

Federal Court



Cour fédérale

Date: 20120828

Docket: IMM-7809-11

Citation: 2012 FC 1022

Ottawa, Ontario, August 28, 2012

**PRESENT:** The Honourable Mr. Justice Russell

**BETWEEN:**

**NELSON ARISTIDES ANGULO LOPEZ;  
CELINA MATILDE VELASCO DE ANGULO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**INTRODUCTION**

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 6 October 2011 (Decision), which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

## **BACKGROUND**

[2] The Principal Applicant and his wife, the Secondary Applicant, are citizens of El Salvador who fear harm from the Maras Salvatruchas Gang (MS-13).

[3] From August 1979 until February 2004, the Principal Applicant was a member of the El Salvadorian Navy. After retiring from the Navy, he was appointed director of the Chalatenango Prison in Chalatenango, El Salvador. The Chalatenango Prison housed approximately 1000 MS-13 members. As prison director, the Principal Applicant was responsible for prisoner transfers, searches for contraband – including weapons and drugs – and the general security of the facility. During his tenure, he began a successful initiative to coordinate with the El Salvadorian police to reduce the amount of gang activity in the prison.

[4] In January 2009, an inmate at the prison told the Chief Warden that other inmates were digging a tunnel to escape. That inmate also said the other inmates were monitoring the Principal Applicant and intended to harm him. The Principal Applicant reported the tunnel to the Fiscalía – a national investigative body – which began an investigation. The Principal Applicant also put the prison under lockdown for fifteen days. During this time, someone put a note on the Principal Applicant's desk telling him not to go into the prisoners' area or he would be taken hostage.

[5] The Principal Applicant believed that, because of his work at the prison, MS-13 members outside were following him and intended to harm him. He reported his fears to the prison authorities, who then reported to the Fiscalía, but they did not investigate these allegations. Although he asked for a different car and for bodyguards, this protection was not given to him. He

filed a report with the Fiscalía on 7 April 2009, which detailed his allegations, but no action was taken on this report.

[6] One week after he filed the report, the Principal Applicant found a page torn from a telephone book on the ground by his car. The page contained his name, address, and telephone number. The Principal Applicant believed this page was a message from MS-13 to tell him they knew what car he drove and where he lived. Several days later, “M13S Locos” was written on the outside of his house. A police officer at the prison told the Principal Applicant this could mean MS-13 had marked his house and intended to come after him.

[7] The Principal Applicant believed his life was in danger, so he and the Secondary Applicant fled El Salvador on 27 April 2009. They first went to Seattle, United States of America, then to Surrey, British Columbia on 30 April 2009. The Applicants claimed refugee status the same day they arrived in Canada.

[8] The Secondary Applicant relied on her husband’s narrative to support her claim. The RPD joined their claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR 2002-228 and heard the claims together on 31 May 2011. The RPD refused the Applicants’ claims on 6 October 2011 and notified them of the Decision on 14 October 2011.

## **DECISION UNDER REVIEW**

[9] The RPD found the Applicants were not Convention refugees or persons in need of protection because state protection was available to them in El Salvador.

### **Possible Exclusion**

[10] Before the RPD hearing, the Respondent alleged the Principal Applicant was excluded from refugee protection under Article 1F(a) of the *Convention Relating to the Status of Refugees* (Convention). During the El Salvadorian civil war, while the Principal Applicant was a member of the El Salvadorian Navy, the Army had committed crimes against humanity. The Respondent said the Principal Applicant's membership in the El Salvadorian Navy meant he was complicit in the commission of crimes against humanity, which would exclude him from protection under Article 1F(a). The Principal Applicant agreed the El Salvadorian Army had committed crimes against humanity, but said the Navy was a separate branch of the armed forces. He was not complicit in the crimes against humanity because he was a member of a separate branch. The RPD agreed, finding that, although he had been a high ranking officer, the Principal Applicant had not provided support for the atrocities the Army had committed. On the evidence before it, the RPD was not satisfied the Respondent had met the onus to show complicity in crimes against humanity. The Principal Applicant was not excluded from claiming protection under the Convention.

### **Merits of the Claim**

[11] The RPD found the Principal Applicant had not rebutted the presumption of state protection, so his claim for protection could not succeed. The Secondary Applicant's claim depended on her husband's claim, so she too was not a Convention refugee or person in need of protection. The Principal Applicant had established his identity, and proven he was the director of the Chalatenango Prison, and that he had received threats from MS-13 members. However, the Principal Applicant's unsuccessful efforts to seek state protection were not sufficient to rebut the presumption established by *Canada (Attorney General) v Ward*, [1993] 2 SCR 689.

