Date: 20080820

Docket: IMM- 4430-07

IMM-4431-07

Citation: 2008 FC 962

Ottawa, Ontario, August 20, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

TONI TOUFIC BARRAK, SONIA EL-KHOURY, DENISE BARRAK, MICHELLE BARRAK (by her litigation guardian, TONI TOUFIC BARRAK), and CHARBEL BARRAK (by his litigation guardian, TONI TOUFIC BARRAK)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek the judicial review of two decisions made the same day and by the same Pre-Removal Risk Assessment (PRRA) Officer. In file number IMM-4431-07, it was found that the applicants would not face more than a mere possibility of persecution and that they would not likely face a risk of torture, or a risk to life, or of cruel and unusual punishment, pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (2001, c. 27) (*IRPA*). The officer also found, in file number IMM-4430-07, that there were insufficient humanitarian and compassionate

(H&C) grounds to approve the applicants' request for an exemption from the requirement of the *IRPA*.

[2] These two related applications for judicial review have not been consolidated under Rule 105 of the *Federal Courts Rules* (SOR/98-106) but were scheduled for hearing one immediately following the other. These reasons will therefore serve for each of the two proceedings and will be placed in each of the files.

I. Background

[3] The principal applicant, Toni Toufic Barrak, his wife, Sonia El-Khoury, and their two oldest children, Denise and Charble Barrak, are Maronite Christian citizen of Lebanon. Michelle Barrak, their youngest child, is a citizen of the United States where she was born on December 10, 1997.

[4] The main applicant, Mr. Barrak, was a member of the Phalangist Party (Party) and the Lebanese Forces, a Christian militia, which was formed to protect the Christian sectors of the country during the Lebanese Civil War. He joined the Party in 1977 as an ordinary member; the Party merged with the Lebanese Forces in 1979. He received training with the Lebanese Forces in 1986 and was in charge of 90 men but received no monetary compensation from the Lebanese Forces. From about 1977 to 1993, the applicant fought against Muslim and Syrian groups.

[5] Mr. Barrak recounts that he was detained and tortured three times by the authorities in the country. In 1978, Syrian Army members kidnapped him at a checkpoint. He was detained, beaten and tortured for four months. He says that he was of interest to them as they wanted information about the Christian sector and leadership. After his release from jail, he received medical treatment.

[6] In 1990, he was kidnapped again while fighting on the lines that divided the Christian and Muslim sectors. When word spread that their leader had given up his arms, he tried to run for home but was captured by the Syrians. He was detained for 62 days and tortured with electrical shocks. He was subsequently released with other Lebanese Forces after the intercession of the patriarch of the Maronite Church.

[7] Lastly, he was arrested and detained by Syrian Intelligence in 1993. He was taken from his home in the middle of the night, in front of his family, and kept in detention for 13 days. When the applicant's wife tried to intervene, she was physically assaulted. The applicant was interrogated and beaten by the authorities who were trying to find information about the killing of two Syrian men in the area. He was released after the authorities were convinced that he knew nothing about the incident. He claims that the incident caused his mother to have a nervous breakdown and his older daughter was traumatized.

[8] All the applicants fled to the United States and entered as visitors in January 1994. They made asylum claims which were eventually denied in 2000, as well as their appeal in 2003.

[9] In May 2003, they came to Canada where they asked for refugee protection. On November 10, 2005, the Refugee Protection Division (RPD) found that they were neither Convention refugees nor persons in need of protection. The RPD did not believe that Mr. Barrak was a political member of the Party or a member of the Lebanese Forces. It also found that there has been a change in the country conditions since their departure from the country. Finally, the RPD came to the conclusion that the risk posed by terrorist groups is generalized to all Lebanese citizens and thus, that they did not have a personalized risk in this regard.

II. The impugned decisions

A. The PRRA decision

[10] Although the PRRA officer found that the situation in Lebanon was not perfect, she concluded that it has improved significantly since April 2005 when the Syrian military forces withdrew from the country. Therefore, she held that there was insufficient documentation showing that the applicant would be targeted in the event of a return based on his political profile and membership in the Lebanese Forces.

