generally required if there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application: *Ullah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 221. While the Court has acknowledged that there is a difference between an adverse credibility finding and a finding of insufficient evidence, the Court has sometimes found an officer to have improperly framed true credibility findings as findings regarding sufficiency of evidence and therefore an oral hearing should have been granted: *Zokai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1103 at para 12; *Liban v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 at para 14; and *Haji v Canada (Minister of Citizenship and Immigration)*, 2009 FC 889 at paras 14-16.

[30] In this matter the Applicants alleged that they were entitled to an oral hearing because the Officer made veiled credibility findings while the Respondent asserts that the Officer, as stated in the reasons, based the decision on an insufficiency of evidence. Accordingly, the Court must first determine whether a credibility finding was made, explicitly or implicitly. If so, then it must determine if the issue of credibility was central to or determinative of the decision (*Adeoye v Canada (Citizenship and Immigration)*, 2012 FC 680 at para 7; *Matute Andrade v Canada (Citizenship and Immigration)*, 2010 FC 1074 at para 30 ("*Matute-Andrade*")). More specifically in this matter, whether the Applicants' credibility was called into question and if this was a determinative factor in the Officer's finding that they will not face a risk to life, a risk of torture or a risk of cruel and unusual treatment or punishment in Palestine.

[31] When considering an allegation of veiled credibility findings, the Court must look beyond the words that have been used by the Officer in the decision. Although the Officer explicitly stated in the decision that he or she was not making credibility findings, that does not dispose of the issue as it is possible that the Officer, by his or her reasoning, was calling into

question the Applicants' credibility, even while stating that the decision was based on insufficient evidence. The Court must therefore identify the true basis for the decision (*Matute-Andrade* at paras 31-32).

[32] As recognized by Justice Kane in *Gao v Canada (Citizenship and Immigration)*, 2014 FC 59, it can be difficult to distinguish between a finding of insufficient evidence and a finding of credibility:

> 32 I note that in some cases it is difficult to draw a distinction between a finding of insufficient evidence and a finding that the applicant was not believed i.e. was not credible. The choice of words used, whether referring to credibility or to insufficiency of the evidence is not solely determinative of whether the findings were one or the other or both. However, it cannot be assumed that in cases where an Officer finds that the evidence does not establish the applicant's claim, that the Officer has not believed the applicant.

[33] In *Ferguson* Justice Zinn addressed the assessment of evidence submitted to a PRRA officer. There, the PRRA officer found that the applicant in that case had provided insufficient evidence to establish that she was lesbian. The only evidence substantiating her claim was an unsworn written statement by her counsel and the officer found that this was not probative evidence. The applicant argued that the officer was really making a credibility finding as to her sexual orientation. Justice Zinn disagreed, finding that the PRRA officer's reasoning simply suggested that he neither believed nor disbelieved the applicant but remained unconvinced. Justice Zinn also noted the two ways in which a PRRA officer may assess evidence, by assessing its credibility and then determining the weight to be afforded to it, or, by moving immediately to an assessment of weight or probative value without considering whether it is credible.

[34] The Respondent takes the position that in this matter the Officer took the latter approach. However, in my view, the Officer's reasons for discounting the medical reports and the Principal Applicant's affidavit evidence do not support that position.

[35] As a preliminary point, I note that when submitting the PRRA application the Applicants' counsel noted that he was enclosing a copy of the Principal Applicant's affidavit, which summarized her claim for refugee protection and asked the Officer to review the affidavit for a summary of her fear of persecution. The content of the Principal Applicant's affidavit is described, in part, in the background section of this decision. It is clear from the affidavit that the primary risk being presented by the Applicants for the purposes of their PRRA application was their fear of death and bodily harm by Hamas militants. Accordingly, the evidence related to the harassment and assault of the Applicants' immediate family members by Hamas militants was central to the application and is significant when considering ss 167(b) and (c) of the IRP Regulations.

[36] The Principal Applicant's affidavit attached, as an exhibit, a medical report dated March 16, 2015 from an orthopedic surgeon to corroborate the allegation in her affidavit that her husband was shot by Hamas militants in 2008. That report states that the named patient is suffering from left thigh pain and numbness, "S/P old bullet injury to left thigh with femoral Artery injury, underwent surgical operation for repairing the femoral artery". It describes post-surgery scars, an x-ray report as showing "opaque shadow to medial aspect of left Femur to proximal third (Bullet)" and states "Given this medical report upon his request".

[37] The Officer discounts this report on the basis that it does not indicate when the gunshot injury occurred or the circumstances in which the injury was inflicted. Further, that the author of the report indicated that it was issued to the patient upon his request but, according to the Principal Applicant's affidavit, her husband had gone into hiding in 2014 and his whereabouts remain unknown. Moreover, the Principal Applicant left Palestine in 2014, thus it was unclear how her husband obtained the report, which was only a copy and not an original, and provided it to the Principal Applicant. In my view, the Officer is clearly calling into question the authenticity of the document and the credibility of the Principal Applicant based on the inconsistency between the statement in her sworn affidavit that her husband's whereabouts have been unknown since 2014 and the fact that the report was issued to her husband in 2015. It was also unreasonable for the Officer to expect that a medical report, presumably issued for the purpose of confirming an injury that was alleged to have occurred approximately seven years previously, would indicate the circumstances under which it was inflicted (*Ukleina v Canada (Citizenship and Immigration)*, 2009 FC 1292 at para 10). The physician did not witness the alleged shooting.

