Federal Court  Cour fédérale

Date: 20171101

Docket: IMM-3980-16

Citation: 2017 FC 982

Ottawa, Ontario, November 1, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MARIANO NAPOLEON MARTINEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mariano Napoleon Martinez [the Applicant] seeks judicial review of a deportation order issued by the Immigration Division [ID] of the Immigration and Refugee Board of Canada, pursuant to paragraph 45(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The ID issued this order after determining that the Applicant was inadmissible under paragraph 36(1)(a) of the *IRPA* for having been convicted in Canada of an offence under an Act of Parliament with a maximum sentence of at least ten years.

[2] The Applicant does not contest that he is a person described by paragraph 36(1)(a) of the *IRPA*. Rather, he seeks judicial review on the basis that at the admissibility hearing held on September 7, 2016 the ID refused to grant him an adjournment pending the completion of an access to information request that had been filed with the Canada Border Services Agency [CBSA]. The Applicant intended to attempt to use the information from the CBSA to argue that the CBSA had committed an abuse of process in referring the inadmissibility report when it did. The ID refused to grant the adjournment on the basis that it did not have the ability to grant a stay of proceedings on the grounds asserted by the Applicant and therefore an adjournment was not warranted.

[3] The Applicant does not frame his abuse of process argument as one of delay. Rather, he argues that by referring the matter of the Applicant's inadmissibility to the ID in 2015 based on the Applicant's guilty plea in 2010, the CBSA committed an abuse of process by choosing to make the referral after, rather than before, the coming into force of the *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 [*FRFCA*]. Passage of the *FRFCA* deprived the Applicant of an appeal to the Immigration Appeal Division [IAD] because the sentence imposed on him exceeded six months of imprisonment which was one of the amendments to the *IRPA* introduced by the *FRFCA*. Prior to the amendment the applicable term of imprisonment was two years.

[4] The relevant sections of the *FRFCA* and the *IRPA* are set out later in these reasons.

[5] For the reasons that follow this application is denied. The Applicant has mischaracterized the issue which was before the ID. The issue was not whether the ID had the jurisdiction to grant a stay of proceedings. The issue was whether the ID had the jurisdiction to grant a stay of proceedings on the grounds put forward by the Applicant – which was that there had been an

abuse of process by CBSA and time was needed to gather evidence to prove it. In addition, the Applicant is caught by the transitional provisions of the *FRFCA* which anticipated the very situation in which he found himself.

II. **Background Facts**

A. *Events Leading to the Admissibility Hearing*

[6] The Applicant is a national of El Salvador. He has been a permanent resident of Canada since August 8, 1983.

[7] On August 9, 1999, the Applicant was convicted of sexual assault and given a suspended sentence plus eighteen months of probation. In 2007, the Applicant was convicted of sexual assault and sentenced to 90 days of intermittent custody followed by two years of probation. As a result of this conviction, the CBSA began an immigration investigation and a report was issued under subsection 44(1) of the *IRPA*. However, the officer at that time recommended that a warning letter be issued instead of making a report.

[8] A complaint was made to police on March 4, 2010, by the Applicant's daughter, Marta who alleged that the Applicant had engaged in historical sexual abuse and was currently stalking and harassing Marta and her children (parking outside her house often, and at one point moving his thumb across his neck in a gesture taken as a death threat). The Applicant was arrested and, on September 30, 2010, after 210 days in custody, he pled guilty to criminal harassment. He was given a suspended sentence in addition to the 210 days of pre-sentence custody, plus he received two years of probation with a term that he have no contact with Marta or her two daughters. The Applicant alleges he was not guilty but says he plead guilty in order to get out of jail.

[9] On July 29, 2011, Marta's two daughters were on a bus when the Applicant boarded. He waited for them to exit the bus, and then told them in Spanish, "I'm coming for you." He was arrested the same day and charged with failing to comply with probation. He was convicted on May 17, 2012 and sentenced to ten days of imprisonment followed by two years of probation.

