Federal Court  Cour fédérale

Date: 20240206

Docket: IMM-5823-22

Citation: 2024 FC 191

Calgary, Alberta, February 6, 2024

PRESENT: Madam Justice Go

BETWEEN:

MAYUR PANKAJ PATEL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of the Immigration Appeal Division [IAD]'s decision, dated May 19, 2022, which granted the appeal of the Minister of Public Safety and Emergency Preparedness [Minister] and found Mayur Pankaj Patel [Applicant] inadmissible for misrepresentation as per subsection 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Decision].

[2] The Applicant is a 25-year-old citizen of India. On September 1, 2018, the Applicant applied for a Temporary Resident Visa [TRV] as a visitor and listed “Tourism” as his purpose of visit. The Applicant entered Canada on November 13, 2018. After coming to Canada, the Applicant helped look after his sister’s mother-in-law during her recovery from a stroke.

[3] In or around March or April 2019, the Applicant attended a job interview with Adamas International Inc. [Adamas], after which he was told he was “good for it.” On April 8, 2019, the Applicant submitted a request to extend his visitor visa, and declared that his original purpose for coming to Canada and his purpose for visiting Canada was a “Family Visit.” The extension was approved on May 17, 2019, and was set to expire on August 17, 2019. Meanwhile, Adamas submitted a labour market impact assessment [LMIA] on April 3, 2019. A positive LMIA was issued on June 3, 2019, and on June 10, 2019, Adamas sent the Applicant an employment offer.

[4] A Minister’s delegate issued a report under section 44 of *IRPA* alleging that the Applicant misrepresented himself in his extension application as his true intention when he made the extension request was to work. The Immigration Division [ID] determined that the Applicant was not inadmissible for misrepresentation.

[5] The Minister’s appeal to the IAD was in writing only and no oral testimony was heard on appeal. The IAD determined that in his original TRV application, the Applicant listed his purpose of visit as “Tourism,” but found he came to Canada to care for his sister’s mother-in-law. Further, the IAD found that the Applicant listed “Family Visit” as his purpose of visit in his April 2019 visa extension application but was pursuing employment at the same time. Based on

these two findings, the IAD determined the Applicant misrepresented his purpose of visit to Canada and that the misrepresentation could have induced an error in the *IRPA*'s administration.

[6] The Applicant seeks judicial review of the Decision. For reasons set out below, I grant the application for judicial review.

II. Issues and Standard of Review

[7] In his written submissions, the Applicant submits several issues challenging the IAD's findings that he misrepresented his purpose of visit in his initial application and in his extension applications. At the hearing, the Applicant reframed the issues as follow:

A. Did the IAD err by failing to engage the duty of candour analysis as required by the Federal Court of Appeal [FCA] in *Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169 [*Sidhu*]?

B. Did the IAD err by failing to properly engage with the ID's decision and reasons?

C. Did the IAD err by failing to properly consider the innocent misrepresentation exception?

[8] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para

85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94, 133-135.

III. Analysis

[10] Paragraph 40(1)(a) of the *IRPA* sets out the law for misrepresentation [see Appendix A].

[11] The test for paragraph 40(1)(a) is two-part. First, there must be a direct or indirect misrepresentation or withholding of material facts relating to a relevant matter. Second, the misrepresentation must be so that it induces or could induce an error in the administration of the *IRPA*: *Kumar v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1512 [*Kumar*] at para 9, *Chung v Canada (Citizenship and Immigration)*, 2023 FC 896 at para 12, *Gautam v Canada (Citizenship and Immigration)*, 2022 FC 550 at para 19.

[12] A misrepresentation is material if it is important to affect the process: *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 at para 25 [*Oloumi*]. The misrepresentation need not necessarily be decisive or determinative: *Younes v Canada (Citizenship and Immigration)*, 2023 FC 1024 at para 32, *Song v Canada (Citizenship and Immigration)*, 2019 FC 72 at para 27, and *Oloumi* at para 36. Furthermore, when the withholding of information is at issue, "surrounding circumstances" must be considered to determine if the withholding is sufficient to render an individual inadmissible: *Sidhu* at para 71.

[13] The case law has carved out a narrow exception based on innocent misrepresentation or honest mistake: *Wang v Canada (Citizenship and Immigration)*, 2020 FC 262 at para 15, *Akintunde v Canada (Citizenship and Immigration)*, 2022 FC 977 at para 40, *Pal v Canada (Citizenship and Immigration)*, 2023 FC 502 at para 24, *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 at para 18. The innocent misrepresentation exception applies where (i) the applicant honestly believed they were not representing a material fact, (ii) the applicant's belief was reasonable, and (iii) knowledge of the misrepresentation was beyond the applicant's control: *Kaur v Canada (Citizenship and Immigration)*, 2023 FC 1454 at para 26.