[38] The Principal Applicant's affidavit also states that in 2012, persons from Hamas beat her son, Oday, damaging his eye which required the implantation of an intraocular lens. Further, that his doctor, afraid for his life, refused to write the exact cause of the injury. The affidavit attached as an exhibit a medical report from an ophthalmologist, dated March 15, 2015, in support of this allegation. It states, in part, that the named patient had "suffered Traumatic Cataract on left eye since 3 years ago. Intraocular lens done for the left eye….He can wear glass or do laser operation".

[39] The Officer discounted this medical report on the basis that it was not issued immediately after the injury/surgery but rather three years later and within days of the other medical notes being issued. It did not indicate the date of the injury or the instrument with which the injury was inflicted and the Officer stated that this information could have been provided without revealing the perpetrator of the attack, but was not. Nor did the report allow the Officer to determine if the Principal Applicant's son had been attacked, as opposed to receiving an accidental injury or that the perpetrators were members of Hamas. The Officer again raised the question of how the report was obtained given that the Principal Applicant had fled Palestine in 2014 but the report was dated 2015. As noted above, the Principal Applicant's affidavit explained that the doctor did not provide an exact cause of the injury because he feared for his life. It also stated that the injury was caused by a beating by persons from Hamas. In my view, the Officer was calling into question the credibility of the Principal Applicant's sworn evidence on the basis that the cause of the injury was not stated by the physician, without explaining why her sworn evidence on this point required corroboration. It was also unreasonable to afford the report no weight on the basis that it did not describe the instrument of injury or because it was obtained after the incident and at the same time as the other corroborating medical reports were obtained.

[40] The Principal Applicant's affidavit also describes an incident in 2014 when two masked persons confronted her husband, accusing him of being a collaborator who deserved death, and throwing a burning material on his neck which caused him severe burns and pain. The affidavit attached as an exhibit a medical report to corroborate this allegation dated March 16, 2015 which states "After examination of the above name: I fined [*sic*] that he has ESCARE OF BURNIS

[*sic*] after a caustic material he needs a plastic surgery". The Officer discounted this evidence as it did not indicate the location or date of injury or that it was the result of an assault. Further, that it is dated March 2015 which is a year after the Principal Applicant's husband's alleged disappearance and seven months after the Principal Applicant's departure from Palestine. Additionally, because the report is a photocopy and does not contain any security features. Again, the Officer is calling into question the credibility of the Principal Applicant's sworn evidence on the basis of the information that is and is not present in the report, is questioning the authenticity of the report and unreasonably discounts it on the basis that it fails to state the cause of the injury as being an assault.

[41] An applicant's testimony is presumed to be true unless there is a valid reason to doubt its truthfulness (*Maldonado v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 248 (FCA); *Chekroun* at para 65; *Ogunrinde v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 760 at para 38). Here the Officer implicitly disbelieved the Principal Applicant's claim of previous attacks by Hamas (*Whudne v Canada (Citizenship and Immigration)*, 2016 FC 1033 at paras 20-23). The Principal Applicant swore that she feared that she and her family would be killed if they were returned to Palestine. The Principal Applicant provided medical documentation corroborating the three allegations of assault. While I agree that there is an inconsistency arising from the Principal Applicant's sworn evidence that her husband's whereabouts have not been known since 2014 and the fact that the medical reports were obtained in 2015, one of which states it was issued to her husband upon his request, this is the very reason why an oral hearing would have been warranted. The Officer's veiled credibility findings concerning the Principal Applicant's sworn evidence and medical reports raised a

serious issue related to the Applicants' alleged fear of Hamas. This was central to the decision denying protection and, had the Officer not discounted the evidence it may have justified allowing the PRRA.

[42] And, although not determinative, I also note that the Officer's credibility findings were made in a circumstance where the Applicants had never been afforded an oral hearing before the RPD or otherwise, which means that the Applicants have not had an opportunity to address the credibility concerns about their claimed fear of Hamas (*Zmari* at para 18).

[43] Having reached this conclusion I need not consider the second issue, being whether the Officer's factual findings were erroneous and unreasonable. However, as noted briefly above, the Officer's assessment of the medical reports was unreasonable in discounting the reports on the basis that they did not say how the injuries were incurred when the doctors who prepared the reports were not witnesses to those events. The Principal Applicant's sworn affidavit described the cause of the injuries and the existence of the injuries was corroborated, and not contradicted, by the medical reports. Further, to the extent that the Officer was discounting the reports because the Principal Applicant did not explicitly state that the reason they had been obtained and tendered was to corroborate the claim, this was unreasonable. Applicants routinely provide such information for just this purpose which would also explain why they were obtained at around the same time.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted and the matter is remitted back for re-determination by a different PRRA officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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