[10] On May 21, 2015, a CBSA Officer prepared a report under subsection 44(1) of the *IRPA* [the Report], alleging that the September 30, 2010 conviction made the Applicant inadmissible under paragraph 36(1)(a) of the *IRPA*.

[11] On July 3, 2015, the Officer prepared a comprehensive narrative report to accompany the Report to go to the Minister's Delegate. The narrative report included an assessment of a number of factors set out in the enforcement manual (ENF 6), including a humanitarian and compassionate assessment. It recommended referral on the grounds of: the severity of the conviction and lengthy sentence imposed; the two prior convictions; and the previous leniency by the CBSA in issuing a warning letter. The Officer determined that the criminality outweighed the humanitarian and compassionate grounds that might exist. The Minister's Delegate concurred with the recommendation, and on September 9, 2015, the report was referred to the ID.

B. *The Adjournment Request*

[12] The ID hearing was initially set for June 1, 2016. It was adjourned twice, once for the Applicant to retain counsel and a second time, peremptory on the Applicant, to September 7, 2016 at the request of Applicant's counsel, who was retained on July 15, 2016 one week prior to the originally re-scheduled hearing. Counsel also on July 15 submitted an access to information request to the CBSA seeking disclosure of any and all records related to the Applicant's

admissibility matters. Two weeks later, on July 29, 2016, counsel requested the ID issue an order requiring the CBSA to provide this disclosure.

[13] On August 16, 2016 the CBSA requested an extension of time of up to forty-five days beyond the thirty day statutory time limit in order to respond to the Applicant's information request.

[14] When no disclosure had been received from the CBSA by the day before the hearing the Applicant faxed a letter to the ID, requesting an adjournment of the hearing "until we have received full disclosure from the CBSA". The reason provided for the request was that the CBSA decision to refer the Applicant to an admissibility hearing more than five years after his 2010 conviction was an abuse of process. The Applicant stated that the requested materials were necessary in order to fully make his case. On the morning of the hearing the Minister faxed an objection to the adjournment on the basis that the ID did not have jurisdiction to grant it.

[15] At the ID hearing on September 7, 2016 counsel for the Applicant was asked by the member to re-iterate the adjournment request for the record. Counsel then indicated that it appeared that CBSA was in the process of gathering the requested information and it was necessary to have it in order to provide a full evidentiary record. Counsel believed the information would support the argument that the hearing, occurring six years after the 2010 conviction, constituted an abuse of process.

[16] The ID refused the adjournment request, held the admissibility hearing, and issued the deportation order. The adjournment refusal is the decision under review.

III. **Applicable Legislation**

[17] On June 19, 2013, the *FRFCA* was given royal assent. Parts of it immediately entered into force. Section 24 of the *FRFCA* amended subsection 64(2) of the *IRPA* which governs appeals of removal orders to the IAD:

24. Subsection 64(2) of the Act is replaced by the following:	24. Le paragraphe 64(2) de la même loi est remplacé par ce qui suit :
Serious criminality	Grande criminalité
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).	(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)b) et c).
[emphasis added]	[soulignement ajoutés]

[18] Subsections 64(1) and (2) of the *IRPA* at the time of the Applicant's guilty plea and immediately prior to the passage of the *FRFCA* stated that:

No appeal for inadmissibility	Restriction du droit d'appel
64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	64 (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality	Grande criminalité
(2) For the purpose of subsection (1), serious criminality must be with	(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins

respect to a crime that was punished in Canada by a term of imprisonment of at least two years. [emphasis added]	deux ans. [soulignement ajoutés]

[19] As can be seen, upon the *FRFCA* coming into force, subsection 64(2) of the *IRPA* was amended so that subsection 64(1) applied to any person inadmissible for serious criminality who had been sentenced to six months or more of imprisonment. As a result, those people would no longer have appeal rights to the IAD that includes the ability to consider humanitarian and compassionate factors. At the time of the Applicant's guilty plea the applicable term of imprisonment to trigger section 64(1) was two years or more.