[14] I will apply these legal principles to my review of the Decision.

A. *Did the IAD fail to engage the duty of candour analysis?*

[15] The duty of candour is set out in section 16 of the *IRPA*, and refers to an applicant's onus of providing complete, honest, and truthful information in every manner when applying for entry into Canada. As the FCA noted in *Sidhu* at para 71:

> In the context of paragraph 40(1)(a) of the Act, the requirement of candour is invoked to assess the "withholding" aspect of the provision. This is a recognition that in certain circumstances there may be an obligation to disclose information in order to avoid a finding that a permanent resident or foreign national withheld material facts relating to a relevant matter that induces or could induce an error in the administration of the Act. It is necessary to consider the surrounding circumstances in order to determine if, in a particular case, the withholding of information is sufficient to render a permanent resident or foreign national inadmissible for misrepresentation (*Bodine v. Canada (Citizenship and Immigration)*, 2008 FC 848, 331 F.T.R. 200, at paragraph 42; *Baro v. Canada (Citizenship and Immigration)*, 2007 FC 1299, [2007] F.C.J. No. 1667 (QL), at paragraphs 15 and 17).

[16] In *Sidhu*, the FCA set out the following three findings, which Justice McVeigh summarized at para 46 in *Canada (Citizenship and Immigration) v Mattu*, 2020 FC 890 [*Mattu*]:

(1) the duty of candour is an overriding principle of the *IRPA*,

(2) there must be reasons given by the decision-maker as to why the duty of candour did not engage in a particular case, and

(3) the reasons why the applicant did not consider undisclosed information relevant were required.

[17] The Applicant argues that according to the third point from *Sidhu*, the FCA emphasized the importance of assessing surrounding circumstances to determine whether the withholding of information renders a person inadmissible.

[18] The Applicant submits that similar errors were made by the same IAD member under similar circumstances as those in *Kumar*. Like the case at hand, the Applicant submits the issues in *Kumar* centred on the IAD's assessment of misrepresentation, and the Court allowed the application, noting the same IAD member's failure to engage the duty of candour analysis and to consider the surrounding circumstances before finding the foreign national inadmissible: *Kumar* at paras 19-20.

[19] In his written submission, the Applicant also asserts there is a limit on the duty of candour. The Applicant did not pursue this argument at the hearing, and in any event, I agree with the Respondent that neither *Mattu* nor *Sidhu* found that there is a limit on the duty of candour. I also agree with the Respondent that the duty of candour is an overriding principle of the *IRPA* that underlies paragraph 40(1)(a): *Sidhu* at para 17.

[20] However, I disagree with the Respondent that no duty of candour was required, citing *Avram v Canada (Citizenship and Immigration)*, 2022 FC 168 [*Avram*] at para 23. I note at para 18 of *Avram*, Justice Roy found the officer in that case did not act unreasonably in concluding the applicant's failure to answer the question correctly was deliberate because "there is no ambiguity at all in the question or in the rest of the questionnaire." Unlike *Avram*, the ambiguity in the TRV application and extension forms was a live issue in dispute before the ID and IAD.

[21] In this case, the ID found the Applicant's testimony credible and found that:

- The Applicant's reasons for applying to stay in Canada were the same for which he originally arrived; namely for a family visit;
- The Applicant did not come with the intention of staying long term and that finding work was not planned;
- At the time he applied for the extension of his visitor's record, the Applicant did so with the intention to remain in Canada for the purpose of a family visit; and
- If the Applicant had an intention of working in Canada one day, that is permitted.

[22] The ID examined whether the Applicant had a duty to disclose the job offer or LMIA application at the time he applied for an extension of his visitor's record, thus misrepresenting himself. The ID member conducted a detailed and extensive analysis on the duty of candour based on the decisions in *Sidhu* and *Mattu* before concluding that there were too many steps removed from an actual change of circumstance to be material to the extension application.

[23] In contrast, the IAD member referenced the duty of candour once, when they noted:

> [16] Counsel for the [Applicant] argues that there is a limit to the duty of candour and cites the case of *Mattu* as authority for this. She

> notes that the [Applicant] selected "family visit" in his TRV extension application signed April 8, 2019. However, the concern raised by the Minister is with the initial TRV application made in September 2018, where the [Applicant] had the option of filling in the purpose for his visit under "other".