[12] The RPD began its state protection analysis with a review of the conditions in El Salvador. It found El Salvador is a constitutional, multi-party democracy with functioning democratic institutions. In this context, *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 (FCA) established that the Applicants had a heavy burden to show they had exhausted all courses of action open to them to seek state protection.

[13] The RPD found the Applicants had not taken all the steps they could have to seek state protection. When the Principal Applicant initially received the threat related to his reporting the inmates' tunnel, he did not personally contact the police. He contacted the prison director, who in turn contacted the Fiscalia. A letter informing the Principal Applicant of the threats, written by the Deputy Director of the prison, was given to the Fiscalia to assist in its investigation. The Principal Applicant had received threats between January and April 2009, but had not contacted anyone for help other than reporting to the prison director. The Principal Applicant said he had not followed up on the complaint which the prison director made to the Fiscalia because the proper procedure was to wait for the Fiscalia to contact him and call him for an interview. However, the Fiscalia did not contact him. The Principal Applicant also said he received no response to a letter he hand-delivered to the Fiscalia on 7 April 2009. He testified that his experience confirmed his knowledge that the authorities in El Salvador are slow in dealing with complaints. The RPD found the Principal Applicant should have followed up on the reports to the Fiscalia. His failure to do so meant he could not rebut the presumption of state protection.

[14] The Principal Applicant said it was the authorities' responsibility to contact him and that nothing informed him he needed to follow up on his complaint. The RPD said this made no sense; the Applicant feared for his life but did not take any action to ensure he was protected. Further, the

inmates who were digging the tunnel had been transferred out of the prison. After they were transferred, the authorities would reasonably give lower priority to the Principal Applicant's complaint.

[15] The RPD referred to two documents the Applicant submitted and noted there are problems and inefficiencies with the El Salvadorian authorities. A report from the United States' Department of State said corruption and criminality hinder the authorities' effectiveness. A report from the United States' Overseas Security Advisory Council (OSAC Report) showed that the National Civil Police (PNC) is still developing into an effective police force. The PNC's effectiveness is hampered by equipment shortages and its anti-gang and crime suppression efforts are somewhat ineffective.

[16] The RPD found that El Salvador is making serious efforts to address gang violence. The government held a conference on street gangs and the President dispatched soldiers to fight delinquency. A high rate of violence in El Salvador shows that gang violence is still a problem, but the police help people who are threatened by gangs.

[17] The Principal Applicant had not taken reasonable efforts to access state protection and his minimal efforts could not rebut the presumption of state protection. He had worked closely with the police to coordinate anti-gang initiatives at the Chalatenango prison but he had not used his personal connections with the police to obtain protection. Before the RPD, he downplayed his personal connections with the police by saying he only had a good working relationship with the police chief. The Principal Applicant also said the chief was away on a training course when the threats occurred, so he could not help him. The RPD rejected these statements, noting the Principal Applicant said he had a good working relationship with the police as a whole. The Principal Applicant was vague

about when the police chief was away on the training course. Although he had options to contact the police, the Principal Applicant had not exercised them.

[18] The Principal Applicant's own experience with the authorities in El Salvador showed they were making serious efforts to stop gang activity. The police had taken reports when two members of his family were robbed on the street. The Principal Applicant had never encountered a police officer attempting to smuggle contraband into Chalatenango prison while he was the director. Further, the police anti-gang initiatives which the Principal Applicant had helped to coordinate were effective.

[19] The Principal Applicant failed to give the authorities evidence in his possession which was crucial to their investigation. He did not hand over the torn page from the telephone book or the photographs he had of the graffiti on his house. *Villasenor v Canada (Minister of Citizenship and Immigration)* 2006 FC 1080 establishes that refugee claimants cannot assert a lack of state protection without first making the authorities aware of the threats against them and giving the authorities an opportunity to protect. Although police efforts in El Salvador may not always have been successful, this does not mean that state protection is not available there. See *Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189 (FCA). The Principal Applicant's failure to hand over evidence showed he was not serious about seeking state protection.

## **ISSUES**

[20] The Applicants raise the following issues in this proceeding:

- a. Whether the RPD misapplied the law on state protection;
- b. Whether the RPD's state protection finding was unreasonable;
- c. Whether the RPD erred by making a veiled credibility finding.

## STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[22] The first issue is subject to the reasonableness standard. The Applicant challenges the RPD's finding that jurisprudence from this Court was applicable to the facts before it. This issue is one "where the legal and factual issues are intertwined [...] and cannot be readily separated" and to which the reasonableness standard applies. See *Dunsmuir*, above, at paragraph 53.

[23] The Applicants say the RPD ignored evidence which showed that the protection El Salvador offers is ineffective. The standard of review on this issue is also reasonableness. In *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. Justice Leonard Mandamin followed this approach in *Lozada v Canada (Minister of Citizenship and Immigration)* 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)* 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness.

[24] With respect to the third issue, *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228 held that any credibility finding must be made "in clear and unmistakable



terms.” In *Zokai v Canada (Minister of Citizenship and Immigration)* 2004 FC 1581 Justice W. Andrew MacKay held that “the essence of the decision is that the applicant's story and professed fears are given no weight, effectively rejecting the applicant's evidence as not credible even though no specific reference is made to credibility as an issue.” More recently, Justice Carolyn Layden-Stevenson relied on *Hilo* in *Medina v Canada (Minister of Citizenship and Immigration)* 2008 FC 728 and held that, “Credibility is a matter which falls within the exclusive purview of the RPD. The RPD was not obliged to accept Mr. Medina's story. However, the law has long required that credibility findings be stated in clear and specific terms” See also *L.Y.B. v Canada (Minister of Citizenship and Immigration)* 2009 FC 1167 and *D.J.D.G. v Canada (Minister of Public Safety and Emergency Preparedness)* 2010 FC 765. In my view, these cases all point to an underlying concern about the “justification, transparency and intelligibility” in determining cases based on claimant's credibility. As the Supreme Court of Canada held in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 at paragraph 16, “if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.” The standard of review applicable to the third issue is reasonableness.

[25] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

## ARGUMENTS

### The Applicant

#### RPD Misapplied the Law on State Protection

[26] The RPD erred when it applied cases from this Court to the Applicants’ claim when those cases were distinguishable on their facts. The RPD relied on *Villasenor*, above, for the proposition that claimants must take steps to seek protection before they can claim that state protection is not available to them. *Villasenor* is distinguishable because, unlike the Applicants, Villasenor had submitted no evidence of his efforts to seek protection and had not reported any threats to the authorities. In the instant case, the Applicants informed the authorities of the threats against them. They also provided documents to show the steps they had taken to seek state protection.

[27] The RPD also erroneously relied on *Osornio v Canada (Minister of Citizenship and Immigration)* 2011 FC 684. Osornio had not identified her persecutors. Here, the Applicants specifically identified the agents of harm and their ability to act with impunity.

[28] Contrary to the RPD’s finding, *Badilla v Canada (Minister of Citizenship and Immigration)* 2005 FC 535 teaches that claimants are not required to take additional steps when authorities do not take meaningful or timely measures to protect. The Applicants took steps to obtain protection, but no help was forthcoming; they were not required to go any further than they did.

### **Veiled Credibility Finding**

[29] Although the RPD initially said it found the Principal Applicant was credible, it later found state protection was not available. This was a veiled credibility finding. The allegation that state protection was unavailable was a central aspect of the Principal Applicant's testimony. *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 establishes that a claimant's sworn testimony is presumed to be true. As such, the RPD was bound to explain why it found the Applicants' allegation that state protection was not available was not credible.

### **State Protection Finding Unreasonable**

[30] The RPD improperly required the Applicants to put themselves in danger to obtain state protection. *Ward*, above, establishes at paragraph 48 that claimants are not required to put themselves in danger to demonstrate state protection is not effective.

[31] The RPD also erred when it looked only at the efforts El Salvador is making to combat gang violence without looking at the effectiveness of those efforts. In *Razo v Canada (Minister of Citizenship and Immigration)* 2007 FC 1265 at paragraph 10, Justice Eleanor Dawson held that

the Board failed to consider whether effective protection existed. It is insufficient for a state to possess institutions designed to provide protection if those institutions do not provide actual and adequate protection.

[32] In a similar way, *Bautista v Canada (Minister of Citizenship and Immigration)* 2010 FC 126 shows the RPD must assess the adequacy of a state's efforts to protect. There was no evidence that El Salvador's efforts to protect prison directors from MS-13 are effective in practice.