[20] The *FRFCA* also contained transitional provisions addressing its implementation. Relevant to this matter is the transitional provision in section 33 which addresses the implementation of the change to subsection 64(2) of the *IRPA*:

Appeal	Appel
33. Subsection 64(2) of the Act, as it read immediately before the day on which section 24 comes into force, continues to apply in respect of a person who is the subject of a report that is referred to the Immigration Division under subsection 44(2) of the Act before the day on which section 24 comes into force.	33. Le paragraphe 64(2) de la Loi, dans sa version antérieure à l'entrée en vigueur de l'article 24, continue de s'appliquer à l'égard de toute personne visée par une affaire déférée à la Section de l'immigration au titre du paragraphe 44(2) de cette loi avant l'entrée en vigueur de l'article 24.

[21] The Applicant's section 44 referral was made on September 9, 2015, over two years after the passage of the *FRFCA*. Therefore, on the face of it, the transitional provision does not apply to him and he is subject to subsection 64(2) as amended by *FRFCA* with no right to appeal to the IAD.

IV. **The Decision Under Review**

[22] The ID found that the Applicant was asking for an adjournment to gather evidence to present an abuse of process argument based on the delay between the harassment conviction and the CBSA's referral to the Minister's Delegate, and subsequent referral to the ID.

[23] The ID determined that this was a similar situation to *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591, 257 ACWS (3d) 916 [*Torre*], and therefore there was no need to grant an adjournment to deal with a potential abuse of process argument. Specifically, the ID referred to the finding in *Torre* that the only delay that the Court should consider in determining whether there was an abuse of process is the delay between the Minister's decision to prepare a report under section 44 and the decision by the ID following the admissibility hearing (at para 32).

[24] The IAD also noted that it had an obligation under subsection 162(2) of the *IRPA* to proceed as quickly as possible. Therefore the ID refused the adjournment.

[25] The hearing then proceeded during which counsel for the Applicant admitted the facts in the Report were true. The Applicant testified that he had not successfully appealed the September 30, 2010 conviction to a higher court. The ID found that the offence was punishable by a term of imprisonment not exceeding ten years and therefore it was an indictable offence pursuant to paragraph 36(1)(a) of the *IRPA.* A deportation order was issued and the Applicant was advised by the ID, incorrectly, that he had 30 days to appeal to the Immigration Appeal Division.

V. **Issues and Standard of Review**

[26] The parties do not agree on the standard of review, nor do they agree on the framing of the issues.

A. *The Issues*

[27] On my review of the facts and the decision under review I find that the issues to be determined are:

1. Did the ID err in refusing to grant the adjournment request on the ground of its lack of jurisdiction?
2. Was the section 44 referral by the CBSA an abuse of process?

B. *The Standard of Review*

[28] The Applicant argues that there is a jurisdictional question and it is reviewable on the correctness standard. He also argues that whether there has been an abuse of process is similarly reviewable on the correctness standard.

[29] The Respondent frames the issue as whether the *IRPA* grants the ID the power to stay proceedings for an alleged abuse of power. On that basis the Respondent notes that: (1) the standard of review on whether to grant an adjournment is reasonableness; (2) the question concerns the interpretation of the ID's home statute, and therefore the standard of review is reasonableness.

[30] In both *Torre*, decided by Madam Justice Tremblay-Lamer and *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427, 279 ACWS (3d) 809 [*Ismaili*], decided by Mr. Justice Diner, the standard of review was found to be correctness when the issue was said to

be whether the ID had jurisdiction to grant a stay of proceedings for abuse of process due to unreasonable delay. In *Bruzzese v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1119, 274 ACWS (3d) 141 [*Bruzzese*], Mr. Justice Barnes found the issue, although said to be jurisdictional, was still an interpretation of the provisions of the *IRPA*, the home statute of the ID and that reasonableness was the standard of review.

