Federal Court  Cour fédérale

Date: 20111206

Docket: IMM-1655-11

Citation: 2011 FC 1421

Ottawa, Ontario, December 6, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

THANABALASINGAM SINNATHAMBY
AND
VASANTHADEVI THANABALASINGAM

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION
AND
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants apply for judicial review of the January 10, 2011 decision of Brian Hudson, an Immigration Counsellor (the Officer), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[2] The Officer determined that the Applicants' application for permanent residence could not be approved because they are inadmissible to Canada pursuant to section 40(1)(a) of *IRPA* for misrepresentation. The Officer found that the information they initially provided and on two subsequent requests kept changing with new details being added leaving the Officer uncertain he had been provided a complete and accurate account of the Applicants circumstances.

[3] The Applicants submit they were denied procedural fairness in not being granted an in-person interview, in that they did not properly understand what information was requested of them and their misrepresentations were not materially important.

[4] For reasons that follow, I am dismissing this application for judicial review.

Background

[5] Thamilarasi Sivanesan (the "Daughter") and her parents Thanabalasingam Sinnathamby and Vasanthadevi Thanabalasingam (the "Applicants"), are originally from Sri Lanka. The Daughter immigrated to Canada in 2002 and is now a Canadian Citizen. The Applicants are citizens of Sri Lanka and continue to live there.

[6] In June 2006, the Daughter applied to sponsor the Applicants' application for permanent residence.

[7] The Officer's initial review of the Applicants' application revealed inconsistencies and omissions with regards to information provided relating to the Applicants' employment, arrests and detention, residences, travel and immigration history.

[8] The Officer sent a procedural fairness letter dated October 19, 2010 to the Applicants providing them with an opportunity to respond to the Officer's concerns. The Officer set out four questions requesting further clarification regarding the Applicants' travel history, arrests and detention, residences and immigration history.

[9] The Applicants responded in a letter dated November 11, 2010. However, the Applicants' reply raised further concerns and questions for the Officer.

[10] On November 24, 2010, the Officer sent a second procedural fairness letter to the Applicants specifically relaying his concerns regarding the Applicants' residence history, activity/employment history, history of arrests and detainments, and travel history. The Officer stated he remained concerned that the Applicants had either failed to declare key information or had provided information that is contradictory. The Officer set out some of the contradictions in the information provided up to that point and provided the Applicants 30 days to respond to the discrepancies.

[11] The Applicants responded on December 20, 2010 to the second procedural fairness letter. They attempted to allay the concerns expressed by the Officer and clarify the contradictions in the information submitted to that point. Their letter alleviated the concerns the Officer had about the

Applicants' residences. However, the Officer found that the information provided in the December 20, 2010 letter raised additional contradictions in the Applicants' information and added further to the confusion.

[12] On January 10, 2011, the Officer refused the Applicants' application and found that the Applicants were inadmissible to Canada for a period of 2 years. A letter was sent to the Applicants informing them of the Officer's decision.

Decision Under Review

[13] The Officer's reasons are found in the decision letter dated January 10, 2011 and are supplemented by the CAIPS notes. The Officer, having reviewed all the facts of the file, remained concerned regarding the Applicants' admissibility; specifically their arrest, detention and employment history. The Officer noted that when these concerns were raised, the information subsequently provided continued to present contradictions and provided details that should have been provided within the Applicants' original application.

[14] The Officer decided the Applicants had not discharged their statutory obligation to satisfy the Officer that they were not inadmissible. The Officer concluded he did not have a complete picture of the Applicants' background and was not satisfied that the Applicants were not inadmissible to Canada.

Relevant Legislation

[15] The *Immigration and Refugee Protection Act*, SC 2001, c 27 provides:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	…
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
[Emphasis added]	

Issues

[16] In my view, the issues arising in this application are:

1. Does the Daughter have standing to bring this application?

2. Did the Officer violate the duty of procedural fairness owed to the Applicants?

3. Was the Officer's decision reasonable?

Standard of Review

[17] The Supreme Court of Canada has held that there are only two standards of review: correctness for questions of law, and reasonableness for questions involving fact or mixed fact and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paras 50 and 53.