[11] The PRRA officer also concluded that the applicants would not be at risk from being Christians in Lebanon. She noted that the president of Lebanon is a Maronite Christian; that the Constitution provides for freedom of religion which is generally respected by the government; that Maronite Christians are the largest Christian community in the country; and that the state is

committed to preventing acts of religious persecution, even if the situation for Christians in Lebanon is not ideal.

B. The H&C decision

[12] The PRRA officer reiterated her PRRA conclusions in the H&C decision. She concluded that the principal applicant would not be targeted as a result of his political profile and membership in the Lebanese Forces. She also found that the applicants would not face risk as Maronite Christians.

[13] The PRRA officer acknowledged that the children have few ties to Lebanon but she stated that they will have their parents and extended family to assist them in their integration to the country. She noted that Denise, the eldest child, is a scholarship student at the University of Windsor and married to a Canadian citizen; the other two children have exemplary grades.

[14] Finally, the PRRA officer noted that the applicant is the owner of a business known as S&T Automotive Distributors and that his wife is gainfully employed. She also mentioned the positive character of the family as shown by letters of reference. However, she concluded that the applicants' employment is not unusual for persons who spent four years in Canada. Further, she held that the principal applicant's skills acquired by owning businesses in Canada and in the United States can be transferred to Lebanon. She therefore concluded that there were insufficient H&C grounds to allow an exemption to the applicants.

III. Issues

[15] The applicants raised several issues in relation to both the PRRA and to the H&C decisions. With respect to the PRRA, counsel for the applicants contended that the officer erred in applying the wrong test for state protection and conducted a selective review of the country documents before her, failed to take into consideration the risk to the children, and ignored their best interest. With respect to the H&C decision, counsel for the applicants submitted that the PRRA officer applied the PRRA test to the H&C risk assessment, that she failed to engage in a proper analysis of the children's best interests, that she applied a too onerous test for establishment, and that she ignored relevant factors in assessing hardship. I will now turn to each of these grounds.

IV. Analysis

A. Standard of review

[16] Prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 329 N.B.R. (2d) 1, a PRRA decision was considered globally and as a whole was assessed on a standard of reasonableness *simpliciter*: *Figurado v. Canada (Solicitor General)*, 2005 FC 347; *Demirovic v. Canada (MCI)*, 2005 FC 1284, 142 A.C.W.S. (3d) 831. It was also held that questions of fact were to be reviewed on a standard of patent unreasonableness, questions of mixed fact and law on a standard of reasonableness, and questions of law on a standard of correctness: *Kim v. Canada (MCI)*, 2005 FC 437, 272 F.T.R. 62.

[17] As a result of the Supreme Court decision in *Dunsmuir*, the reasonableness standards have been merged into one. In doing so, the Supreme Court made it clear that deference was still called for in applying the reasonableness standard. As the Court stated:

> **49.** …deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

As a result, this Court will only intervene to review a PRRA officer's decision if it does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (para. 47).

[18] In *Dunsmuir*, the Supreme Court also mentioned that an exhaustive analysis was not always required to determine the applicable standard of review. If the review has already been performed, it need not be repeated in a similar case. Paying heed to this advice, I am of the view that the appropriate standard of review post-*Dunsmuir* with respect to an H&C decision has been thoroughly canvassed by my colleague Justice Eleanor Dawson in *Zambrano v. Canada (MCI)*, 2008 FC 481, [2008] F.C.J. No. 601 (QL). The question of whether the officer applied the correct test in assessing risk in the context of the H&C decision will therefore be reviewed on the standard of correctness, whereas the deferential standard of reasonableness will be applied to the other issues raised by the applicant.

i. The PRRA decision

[19] The applicants contend that the PRRA officer applied the wrong test for state protection. They argue that the state protection conclusion was based on a selective review of the country documentation and focused on the PRRA officer's finding that 441 extremists were arrested by the police in 2005 and that Lebanon was a parliamentary republic. The applicants assert that the arrests of people who killed citizens do not amount to state protection. They then rely on a number of cases from this Court to argue that state protection should be practical, real and effective, and that the establishment of legislative and procedural framework is not sufficient.