[31] The Supreme Court has clearly stated in a series of judgments that the presumptive standard of review of decisions by administrative tribunals is reasonableness. At the time of the hearing of this matter, the then most recently applicable such judgment was *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293 [*Edmonton East*] in which the Court re-confirmed that when an administrative body interprets its own statute the presumption is that the standard of review is reasonableness unless one of the four categories, originally identified in *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], which call for a correctness review are present. The categories are: (1) a constitutional question regarding the division of powers; (2) a true question of jurisdiction or *vires*; (3) an issue regarding the jurisdictional line between two or more competing specialized tribunals; (4) an issue that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise (*Edmonton East* at para 24).

[32] I am not persuaded that the issue of whether the ID erred in refusing the adjournment request falls within any of the four correctness categories first articulated by the Supreme Court in *Dunsmuir* and subsequently in *Edmonton East* as well as many other very recent decisions. The only theoretically possible such category on these facts is that there is a true question of jurisdiction.

[33] In *Edmonton East* the chambers judge had found that the question of whether the Assessment Board had the power to increase the taxpayer's assessment was a true question of jurisdiction, reviewable on the correctness standard. The Court of Appeal disagreed. The Supreme Court acknowledged that the category of issues of true jurisdiction was narrow and, if it did exist, it was rare. In the result, the Supreme Court determined that the question at issue was simply one of interpreting the Board's home statute. As such, the standard of review was reasonableness (*Edmonton East* at paras 25 – 26).

[34] The same reasoning applies here. There is no true issue of jurisdiction when the ID considers its home statute and determines whether it can or will grant an adjournment, regardless of the reason for the adjournment request. On the facts and in light of the submissions made, the presumption of a reasonableness review has not been rebutted.

[35] Justice Barnes in *Bruzzese* allowed that although in his view the standard of review was reasonableness, if he was wrong then the ID was correct in any event. In this matter I share that view. The decision by the ID in this case was both reasonable and correct in law.

VI. **Analysis**

A. *Did the ID err in refusing to grant the adjournment request on the ground of its lack of jurisdiction?*

[36] The Applicant says the ID erred in refusing to grant the adjournment request because in doing so it limited its own jurisdiction. The Applicant relies on section 162 of the *IRPA* which provides the ID with a general power to determine questions of law including questions of jurisdiction. The Applicant also relies on section 165 which gives the ID the power to do anything it considers necessary to provide a full and proper hearing.

[37] In terms of the adjournment request, the argument is that the CBSA purposely delayed in making a report and referral of the 2010 conviction until after the *FRFCA* came into effect. If proven, that is a form of prejudice that may have arisen from the delay but, fundamentally, it is an allegation of abuse of process arising from delay - an allegation the Court in *Torre* said that the ID could not address. It was neither unreasonable nor incorrect for the ID to refuse to grant an adjournment on those grounds given the binding authority of *Torre* and other decisions of this Court. This is all the more so given that two adjournments had already been granted to the Applicant and, the September 7, 2016 hearing was marked as peremptory on him.

[38] In its decision not to grant the adjournment, the ID set out the reason that the Applicant sought an adjournment. It was to obtain documents from CBSA relating to the Minister's decision to refer the report to the ID. The stated reason for the request was to see if there was support for an abuse of process argument based on the delay between the 2010 criminal harassment conviction and the decision to refer the report. That summary accords with the submissions made to the ID by counsel that they wanted to wait for the materials to be able to look at them and prepare arguments on abuse of process. From this it is clear that the abuse of process argument is inexorably tied to the "reaching back" and "ambush" arguments made by the Applicant and discussed in the following section. Each such argument says that the passage of time between conviction and the admissibility referral are the basis for the abuse. This is the specific form of abuse of process that was considered by Torre.