[33] The RPD did not properly consider any of the documents the Applicants submitted. The Court should infer from the RPD's failure to mention any of the documents the Applicants submitted that it did not consider them. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1425. *Sekeramayi v Canada (Minister of Citizenship and Immigration)* 2008 FC 845 teaches that the RPD must explain why it did not consider objective evidence.

[34] The RPD's state protection finding was not supported by the evidence. The RPD speculated about the success of anti-gang initiatives and ignored country-condition documents that show crime is prevalent in El Salvadorian prisons. The United States' Department of State *Human Rights Report 2010: El Salvador* (DOS Report) shows state protection is inadequate in El Salvador and crime is rampant in El Salvadorian prisons. A report from Harvard Law School, *No Place to Hide: Gang and Clandestine Violence in El Salvador* shows that violence, including murder, occurs in El Salvadorian prisons. *No Place to Hide* also shows that state protection is inadequate and criminals operate with impunity in El Salvador. The RPD also ignored its own information, which showed that El Salvadorian authorities are ineffective at protecting citizens.

## **The Respondent**

### **No Error in Law**

[35] *Castellanos v Canada (Minister of Citizenship and Immigration)* 2009 FC 307 shows that refugee claimants must take reasonable steps to seek state protection. State protection need not be perfect, as no state can guarantee protection for its citizens at all times. Further, claimants must show they have exhausted all avenues reasonably open to them to seek protection. The Applicants challenge the RPD's use of *Orsonio* and *Villasenor*, above, but the RPD only relied on these cases

for general propositions about the onus to seek state protection and provide information to authorities. The facts in those cases were different from the instant case, but the legal principles applicable are the same.

[36] The RPD's state protection finding hinged on the Principal Applicant's failure to provide the evidence of threats to the authorities in El Salvador. The RPD properly applied the law which holds that claimants must provide all necessary evidence to the authorities when they seek state protection. The Applicants have pointed to *Badilla*, above, saying this case shows the Principal Applicant did not have to make further efforts after the police failed to provide a meaningful and timely response. However, *Badilla* was a case where the agents of persecution were the police themselves. Further, *Villasenor*, above, establishes at paragraph 19 that

Save in exceptional circumstances, it seems inconceivable to the Court that an applicant should be able to blame the authorities in his country for their inaction when he did not even make them aware of his position of vulnerability and never gave them an opportunity to protect him.

[37] The Applicants' claim was denied because they failed to give important evidence to the police. There was no evidence that making further efforts to seek state protection would put them at risk, so the RPD's finding they had not done enough to rebut the presumption was reasonable.

### **Credibility**

[38] The Applicants have confused two distinct issues: credibility and state protection. Credibility is a finding of fact, while the existence of state protection is a finding of mixed fact and law. The RPD found the Principal Applicant was credible, in that it believed what he said happened to him had actually occurred. It did not automatically follow that state protection was not available

to him. The RPD applied the law on state protection to the facts before it and concluded the Applicants had not met the burden on them to rebut the presumption. The RPD did not make a veiled credibility finding.

### **State Protection Finding Reasonable**

[39] The Applicants have said the RPD ignored evidence when it analysed state protection, but the Decision shows this is not so. At paragraphs 13 and 14, the RPD specifically refers to the DOS Report and the OSAC Report which the Applicants have said it ignored. The RPD also referred to other documents which showed problems with the authorities in El Salvador. The RPD balanced this negative information against other information which showed El Salvador is making efforts to combat gang violence. In light of the documentary evidence, the RPD reasonably concluded the Principal Applicant's efforts did not rebut the presumption of state protection.

### **ANALYSIS**

[40] The Applicants say that the RPD misconstrued the law on state protection by incorrectly applying "case law on state protection that is highly distinguishable from the Applicant's case." There is no substance to this argument. The RPD did not rely upon or blindly apply other cases. All cases have to be decided on their particular facts, but they often give rise to, and illustrate, general principles that can be useful in subsequent cases. In the present case, the RPD simply referred to general guiding principles that have emerged over time and which also arise on the facts of this particular case. I see nothing unreasonable or wrong in law in the RPD's approach to this case.

[41] Nor do I find that the RPD required the Applicants to endanger themselves in order to prove the effectiveness of state protection. In this case, the state was not the source of the threats against them. The Applicants did not say they feared the state or that they would put their lives in danger if they sought protection. Their argument was that the state was unable or unwilling to protect them, so there was no point in going to the state to ask for protection.