[20] I agree with counsel for the respondent that the applicants completely mischaracterize the officer's conclusion by limiting it to two evidentiary findings and by suggesting that she ignored evidence. The PRRA officer rejected the applicants' PRRA as she concluded that there was insufficient objective evidence to show that the principal applicant would be targeted owing to his political profile and membership in the Lebanese Forces.

[21] The gist of the country documentation is that there has been a remarkable change in Lebanon since April 2005, when the Syrian forces left. The officer acknowledged the fact that the situation was far from perfect and did indeed note the arbitrary arrests, torture and killing that went on when the Syrians were in control of the country. But the objective documentation also shows that things have considerably improved over the last few years. It was therefore not unreasonable for the officer to conclude, in light of these changes and of the fact that the applicants have left their

country almost fifteen years ago, that they would not likely face a risk of torture, risk to life or a risk of cruel and unusual punishment.

[22] The PRRA officer also found that the applicants would not face more than a mere possibility of persecution under section 96 of the *IRPA* on the basis of their being Maronite Christians. Again, this conclusion is based on a thorough review of the objective evidence and is not unreasonable.

[23] The PRRA officer is entitled to a high degree of deference in the weighing of the evidence and may base her decision on all the relevant information and the necessary inferences. Provided the inferences drawn are not unreasonable to the point of warranting the Court's intervention, the officer's findings are not open to judicial review. In the case at bar, the officer's reasons and decision are logical, coherent and contextual, and based on the submitted evidence.

[24] The applicant also contended that the PRRA officer erred in not considering two photographs showing him in the uniform of the Lebanese Forces. These photos were produced to corroborate the principal applicant's political profile, which was one of the key issues in the RPD decision. However, his profile was not questioned by the PRRA officer. She accepted his profile but found that there was a lack of objective evidence showing that a person with his profile would be at risk.

[25] Finally, counsel for the applicants contended in her written submissions that the PRRA officer failed to address the best interests of the children. She was well advised, however, to

abandon this argument at the hearing. It is now well established that an assessment under sections 96 and 97 of the *IRPA* does not necessitate consideration of the best interests of the children. As the Federal Court of Appeal wrote in *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 F.C.R. 3, at para. 13:

> Neither the Charter nor the *Convention on the Rights of the Child* requires that the interests of affected children be considered under every provision of *IRPA*: *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655, 2005 FCA 436 at para. 105. If a statutory scheme provides an effective opportunity for considering the interests of any affected children, including those born Canada [sic], such as is provided by subsection 25(1), they do not also have to be considered before the making of every decision which may adversely affect them. Hence, it was an error for the Application Judge to read into the statutory provisions defining the scope of the PRRA officer's task a duty also to consider the interests of the adult respondents' Canadian-born children.

[26] For all these reasons, I am therefore of the view that the application for judicial review of the PRRA decision must be dismissed.

ii. The H&C decision

[27] Pursuant to section 25 of *IRPA*, the Minister is authorized to exempt a foreign national from any obligation under that Act or to grant permanent residence where the Minister is of the opinion that it is justified by H&C considerations. It is trite law that a decision made on H&C grounds is an exceptional measure and a discretionary one. It offers an individual special and additional consideration for an exemption from Canadian immigration laws that are otherwise universally applied: see, for ex., *Legault v. Canada (MCI)*, 2002 FCA 125, [2002] 4 F.C. 358 at para. 15; *Pannu*

v. Canada (MCI), 2006 FC 1356, 153 A.C.W.S. (3d) 195 at para. 29; *Hamzai v. Canada (MCI)*, 2006 FC 1108, 152 A.C.W.S. (3d) 137 at para. 19.