[39] In the leading case of *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*] the Supreme Court established that in administrative law a state-caused delay in and of itself will not warrant a stay of proceedings as an abuse of process.

Proof of significant prejudice must be shown, it must arise from an unacceptable delay that would offend the community's sense of decency and fairness and it must affect the fairness of the hearing. Whether the length of a delay is inordinate is not based on length of time alone. Contextual factors must also be taken into account. The Applicant did not put forward for review at the ID or before me any evidence to support any of the *Blencoe* factors other than his statement that the loss of his appeal rights when the *FRFCA* was passed was an ambush because he had pled guilty when the consequences were much less significant.

[40] In denying the adjournment, the ID relied on the decision in *Torre*, which dealt with a 17 year delay between the date of criminal conviction and the section 44 referral and found that the ID had no jurisdiction to grant a permanent stay of proceedings. *Torre* followed and applied other jurisprudence of this court dealing with abuse of process caused by delay. In her analysis in *Torre* Madam Justice Tremblay-Lamer also reviewed the Supreme Court of Canada's decision in *Blencoe*. She found that for the delay to qualify as an abuse of process, it must have been part of an administrative or legal proceeding that was already under way:

> [T]he only delay this Court should consider in order to determine whether there was an abuse of process is the delay between the decision made by the Minister to prepare a report under section 44 of the IRPA and the ID's admissibility finding. Any other period of time should not be used to calculate an unreasonable delay resulting in an abuse of process.
>
> *Torre* at para 32.

[41] In *Ismaili* Justice Diner considered a section 44 referral to the ID that also involved a 17 year delay and an abuse of process argument by the Applicant. He noted that after *Torre* there were two other decisions of this Court that found the discretion of the ID was limited to whether the person is inadmissible and, if so, section 45 of the *IRPA* says that the ID shall make a

removal order. Justice Diner found that there was no reason to depart from *Torre* and the cases which followed it.

[42] The ID is bound by decisions of this Court. Counsel for the Applicant pointed to no decision of an appellate Court that contradicts the decision in *Torre,* which has been followed and applied several times in this Court. Given that the ID had before it a clear decision of this Court in *Torre* which contained reasons providing ample support for the refusal to grant an adjournment, it did not err in making the refusal.

[43] The time between the decision to refer the Report and the Applicant's admissibility hearing itself was not lengthy. As there was no delay, the ID could and did properly rely on *Torre* to refuse the adjournment request.

[44] In my view, there is no error in the conclusion given by the ID, after reviewing *Torre*, that similar principles applied here and there was no need to grant an adjournment on the basis of a possibility of an argument for a potential abuse of process.

[45] That then leaves the question of whether the referral itself was an abuse of process.

B. *Was the CBSA's section 44 referral an abuse of process?*

[46] The Applicant primarily says he is not complaining that it took a long time to make the referral but rather that CBSA "reached back to an old conviction" at a time when there was new law. That is an argument that the law was improperly applied retrospectively.

[47] The Applicant is short on the details of how the "reaching back" is an abuse of process other than that he would not have pled guilty. I observe that lack of a guilty plea does not mean that the Applicant would or would not have been found guilty on the evidence.

(1) Was it Procedurally Unfair to make the Referral?

[48] There are two readily apparent arguments to consider with respect to the reason for the "reaching back" allegation. One is that, for the express purpose of depriving him of his appeal rights, the CBSA deliberately delayed dealing with the Applicant's inadmissibility until after the legislative change. The other is that the ordinary delay and prioritization processes within the CBSA caused it not to refer the report until 2015 even though it could have made the referral earlier.