[18] The appropriate standard of review to apply to a decision refusing an application for permanent residence on the grounds of misrepresentation is reasonableness: *Mahmood v Canada (Minister of Citizenship and Immigration)*, 2011 FC 433 [*Mahmood*] at para 11; *Lu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 625, 167 ACWS (3d) 978 at para 12.

[19] Judicial deference to the decision-maker is appropriate where the decision making process demonstrates justification, transparency and intelligibility and the decision falls within a range of possible, acceptable outcomes defensible on the facts and in law: *Dunsmuir* at para 47.

[20] With regards to questions of procedural fairness, the applicable standard of review is correctness: *Sketchley v Canada (Attorney General)*, 2005 FCA 404, 44 Admin LR (4^{th}) 4 at para 46.

Analysis

Does the Daughter have standing to bring this application?

[21] The Respondent submits that the Daughter should be struck as an applicant in these proceedings as she, the sponsor, has no standing in this application. The Respondent relies on *Thangarajah v Canada (Minister of Citizenship & Immigration)*, 2011 FC 754 where J. Near of this Court stated:

> [16] The Applicant submits that as the sponsor he has an evident interest in the litigation and that in many cases before the Immigration Appeal Division (IAD) the sponsor is the appellant.
>
> [17] The Respondent argues that this is not an application for judicial review of a decision made by the IAD, in which situation the sponsor would have had the right to appeal the decision before the IAD and then come to the Court for a review of that decision. Rather, in the present situation the Applicants had no appeal right before the IAD and the Applicant has no standing to challenge the refusal of the application since he is not "directly affected" by the decision. The jurisprudence of this Court supports this position. The Respondent cites *Carson v Canada (Minister of Citizenship and Immigration)* (1995), 95 FTR 137, 55 ACWS (3d) 389 at para 4:
>
> > [4] While Mrs. Carson has an interest in this proceeding, in that she is Mr. Carson's sponsor for landing in Canada and she was interviewed as part of the marriage interview involving the H&C determination, these facts are insufficient to give her standing in this judicial review. Mrs. Carson is a Canadian citizen and does not require any exemption whatsoever from the Immigration Act or regulations. Moreover, whether she has standing or not has no impact whatsoever on the ultimate issue in this matter. Accordingly, with respect to this proceeding, the applicant, Tonya Carson, is struck as a party.
>
> (see also *Wu v Canada (Minister of Citizenship and Immigration)* (2000), 183 FTR 309, 4 Imm LR (3d) 145 at para 15).

> [18] Accordingly, the Applicant is struck as a party. However, further to the request of both parties, the Court will add the Applicant's sponsored dependents as named Applicants.
>
> [Emphasis added]

[22] The situation in this case is similar to that in *Carson*. In this case, the Daughter is a Canadian citizen and does not require any exemption from the *IRPA* or regulations. Also, whether the Daughter has standing or not has no impact on the ultimate issue in this matter.

[23] Following the jurisprudence cited above, the Daughter, Thamilarasi Sivanesan, is struck as a party. The parents Thanabalasingam Sinnathamby and Vasanthadevi Thanabalasingam remain named as Applicants.

Did the Officer violate the duty of procedural fairness owed to the Applicants?

[24] An allegation of a breach of procedural fairness is reviewed on a standard of correctness. In most instances, a breach of procedural fairness will be determinative of the application for judicial review: *Ghasemzadeh v Canada (Minister of Citizenship & Immigration)*, 2010 FC 716 [*Ghasemzadeh*] at para 16.