[24] The IAD member then went on to find *Mattu* distinguishable because it dealt with failure to disclose a sham marriage. The IAD did not explain why, in the context of this case, the duty of candour and the surrounding circumstances would or would not support a finding of inadmissibility, with respect to either the Applicant's original visa application or his extension request.

[25] The IAD member also seemingly conflated the issue of duty of candour with the "innocent misrepresentation" exception when they rejected the Applicant's argument on the duty of candour by finding the Applicant's purpose of visit to Canada was significantly different from the one stated in his initial application, and that it "does not fall within the category of innocent misrepresentation." In reading the IAD's analysis, I am unable to discern whether the member had considered the duty of candour before rejecting it, or whether they found the "innocent misrepresentation" exception did not apply, when concluding that the Applicant was inadmissible due to misrepresentation.

[26] The IAD's failure to engage in the duty of candour analysis, and its conflation of different legal concepts could well have been a result of the peculiar manner in which the member framed the legal issues before them. After quoting the facts that were not in dispute, the IAD member summarized the "questions" before them as follows:

i) The [Applicant] had a different purpose other than the one he gave to immigration authorities when he first applied to come to Canada on September 1, 2018.

ii) The [Applicant] was obliged to tell immigration authorities that he had made a job application and received a positive response, if not a formal offer, even though LMIA approval had not been completed when he applied for a visitor's visa extension.

iii) The [Applicant's] omission of his highest level of education from his application and incomplete and inaccurate information with regard to his employment history amount to misrepresentation under the [*IRPA*].

[27] The IAD member framed these as "questions" when they read more like findings, although I should add that the IAD ultimately did not find the Applicant misrepresented his employment history. The member then went on to state:

> [9] To my mind, section 40(1)(a) can be broken down into these constituent elements:
>
> i) In this appeal, the withholding of facts;
>
> ii) Whether the facts are material to a relevant matter;
>
> iii) If the answer to the above is yes, whether the withholding could have induced an error in the administration of the [*IRPA*].

[28] Nowhere in the framing of the questions or the constituent elements did the IAD member mention the need to consider the surrounding circumstances as part of the duty of candour analysis, or for that matter, the innocent misrepresentation exception even though it was also an issue raised by the Applicant.

[29] In *Kumar*, Justice Fuhrer also took issue with the member's framing of the issues and pointed out that the member's framework "fails to add the overlay consideration of whether, based on the surrounding circumstances in the particular case, the act of withholding is sufficient to culminate in a finding of inadmissibility under section 40:" *Kumar* at para 14. Citing the FCA in *Sidhu*, Justice Fuhrer further continued at para 14: "this is a balancing exercise that the decision maker must undertake in each case, given the seriousness of an inadmissibility determination."

[30] Like *Kumar*, I find the reasons of the IAD member did not reflect the necessary balancing; the reasons were rather a formalistic application of the framework. The IAD did not engage with the duty of candour and did not consider the surrounding circumstances, and the IAD's reasons – which seemed to conflate two different legal concepts – failed to meet the hallmarks of justification, transparency and intelligibility.

B. *Did the IAD err by failing to properly engage with the ID's decision and reasons?*

[31] The Applicant argues the IAD was required to engage with the ID's analysis, examine the legal error, and provide an explanation, but instead it overturned the ID's factual findings and legal consideration without providing an explanation. The Applicant argues this renders the Decision unreasonable.

[32] The Applicant also argues recent decisions from this Court have found that if the IAD does not hold an oral hearing, the appeal cannot be a true *de novo* appeal, citing a quote from Justice St-Louis in *Verbanov v Canada (Minister of Public Safety and Emergency*

Preparedness), 2019 FC 324 [*Verbanov*] at para 26. The Applicant submits the IAD should have at least explained why it was not adopting the ID's reasons. The Respondent, quoting from the same case, argues that the IAD owes no deference to the ID, nor is it bound by the ID's findings.