[49] In my view, both arguments are answered by *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, 48 Imm LR (4th) 175 [*Sharma*]. There, one of the arguments by that applicant was that the CBSA could have issued the section 44(1) report prior to the legislative changes which arose eight days after his sentencing hearing in 2013. Before the Federal Court of Appeal, the appellant suggested that in delaying the issuance of the report, the CBSA deprived him of an opportunity to avoid deportation. Three of the observations made by Mr. Justice de Montigny, writing for the Court, concern the level of procedural fairness owed to a person who is the subject of a section 44 proceeding. They are important in the present case. The points made speak to the issues of possible prejudice to the Applicant and the procedural fairness that he could expect:

> (1) Parliament turned its mind to the temporal application of the *FRFCA* amendment to six months and it is not for the courts to vary the clear intention of Parliament;

> (2) Prior to removal from Canada other procedures are available to stop deportation so the admissibility hearing is not determinative of deportation; and,
>
> (3) Parliament has left to the Ministry the determination of the procedure to follow. A level of deference is therefore owed to the procedure selected by the Ministry.
>
> *Sharma* at paras 38, 37 and 28.

[50] The principles enunciated in *Sharma* apply equally to this matter. It is not the role of this Court or the ID to extend or modify the transitional provisions in section 33 of the *FRFCA* that were specifically chosen by Parliament. The legislature could have provided that the former provisions of subsection 64(2) applied if the sentencing occurred prior to passage of the *FRFCA* but, it chose not to. The legislature chose the date on which the referral decision is signed by the Minister or his delegate. The Court should not interfere with that policy choice by Parliament when reviewing the process undertaken by CBSA.

(2) Does the Presumption against Retrospectivity Apply?

[51] As stated at the outset, the Applicant submits that the Minister applied the law retrospectively as in May, 2015 the CBSA "reached back and referred an old conviction under the new law". But for the transitional provisions of the *FRFCA*, the Applicant might have an argument. But, section 33 of the *FRFCA* states that only referrals already in existence at the time of passage of the *FRFCA* enjoy the benefit of the appeal to the IAD; all other referrals do not.

[52] The Supreme Court has very recently discussed the legal presumption of retrospectivity in the context of the *IRPA*. The Court found that the legal presumption against retrospective application of laws is a matter of fairness; it engages the rule of law. The presumption is that laws apply retrospectively only where Parliament has clearly signalled, usually by express

language or necessary implication, that it has turned its mind to the issue of retrospectivity. If there is no indication in the legislation that Parliament had considered the retrospectivity of the provision and the potential for it to have unfair effects, the presumption against retrospectivity applies: *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paras 43 – 45 and 48 – 50, [2017] SCJ No 50 (QL). Although *Tran* was decided after the hearing of this application, the ability of Parliament to rebut the presumption against retrospectivity has long been recognized prior to the concise restatement of it in *Tran*. As such, the fact that *Tran* was released after this matter was heard is of no consequence.

[53] Parliament has clearly indicated in section 33 of the *FRFCA* that only a section 44(2) referral made before the *FRFCA* came into force can receive the benefit of the former provisions of subsection 64(2) of *IRPA*. That is a definitive statement of the intention of Parliament, in the express language of the kind referred to by the Supreme Court in *Tran*, that the law does apply retrospectively where the referral had not been made by June 19, 2013.

[54] The referral of the Applicant took place in 2015 and the *FRFCA* was passed in 2013. Section 33 of the *FRFCA* requires that the newer provisions of subsection 64(2) apply. Given the explicit language used in section 33, the presumption against retrospective application of the law was rebutted, the section 44(2) referral was in compliance with the legislation and there was no right to appeal to the IAD.

[55] For these reasons, the application is dismissed.

VII. **Proposed Question for Certification**

[56] The Applicant proposed the following question for certification:

> Does the Immigration Division have jurisdiction to stay proceedings before it where it finds that those proceedings amount to an abuse of process?

[57] I decline to certify the question as, on the facts of this case, it would not be dispositive of the appeal and it is likewise not a serious question of general importance.

JUDGMENT IN IMM-3980-16

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified as there is no serious question of general importance on these facts.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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