[25] The Applicants submit they were denied procedural fairness because they were not provided with an in-person interview to address the concerns of the Officer. However, the jurisprudence is clear that an oral hearing is not always necessary for a visa officer to fulfill his duty of procedural fairness: *Ghasemzadeh* at para 27. As J. Lemieux stated in *Ghasemzadeh*:

> What the duty [of procedural fairness] requires is that the applicant be afforded a meaningful opportunity to present the various types of evidence to his or her case and have it fully and fairly considered.

[26] According to the CAIPS notes, the Officer, upon review of the Applicants' application, had concerns about discrepancies discovered in their file. In an attempt to have these concerns resolved, the Officer sent a procedural fairness letter to the Applicants outlining his concerns. He requested answers from the Applicants the following:

> 1. Please provide a list of your trips back and forth from India when you visited your family. Please provide copies of passport pages to confirm this travel.
>
> 2. What problems did you and your family encounter with regard to the Sri Lankan armed forces, IPKF and LTTE? Were you or any family member ever detained by any force? If yes, provide details. Were you or any family member forced to do work for the LTTE?
>
> 3. Your son has given a different address history from yours. Please outline where your son has lived and if apart from his family, please provide an explanation.
>
> 4. Why did your wife not declare her visitor visa application in 03/04 on her current application form? Why in that application interview did she say she had no travel history when her application address list shows she lived in Chennai from 07-97-05/03? Did she attend your daughter's wedding in Chennai?

[27] This letter set out the specific concerns held by the Officer and the information requested to alleviate these concerns. This was the first opportunity the Applicants had to respond and provide the necessary evidence.

[28] The Applicants responded by letter on November 11, 2010.

[29] After reviewing the Applicants' November 11, 2010 letter, the Officer's concerns remained. In fact, the Officer's CAIPS notes indicate that the November 11, 2010 letter created more uncertainty. For example:

a. The November 11, 2010 letter described three instances where the father was arrested or detained. None of these arrests or detentions had been declared by the Applicants in their application.

b. The November 11, 2010 letter also stated that the father sold produce after his boat was destroyed in 1986 and that he mentioned leasing a boat and returning to his passenger business about 2002. The produce business was also omitted from the father's personal history.

[30] As a result, the Officer sent a second procedural fairness letter on November 24, 2010 to the Applicants. The Officer specifically stated that he had concerns that the Applicants had misrepresented their residence history, activity/employment history, history of arrests and detainments, and travel history. The letter set out examples of the contradictions found and provided a final opportunity to the Applicants to respond and alleviate the Officer's concerns.

[31] The Applicants responded on December 20, 2010.

[32] The Officer's CAIPS notes indicate the Applicants' December 20, 2010 letter allayed the concerns about discrepancies in their residence history. However, the Applicant's letter failed to satisfactorily address the remainder of the Officer's concerns. His CAIPS notes record:

> On the topic of the employment history of the PA, he now tells us his boat was indeed destroyed in 1986 and that he commenced selling produce in 1989/90. He then goes on to describe his re-entry into the boat provision business. That does not explain why, in his application, he tells us he was engaged in [the] boat services from 1970 to 2008. He was not according to this most recent information. The pa again confirms that he was "…detained several times".
>
> He tells us he did not declare the detentions because "...they were not official". Our application questions say nothing about detentions or arrests being official. He says he didn't intent to misrepresent this information yet provides a rational as to why he deliberately omitted it form his application. He rationalizes the failure of his wife to declare her travel history as a matter of the travel being on a previous passport. He makes no mention of the failure of his wife to declare her previous CCV application in this most recent response. He tells us his wife failed to declare her residences in India as "…it was only temporary". Again, there is nothing in our application that makes reference to the duration of the residence.
>
> In summary, my conclusion of Nov 22 stands and with the same rational. Every time we seek information we are provided with further information that contradicts and provides details that should have been provided upon application to us. Each new batch of information neatly rationalizes the wanting nature of the previous information. I am left to assume that if I simply continued to ask further detailed questions, I would receive yet another version of the family history. The Applicant's [sic] have not met their statutory obligation to satisfy me they are not inadmissible. In accordance with A11, the application is refused.
>
> [Emphasis added]

[33] As a result of these continuing discrepancies and revealed omissions, the Officer concluded that the Applicants were inadmissible to Canada due to misrepresentation.