[33] Both parties seem to find support in Justice St-Louis' summary of the jurisprudence in *Verbanov* at para 26:

> [26] An appeal before the IAD is a hearing *de novo* in the broad sense and is not limited to the record before the ID (*Yiu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 480 at para 16 [*Yiu*]; *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 at para 10 [*Castellon Viera*]). The IAD can set aside the ID's decision and substitute a determination that, in its opinion, should have been made (subsection 67(2) of the Immigration Act). The IAD owes no deference to the ID, nor is it bound by the ID's findings (*Musabyimana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 50 at para 24; *Yiu* at para 16; *Castellon Viera* at para 12). The IAD must not determine whether the ID correctly or reasonably concluded that a person is inadmissible, but rather whether the person is in fact inadmissible (*Castellon Viera* at para 11). Nonetheless, the IAD should consider the ID's findings where the applicant has not testified before the IAD *(Patel v Canada (Citizenship and Immigration)*, 2013 FC 1224 at para 27).
>
> [Emphasis added]

[34] Other recent cases also confirm the Applicant's position that IAD appeals are not true *de novo* appeals, but are *de novo* only "in a broad sense." As Justice Strickland explained in *Singh Bains v Canada (Citizenship and Immigration)*, 2023 FC 892 [*Bains*]:

> [28] The Federal Court of Appeal has also held that a true *de novo* proceeding is "a proceeding where the second decision-maker starts anew: the record below is not before the appeal body and the original decision is ignored in all respects" (*Huruglica v. Canada (Citizenship and Immigration)*, 2016 FCA 93 at para 79).

> [29] Rule 6(1) of the Immigration Appeal Division Rules, SOR/2002-230 [IAD Rules] in effect when the IAD made the subject decision (the current version of the IAD Rules contain similar provisions: Immigration Appeal Division Rules, 2022, SOR/2022-277, s. 20(2)) requires the ID to prepare the following for the IAD on appeals of admissibility hearings: (a) a table of contents; (b) the removal order; (c) a transcript of the admissibility hearing; (d) any document accepted as evidence at the admissibility hearing; and (e) any written reasons for the ID's decision to make the removal order.
>
> [30] In light of this jurisprudence and IAD Rule 6(1), it is clear that IAD appeals under s 67 of the *IRPA* are not true *de novo* appeals. Or, put otherwise, they are *de novo* only "in a broad sense". The IAD is empowered to make its own determination and, in doing so, it is not limited to reviewing the ID's reasons and the record that was before the ID. The parties can submit evidence on appeal to the IAD and witnesses can testify and be cross-examined, as was the circumstance when the IAD heard the matter that is now before me.
>
> [Emphasis added]

[35] In *Bains*, unlike the case at hand, the IAD held a hearing where witnesses testified. Nevertheless, Justice Strickland found that in considering the appeal, the IAD "must take into consideration the evidence that was before the ID as well as any new evidence submitted by the parties" and that "[b]ased on the totality of this evidence, as well as the ID's reasons, the IAD must determine if the Minister has met its burden:" *Bains* at para 33. I pause to note that in *Bains*, the ID found the applicant had misrepresented and the IAD confirmed the ID's conclusions. However, I do no read Justice Strickland's comment with regard to the IAD's consideration of the totality of evidence and ID's reasons to be limited only to those cases where the IAD confirms the ID's decision.

[36] The nature of the *de novo* hearing before the IAD was also considered by this Court in *Petinglay v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 1371,

where Justice Pentney turned his mind to a similar question as that raised by the Applicant herein. Ms. Petinglay argued that the IAD was required, at a minimum, to explain why it reached the opposite conclusion to that of the ID as it was not a true *de novo* hearing. Ms. Petinglay submitted that the FCA's finding in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 at para 79 [*Huruglica*], although stated in regard to the Refugee Appeal Division [RAD], should be applied to her, citing *Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 [*Rozas Del Solar*]. The respondent, on the other hand, acknowledged that an appeal to the IAD is a *de novo* hearing in a broad sense, but argued the IAD does not owe any deference to the ID, citing *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 [*Castellon Viera*] at paras 10-11.

[37] While Justice Pentney ultimately made no finding on this very issue, having found the IAD erred in its factual considerations of the allegations of misrepresentation, he observed at paras 52-53:

> [52] I would simply note that the decision in *Castellon Viera* was rendered without the benefit of the Federal Court of Appeal's decision in *Huruglica*, or the more recent discussion in *Rozas del Solar*. At paragraph 57 of its decision in *Huruglica*, the Federal Court of Appeal notes the similarity in wording of the powers of the IAD and the RAD to intervene (set out in paragraphs 67(1)(a) and 111(2)(a) of *IRPA*), but does not elaborate on the point. Since then, *Castellon Viera* has been followed and applied, though it has also been noted that the IAD should consider the ID's findings where the applicant does not testify before it.
>
> [53] It is not clear whether an argument based on *Huruglica* was advanced in any of the more recent decisions that have applied *Castellon Viera*, and there are obvious similarities and differences in the wording of the provisions that govern appeals to the RAD and the IAD. Whether or how *Huruglica* or *Rozas del Solar* may alter or refine the analysis on the relationship between the IAD and the ID is better left to a case where the matter is fully argued and necessary for the resolution of the matter.