[28] An applicant has the burden of adducing proof of any claim on which the H&C application relies and makes a scant application at his or her own peril. An officer is not obliged to gather evidence or make further inquiries but is required to consider and decide on the evidence adduced before him: see *Owusu v. Canada (MCI)*, 2004 FCA 38, [2004] 2 F.C.R. 635 at para. 5; *Selliah v. Canada (MCI)*, 2004 FC 872, 256 F.T.R. 53 at paras. 21-22, affm'd 2005 FCA 160.

[29] The denial of an H&C application does not involve the determination of an applicant's legal rights but rather an exemption from the normal requirement that all persons seeking admission to Canada must make their application before entering Canada: *Gautam v. Canada (MCI)* (1999), 167 F.T.R. 124, 88 A.C.W.S. (3d) 652 at paras. 9-10; *Pashulya v. Canada (MCI)*, 2004 FC 1275, 257 F.T.R. 143 at para. 42.

[30] The applicants do not take issue with the foregoing principles, but submit that the PRRA officer applied the wrong test in assessing the unusual and undeserved or disproportionate hardship. They contend that the officer applied a test of personalized risk and then proceeded to conduct what was essentially a PRRA analysis of risk rather than the broader test appropriate for H&C consideration.

[31] It is not disputed that the test to be applied in the context of a PRRA is much stricter than the one used for the purposes of an H&C application. In the context of a PRRA, risk implies assessing whether the applicants would be personally subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment. An H&C application necessitates the assessment of risk but as one of the factors to determine if the applicants would face unusual and undeserved or disproportionate hardship in the event of a return to his or her country of origin. As this Court stated in *Pinter v. Canada (MCI)*, 2005 FC 296, 44 Imm. L.R. (3d) 118:

> **3** In an application for humanitarian and compassionate consideration under section 25 of the Immigration and Refugee Protection Act (IRPA), the applicant's burden is to satisfy the decision-maker that there would be unusual and undeserved or disproportionate hardship to obtain a permanent resident visa from outside Canada.
>
> **4** In a pre-removal risk assessment under sections 97, 112 and 113 of the IRPA, protection may be afforded to a person who, upon removal from Canada to their country of nationality, would be subject to a risk to their life or to a risk of cruel and unusual treatment.
>
> **5** In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.

[32] While the officer was entitled to rely on the same facts for the PRRA and the H&C assessments, she was required to apply the test of unusual and undeserved or disproportional hardship to those facts, a lower threshold than the test of risk to life or cruel and unusual punishment relevant to a PRRA decision. As I stated in *Ramirez v. Canada (MCI)*, 2006 FC 1404, 304 F.T.R. 136 "…it is perfectly legitimate for an officer to rely on the same set of factual findings in assessing an H&C and a PRRA application, provided that these facts are analyzed through the right analytical prism" (para. 43).

[33] In the case at bar, the officer reiterated the exact same analysis that she conducted for the PRRA in the context of her H&C assessment. Except for the first and the last paragraphs of the H&C assessment, her reasons are identical. Moreover, she collapsed into one test the distinct concepts of "hardship" and "risk", as is apparent in these first and last paragraphs of her risk assessment:

> I turn to the applicants' allegations of risk should they be returned to Lebanon. As such, I look to their personal circumstances and the evidence before me to see if they would face a personalized risk to life or a risk to the security of the person that would amount to being unusual and undeserved or disproportionate hardship if returned to Lebanon.
>
> (…)
>
> The documentary evidence I have reviewed shows that although the situation for all Christians in Lebanon is not ideal, the state is committed to preventing acts of religious persecution towards all faiths, including Christians. The objective evidence shows that religious freedom for Maronite Christians is enshrined in the constitution. Based on the above, I am not satisfied that the applicants would face a

> personalized risk to life or a risk to the security of the person that would amount to being unusual and undeserved or disproportionate hardship if returned to Lebanon owing to their religious beliefs.

[34] Of course, it may well be that the result would have been no different had the officer applied the correct standard. Indeed, the respondent alleges that the officer considered all the allegations of risk advanced by the applicants. That argument, however, begs the question. The officer may well have dealt with the main applicant's fear of arrest, of torture, of being killed or beaten, or with the religious intolerance towards Christian Maronites. But she did not explain why these fears fall short of amounting to unusual and undeserved or disproportionate hardship, even if they do not rise to the threshold of personalized risk to the applicants. There being no certainty that the result of her analysis would have been the same had she applied her mind to the proper test, the file must be returned for a new determination.