[34] In my view, the evidence demonstrates that the Officer met his duty of procedural fairness. Twice the Officer set out his concerns to the Applicants and provided the Applicants an opportunity to address and alleviate those concerns.

[35] I also consider it relevant that one of the reasons the Officer had for sending the second procedural fairness letter was the possibility that the Applicants did not fully understand what was being required of them. As the CAIPS notes state:

> I note that the PA says he can speak English and the preparation of the application was assisted by a family member (the sponsor) who appears to have been living in Canada for many years and thus, I think it reasonable to assume [the PA] has some sense of the need to get it right or at least to understand our questions. Surely someone assisted this PA to craft a lengthy and complicated response to our letter. However, it is not clear to me that our request for information made it clear to the PA that we have concerns and gave him a chance to response [*sic*] to our concern. PF letter necessary.

[36] The Applicants have submitted they do not understand English and that as a result, an in-person interview was required. However, as noted in the passage above, the Officer was under the impression that the father could speak English. This impression was supported by the fact that the father had indicated in his permanent residence application that he could communicate in English. Nonetheless, the Officer wanted to ensure that the Applicants fully understood what was required of them and sent the second, more detailed procedural fairness letter. I find this to be clear evidence that the Applicants were provided with a meaningful opportunity to present evidence relevant to their case.

[37] While the opportunity to present evidence is a significant part of the duty of procedural fairness, that evidence submitted must be fully and fairly considered.

[38] The CAIPS notes clearly show that the Officer fully considered the first letter from the Applicants dated November 11, 2010. This is also evident in the substance of the second procedural fairness letter sent to the Applicants dated November 24, 2010. In this letter, the Officer refers specifically to information provided by the Applicants in their November 11, 2010 letter.

[39] It is also evident that the Officer fully and fairly considered the Applicants' second response letter. The Applicants' December 20, 2010 letter allayed the misrepresentation concerns held by the Officer regarding the discrepancies over residences. This is clear evidence that the Officer considered the information proved by the Applicants in their second letter.

[40] The jurisprudence requires a meaningful opportunity be afforded to the Applicants to present evidence and to have that evidence fully and fairly considered. It was. I am satisfied an oral interview was not required.

[41] The Applicants were provided with two opportunities to present evidence and all of the information provided was fully and fairly considered by the Officer. I conclude the Officer met his duty of procedural fairness. The Applicants' submission for judicial review on these grounds is rejected.

Was the Officer's decision reasonable?

[42] The appropriate standard of review to apply to a decision to refuse an application for permanent residence on the grounds of misrepresentation is reasonableness: *Mahmood* at para 11.

[43] The Officer decided that the Applicants were inadmissible to Canada under s. 40(1)(a). Two factors must be present for such a determination. First, there must be misrepresentations made by the Applicants and second, the misrepresentations must be material in that they could have induced an error in the administration of the *IRPA*: *Bellido v Canada (Minister of Citizenship & Immigration)*, 2005 FC 452 at para 27.

[44] With regards to the presence of misrepresentations made by the Applicants, the evidence is straightforward. The evidence before the Officer referred to numerous contradictions and discrepancies in the Applicants' file.

[45] In the Applicants' application for permanent residence, the only employment listed was that the father was self employed and engaged in "Boat services between Nainativu & Kurikadduwan" from January 1970 to July 2008. However, in their November 11, 2010 response letter it states:

> After my boat had been destroyed [in 1986], I was involved in selling produce such as onions, chillies, and dried fish to market in Colombo and was able to make a good living out of that. Since there was no other way to market the produce, people that cultivated these things would sell them to me at a lower price and I sold them at a higher price in Colombo.