[38] Like Justice Pentney, I also decline to answer the question of how *Huruglica* may alter the analysis on the relationship between the IAD and ID, as it is neither necessary for the resolution of the matter before me, nor is it fully argued by the parties, in my respectful view. I will however make a few *obiter* observations below with a view to assist the IAD in its redetermination of the matter.

C. *Obiter Comments*

[39] The Applicant raises several other issues with regard to the reasonableness of the Decision. I need not address those arguments as I find the IAD member's failure to engage the duty of candour analysis determinative. My decision not to address these other issues, however, does not connote my endorsement for the rest of the IAD member's findings.

[40] While I have not made any determination on the jurisdictional relationship between the IAD and ID, I would offer two observations arising from the context of this case.

[41] First, as noted above, the ID member conducted a thorough review of the applicable legal principles and engaged in a fulsome analysis that was largely absent in the Decision. Whether or not the jurisprudence confirms, as the Applicant urges, that the IAD should explain why it did not adopt the ID reasons, *Vavilov* requires all decisions to demonstrate justification, transparency and intelligibility: *Vavilov* at para 99. Arguably, when faced with an ID decision that came with detailed reasons in support of its legal and factual findings, the IAD should at least have offered some explanations as to why it reached a conclusion that was completely opposite to that of the ID. Doing so does not mean the IAD would be ceding its jurisdiction to the ID or showing

deference to the latter's decision. Rather, "reasoned decision-making is the lynchpin of institutional legitimacy:" *Vavilov* at para 74.

[42] Finally, the ID in this case found the Applicant to be credible on all issues but one, namely, that it was implausible the Applicant did not know he was offered a job by Adamas. The ID arrived at its credibility findings based on all the evidence, including the oral testimonies of the Applicant and his witness. Notwithstanding it did not have the advantage of receiving oral testimony, the IAD appeared to have overturned some of the ID's positive credibility findings when it found the Applicant was "dodgy and evasive regarding the circumstances of the job interview and offer," which went beyond the single negative credibility finding the ID made regarding the job offer.

[43] The FCA in *Huruglica* confirmed that, in the context of refugee hearings, assessing oral evidence is one area where the Refugee Protection Division [RPD] may enjoy a meaningful advantage over the RAD: *Huruglica* at paras 69-70. The FCA also examined the various scenarios under which the RAD may reject or alter the RPD's credibility findings before concluding that the RAD should be given the opportunity to develop its own jurisprudence in that respect: *Huruglica* at paras 70-74.

[44] Since *Huruglica*, the jurisprudence in refugee law has certainly developed to respond to this question, with this Court requiring the RAD to give notice when it makes new credibility findings. It is also worth repeating Justice St-Louis' comment that "the IAD should consider the ID's findings where the applicant has not testified before the IAD:" *Verbanov* at para 26. Perhaps

the time has also come for the IAD to develop its jurisprudence with respect to the nature of its *de novo* appeal in general, and its assessment of the ID's credibility findings in particular, when the IAD relies solely on the record before it without the benefit of a new oral hearing.

IV. Conclusion

[45] The application for judicial review is granted.

[46] There is no question for certification.

JUDGMENT in IMM-5823-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is returned for redetermination by a differently constituted panel of the IAD.
3. There are no questions to certify.

"Avvy Yao-Yao Go"
Judge

APPENDIX A

***Immigration and Refugee Protection Act*, (SC 2001, c 27)**
***Loi sur l'immigration et la protection des réfugiés*, (L.C. 2001, ch. 27)**

Misrepresentation **40 (1)** A permanent resident or a foreign national is inadmissible for misrepresentation **(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; […]	**Fausses déclarations** **40(1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants : **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; […]
Loss of Status and Removal **Report on Inadmissibility** **Preparation of report** **44(1)** An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister. **Referral or removal order** **(2)** If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**Perte de status et renvoi** **Constat de l'interdiction de territoire** **Rapport d'interdiction de territoire** **44(1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre. **Suivi** **(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

FEDERAL COURT

SOLICITORS OF RECORD

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