[42] Nor does the Decision contain any procedural unfairness or disguised credibility findings. The Decision is very straightforward and quite simple. Notwithstanding on-going problems in El Salvador, and notwithstanding limited resources, “the police in El Salvador will not refuse assistance to people receiving threats from gangs.” And in the present instance, the Applicants had not done enough to demonstrate the authorities would not protect them if they asked for protection. Hence, the Applicants had failed to rebut the presumption of adequate state protection.

[43] In my view, the only issue of substance raised by the Applicants relates to the RPD’s conclusion that “in spite of limited resources, the police in El Salvador will not refuse assistance to people receiving threats from gangs,” and the significance of this finding for the state protection analysis.

[44] The evidence relied upon for this conclusion is a June 2007 issue paper from the US Department of State, Bureau of Democracy, Human Rights and Labor, Office of Asia and Western Hemisphere Affairs. There was a significant amount of more recent objective evidence before the RPD to suggest that the police in El Salvador are unwilling or incapable of providing citizens with protection. For example, the Harvard Law School “No Place to Hide: Gang, State, and Clandestine Violence in El Salvador (2010) provides, *inter alia*, the following information:

Gang activities in prisons and juvenile holding facilities remained a serious problem. Of the total population in detention center facilities, 8,406 adult and 394 juvenile inmates were current or former gang members. Gang members were separated from the regular prison population when possible. Gangs continued to exercise influence within the prisons and the judicial system. Prisoners reportedly conducted criminal activities from their cells, at times with the complicity of prison guards. Smuggling of weapons, drugs, and contraband such as cell phones and cell phone chips was a major problem in the prisons. In August 2009, as a means to combat increased inmate extortion using cell phones, authorities continued body cavity searches of prisoners, instituted in 2009, to detect cell phones. Additionally, President Funes ordered the armed forces to reinforce the perimeter security of the prisons holding the most dangerous criminals.

[...]

Inadequate training, insufficient government funding, lack of a uniform code of evidence, and isolated instances of corruption and outright criminality interfered with the PNC's effectiveness.

[...]

Actual and threatened victims of violence interviewed by our researchers in El Salvador – including suspected or imputed gang members and residents of areas with a heavy gang presence – reported that Salvadoran police were unwilling or incapable of providing citizen protection. A resident of a poor urban region outside of San Salvador, emphasizing the ineffectiveness of police presence in the area, told our researchers that police abandon their posts and disappear when gang members take to the streets in her area, leaving citizens vulnerable to extortion, threats, and violence.

[...]

Another related factor that plays an important role in the Salvadoran government's failure to provide meaningful protection to certain sectors of society is the absence of an effective witness and victim protection program. Many of the witnesses, victims and experts interviewed by our researchers emphasized that victims and witnesses in criminal cases in El Salvador become targets for retaliation and violence.



[45] There was also other objective, documentary evidence that the police cannot protect against gang violence. Given the Principal Applicant's profile, his narrative of threats which was accepted by the RPD, the power and the ability of the gang to carry out threats against someone like the Applicants who the gang has targeted, this contradictory evidence is highly significant for the state protection analysis. Under the well-known principles established in *Cepeda-Gutierrez*, above, the RPD had an obligation to consider and explain objective documentary evidence that appears to squarely contradict its finding of fact that the police in El Salvador will not refuse assistance to people receiving threats from gangs. The RPD's failure to do this renders the Decision unreasonable.

[46] While I can accept and understand the RPD's assessment of the Principal Applicant's failure to do more than he did to enlist the protection of the authorities, his personal action or inaction has to be assessed in the context of what the objective documentation tells us about the state's ability and willingness to provide adequate protection.

[47] It seems to me that the RPD is aware of this problem. In paragraph 36 of the Decision the RPD refers to the "efforts" of the state and its recent initiatives to combat gang violence. However, the RPD is well aware that "efforts" are not enough and that it must examine what Justice Mosley has called the "operational adequacy" of those efforts. See *E.Y.M.V. v Canada (Minister of Citizenship and Immigration)* 2011 FC 364 at paragraph 16. In this case, the RPD relies upon the 2007 report to support its conclusions on operational adequacy, but neglects to address the contradictory evidence that was before it.

[48] Counsel agree there is no question for certification and the Court concurs.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that**

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-7809-11

**STYLE OF CAUSE:** NELSON ARISTIDES ANGULO LOPEZ; CELINA  
MATILDE VELASCO DE ANGULO

- and -

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** July 10, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

**DATED:** August 28, 2012

**APPEARANCES:**

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