[46] The Applicants did not adequately explain the discrepancy regarding the father's employment history in the Applicants' application and the subsequent letter.

[47] The Officer also found that the Applicants made a misrepresentation by omitting significant information from their application. For example, when asked on the application for permanent residence whether they had "been detained or put in jail?", the Applicants checked "No". However, this contradicted what the Applicants' son, Kartheebhan Thanabalasingam, had stated in his Personal Information Form (PIF) narrative from his refugee application to Canada in 2003. The son's PIF narrative states:

> On March 13, 1986 a Navy patrol boat was destroyed in a bomb explosion when the boat arrived at Nainativu jetty. It was believed that the Tamil Tigers had done this. In response to this, the Navy personnel on the island went on a rampage against the local civilian population. They set my father's boat on fire and destroyed it. My paternal aunt (father's sister) also owned a boat which was burnt and destroyed that same day by the Navy. She also owned a shop which was burnt by the Navy. There were five local Tamil civilians, none of whom were Tamil Tigers, who were shot and killed by the Navy. Very few people owned boats as large as my father's. The Navy assumed that he must have more money than the other local Tamils, and that he must have some connections to the Tigers. They thought he must be transporting Tigers from the mainland to the island. <u>So the Navy arrested my father, and interrogated him about this. He was detained for about two weeks. He was beaten and tortured in detention.</u> Later, he was released on payment of a bribe to a high ranking officer.
>
> [Emphasis added]

[48] The son's PIF was provided by the Applicants pursuant to a request for the landing papers and PIF of their son Kartheebhan. The son's PIF clearly shows an inconsistency with the information provided by the Applicants in their application. The Officer found that the information

regarding the father's detentions ought to have been included in the Applicants' original application. Because relevant information was omitted and only explained after that information had been brought to their attention, the Officer found that the Applicants had made a misrepresentation.

[49] The Applicants submit that the Officer's findings of misrepresentation did not take into account the Applicants' understanding of the words in the application forms. The Applicants submit that they reasonably understood the term 'detentions' in the permanent residence application for to only refer to "official" detentions. The Applicants submit that the father was never officially detained and therefore, the Applicants did not withhold information regarding those detentions.

[50] I do not find this argument persuasive. The use of the word "official" is argumentative and does not satisfactorily explain why such significant events are excluded.

[51] The Officer is tasked with weighing the evidence submitted by the Applicants and coming to a reasonable determination based on that evidence. So long as the Officer's determination shows justification, transparency and intelligibility and the determination falls within a range of possible, acceptable outcomes, judicial deference is appropriate: *Dunsmuir* at para 47.

[52] The Officer bases his finding of misrepresentation and omissions by identifying specific contradictions found in the file as well as important facts that were withheld from the original application. The Officer clearly and intelligibly sets out his rationale for these findings. I find the Officer's conclusion that the Applicants made misrepresentations falls within a range of possible, acceptable outcomes.

[53] However, the Officer's finding that the Applicants made misrepresentations or withheld information is not enough, on its own, to determine that the Applicants were inadmissible under s. 40(1)(a). It must be determined whether the misrepresentations were material in that they could have induced an error in the administration of the *IRPA*. In this case, the Officer found that the misrepresentations were material.

[54] In his decision letter, the Officer stated that upon completing their application, the Applicants misrepresented or withheld the following material facts: details of their activities, residences and travel/immigration history. The seriousness or materiality of these facts were noted by the Officer in the CAIPS notes:

> Further, the PA and his spouse have misrepresented information concerning their activities, residences travel/immigration history. I cannot conclude that the rationales provided to explain such misrepresentation are any more than an after the fact search for excuses. Such information, especially for people residing for many years in an active war zone, are key to determining admissibility so that the failure to declare or declare with truthful care could lead to an error in the determination of admissibility.
>
> [Emphasis added]

[55] The above CAIPS notes make it obvious that the Officer regarded the misrepresentations could have induced an error in his administration of the *IRPA*. That the Officer is unclear about the background of the Applicants is evident in the CAIPS notes. Any determination of admissibility where concerns remain could be made in error.