[35] There will always be a greater risk of confusion when the same officer rules on a PRRA and an H&C application involving the same individuals. While there may be valid policy and administrative reasons to proceed in this manner, such a course of action is obviously fraught with peril. I cannot but reiterate what I wrote in *Ramirez*, *supra*, at para. 47:

> Officers who rule on both the PRRA and the H&C applications of the same applicants will obviously be at greater risk of confusing the two separate and distinct analyses required by these procedures. Even if well aware of the different rationales underlying these two kinds of applications, they may be drawn to the same conclusions, perhaps inadvertently, if only because it is often difficult, if not conceptually at least in practice, to disregard a previous determination made on the basis of the same facts. This is not to

> say that the practice of having the same officer reviewing both applications should be discouraged. Consistency is also a virtue, and there is no better way to achieve coherence than by having the same officer assessing the same person's PRRA and H&C applications. But extra care should be taken to ensure the two processes are kept separate.

[36] Counsel for the applicants also argued that the officer failed to engage in any substantive analysis of these children's best interests. It is true that the officer's reasons in that respect are rather sketchy, and consists in three short paragraphs describing their ages and schooling. But in fairness, the applicants presented little in the way of submissions or evidence to demonstrate why unusual and undeserved or disproportionate hardship would result if the children were to accompany their parents back to Lebanon.

[37] In light of the limited submissions, the officer's assessment of the children's interests was entirely adequate. In particular, the officer noted the children's limited attachment to Lebanon, their time in the West since 1994, and their success in schooling, as well as the eldest child's recent marriage. Having weighed the factors, the officer determined that they were insufficient to demonstrate unusual and undeserved or disproportionate hardship. The officer was not obliged to conduct elaborate assessments of matters where the applicants themselves failed to.

[38] Aside from the well-established presumption that an officer has considered all of the evidence before him/her, the officer's reasons support the application of this presumption. She explicitly mentioned the children's success in school, their concerns about returning to Lebanon after a long absence and residence in the West since that time, the lack of facility in the Arabic

language and their ties to Canada, including friends. These factors are considered within the factor of attachment or ties to Lebanon referred to by the officer. And while the officer accepted that the children had little attachment or ties to Lebanon, in their particular circumstances, given the presence of parents and extended family that could assist in their integration into the community, these considerations were insufficient to meet the required necessary threshold for hardship. The assessment of weight to be given is a matter within the officer's discretion and expertise.

[39] As this Court has indicated a number of times following *Hawthorne v. Canada (MCI)*, 2002 FCA 475, [2003] 2 F.C. 555 it would elevate form over substance to require an officer to specifically identify the obvious disadvantages faced by children in not remaining in Canada:

> I do not agree with the applicants' submission that the immigration officer was dismissive of the children's interests. Rather, I agree with the respondent's submission that the immigration officer need not have specifically identified the benefits that would be enjoyed by the children if allowed to remain in Canada since, as Justice Décary noted in *Hawthorne*, above, the officer is presumed to know that a child living in Canada with her parents is generally better off than a child living in Canada without her parent. Similarly, it would elevate form over substance, in my view, to require the immigration officer to specifically identify the obvious disadvantages faced by children in not remaining in Canada.
>
> *Sant'anna v. Canada (MCI)*, 2006 FC 1454, 153 A.C.W.S. (3d) 1220.

[40] Finally, the applicants submitted that the officer erred in discounting their establishment in Canada on the basis that it was not sufficiently significant and that it did not go beyond what could be expected of persons living in Canada as long as had. According to their counsel, the guidelines

found in Chapter IP5 of the Immigration Manual do not limit consideration of employment or volunteer work or other forms of establishment as positive factors only if the person has established beyond that which is expected of a person living in Canada for a certain period of time, and the officer had erred in inserting a more onerous test for establishment.