[56] The Applicants claim that any misrepresentations made were not material, or in the alternative, that they cannot be classified as misrepresentations under s. 40(1)(a) because they were corrected before it could have the effect of causing an error in the administration of the *IRPA*.

[57] I find neither of these arguments persuasive.

[58] First, it appears clear that these misrepresentations are material. The Officer was left with an unclear picture of the background and history of the Applicants. As observed in the CAIPS notes, the Applicants lived in an active war zone for many years and that raised security questions that remained unresolved.

[59] Second, this Court has previously considered the proper interpretation of s. 40(1)(a) as it applies to misrepresentations. In *Kahn v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512, J. O'Keefe stated the following at paragraphs 25-29:

> [25] Paragraph 40(1)(a) is written very broadly in that it applies to any misrepresentation, whether direct or indirect, relating to a relevant matter that induces or could induce an error in the administration of the Act. I am of the opinion that this Court must respect the wording of the Act and give it the broad interpretation its wording demands. There is nothing in the wording of the paragraph indicating that it should not apply to a situation where a misrepresentation is adopted, but clarified prior to a decision being rendered.
>
> [26] The applicant submitted that to adopt the respondent's interpretation would result in an absurdity as individuals who made an innocent mistake in their application would be inadmissible for two years on the basis of misrepresentation. I need not deal with this argument as the applicant in this case continued the misrepresentation in his interview with the officer until the officer was able to get him to admit that he had not been employed as stated.

> [27] I acknowledge that this case presents a unique situation as the misrepresentation was clarified before the decision was rendered. However, to adopt the applicant's interpretation would lead me to a situation whereby individuals could knowingly make a misrepresentation, but not be found inadmissible under paragraph 40(1)(a) so long as they clarified the misrepresentation right before a decision was rendered. I agree with the respondent that such an interpretation could result in a situation whereby only misrepresentations "caught" by the visa officer during an interview would be clarified; therefore, leaving a high potential for abuse of the Act.
>
> [28] In *Wang v Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1309 at paragraph 57, this Court noted Parliament's intent regarding misrepresentation as per the explanatory clause-by-clause analysis of Bill C-11 (the Act) which reads:
>
> > This section is similar to provisions of the current act concerning misrepresentation by either permanent or temporary residents but modifies those provisions to enhance enforcement tools designed to eliminate abuse.
>
> [29] Moreover, to accept the applicant's interpretation would be to disregard the requirement to provide truthful information under the Act. In light of these findings, I am of the opinion that the visa officer correctly interpreted section 40.
>
> [Emphasis added]

[60] Justice O'Keefe makes it clear that it is irrelevant whether the misrepresentation had been corrected or not by the time the decision was made. Even if this were not the case, it can not be said in this case that all the misrepresentations had been corrected. While the Officer acknowledged that the Applicants corrected the misrepresentation concerns the Officer had regarding the discrepancies over the Applicants' residences, the Officer's concerns regarding other material misrepresentations remained.

[61] For the foregoing reasons, I conclude that the Officer's finding that the Applicants made material misrepresentations was reasonable. Therefore, the application for judicial review is dismissed.

[62] Finally, in the final two paragraphs of their reply, the Applicants proposed a question to be certified. The Applicants do not set out a specific question but rather appear to request that the proper definition of "residence" and "detention" be clarified.

[63] The Respondent opposes certification of the Applicants' proposed question. The Respondent submits that it does not meet the test for certification.

[64] I agree with the Respondent and I decline to certify the question.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant, Thamilarasi Sivanesan, is struck as a party.

2. The Application for judicial review is dismissed.

3. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THANABALASINGAM SINNATHAMBY AND VASANTHADEVI THANABALASINGAM v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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