[41] The officer was sensitive to the fact that the principal applicant started a business, that his wife works in retail, that they attend church and that they have made friends in the community. After reviewing the applicants' circumstances as a whole, however, the officer was essentially of the view that their establishment was not of a sufficiently significant nature that the hardship caused from having to apply for a permanent residence visa from outside Canada would amount to unusual and undeserved or disproportionate hardship.

[42] I am unable to find the officer at fault for so concluding. The hardship identified by the applicants amounts to the usual hardship faced by all applicants who establish themselves to a certain degree during the period of time that they pursue various avenues that would permit them to remain in Canada after having arrived without legal status. The refusal of an H&C application will always cause hardship, but this is not the test; otherwise, an H&C application would become the back door entrance to Canada and just another method to remain in Canada.

[43] Further, it is absurd to suggest, as did the applicants, that a delay in processing an H&C application necessarily warrants favourable consideration, or that Citizenship and Immigration Canada is to blame for the applicants' establishment in Canada. The fact remains that the applicants

were required by the *IRPA* to leave Canada when their removal orders became enforceable; they did not do so, and thus received an added benefit to which they were not entitled. As I said in *Serda v. Canada (MCI)*, 2006 FC 356, 146 A.C.W.S. (3d) 1057 at para. 23, "[a] failed refugee claimant is certainly entitled to use all the legal remedies at his or her disposal, but he or she must do so knowing full well that the removal will be more painful if it eventually comes to it".

[44] Moreover, establishment is not determinative of an H&C application. It is only one factor to be considered. The purpose of assessing establishment is to determine whether the claimant is established to such a degree that removal would constitute disproportionate hardship. This Court has repeatedly affirmed the hardship which would trigger the exercise of a favourable H&C a discretionary decision should be something other than that which is inherent in being asked to leave after one has been in Canada for a period of time.

[45] For all the foregoing reasons, I am of the view that the application for judicial review in file IMM-4431-07 should be dismissed, and that the application for judicial review in file IMM-4430-07 should be granted. I have not been convinced that the PRRA officer applied the correct test in her assessment of unusual and undeserved or disproportionate hardship.

[46] Counsel for the applicants proposed two questions for certification:

> Question 1: In light of the Supreme Court of Canada's judgement in *Baker v. M.C.I.*, [1999] S.C.J. No. 39 and the requirement in s. 25(1) of the *Immigration and Refugee Protection Act* that the determination of humanitarian and compassionate applications require the "taking into account the best

> interests of a child directly affected" by the decision, does fairness impose a duty on the immigration officer to inquire about the child's best interests, beyond what is submitted by the applicant?
>
> Question 2: Is it an unreasonable limitation or fetter on the exercise of the humanitarian and compassionate discretion under s. 25 of the IRPA for an officer to discount establishment which does not go beyond that which is naturally expected of the person?

[47] Counsel for the respondent opposes certification of either question. I agree that the first question has already been addressed by the Federal Court of Appeal in the case of *Owusu v. Canada (MCI)*, 2004 FCA 38, [2004] 2 F.C.R. 635 at para. 5, where the Court made it clear that the burden of adducing proof of any claim on which an applicant rests on the applicant. Indeed, I note that a similar proposed question was rejected by my colleague Justice Dawson in *Ahmad v. Canada (MCI)*, 2008 FC 646, [2008] F.C.J. No. 814 (QL).

[48] I also agree with the respondent that the second question does not meet the test for certification as it would not factually be determinative of the appeal. Establishment is but one factor considered by the officer, and it was not identified as a determinative issue. Moreover, the test applied by the officer broadly conforms to the jurisprudence of this Court (see, for ex., *Mooker v. Canada (MCI)*, 2007 FC 779, 62 Imm. L.R. (3d) 311 at para. 15; *Mackiozy v. Canada (MCI)*, 2007 FC 1106, 164 A.C.W.S. (3d) 851 at para. 31).

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed in file IMM-4431-07, and granted in file IMM-4430-07. No question of general importance is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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