Date: 20080718

Docket: IMM-228-08

Citation: 2008 FC 884

Vancouver, British Columbia, July 18, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

MORTEZA MOMENZADEH TAMEH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Morteza Momenzadeh Tameh was found to be inadmissible to Canada on security grounds because of his past membership in the Mujahedin-e-Khalq (MEK), an organization for which there are reasonable grounds to believe has engaged in acts of terrorism.

[2] Mr. Momenzadeh Tameh sought Ministerial relief from the finding of inadmissibility in accordance with subsection 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. His request was denied by the Minister of Public Safety and Emergency Preparedness, the Honourable Stockwell Day, on November 15, 2007.

[3] Mr. Momenzadeh Tameh now seeks judicial review of the Minister's decision, asserting that the Minister erred by failing to consider relevant facts, thus rendering the decision unreasonable.

[4] Mr. Momenzadeh Tameh also says that the Minister breached the duty of fairness owed to him by failing to provide adequate reasons for denying his application for Ministerial relief.

[5] For the reasons that follow, I find that the Minister was not fully apprised of all of the pertinent information relating to Mr. Momenzadeh Tameh's application for Ministerial relief. As a consequence, the Minister was unable to properly assess and balance all of the relevant factors in determining whether Mr. Momenzadeh Tameh's presence in Canada would be detrimental to the national interest, thereby rendering the decision unreasonable. The application for judicial review will therefore be allowed.

Legislative Framework

[6] Before turning to consider the facts of this case, it is helpful to have an understanding of the legislative provisions governing applications for Ministerial relief under *IRPA*, and how these provisions have been interpreted in the jurisprudence.

[7] Mr. Momenzadeh Tameh was found to be inadmissible to Canada under the provisions of paragraph 34(1)(f) of *IRPA*, which provides that:

34. (1) A permanent resident or a foreign national is inadmissible on security	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :

grounds for	
…	…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).	*f*) être membre d'une organisation don=t il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

[8] Paragraph 34(1)(c) refers to organizations engaging in terrorism. Section 33 of *IRPA* provides that:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they *have occurred* are occurring or may occur. [emphasis added]	33. Les faits -- actes ou omissions -- mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils *sont survenus*, surviennent ou peuvent survenir.

[9] As a result, the facts giving rise to the inadmissibility of the individual in question need not necessarily be occurring at the time of the inadmissibility hearing: see *Miller v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2006 FC 912, at paragraph 7.

[10] Once an individual has been found to be inadmissible on one of the bases set out in subsection 34(1), that individual may seek Ministerial relief in accordance with the provisions of subsection 34(2) of the Act, which provides that:

34(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a	34(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger

permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

[11] As I observed in *Ali v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 F.C.R. 485, 2004 FC 1174, a subsection 34(2) inquiry is directed at a different issue to that contemplated by subsection 34(1) of *IRPA*.

[12] The issue for the Minister under subsection 34(2) is not the soundness of the determination that there are reasonable grounds for believing that an applicant is a member of a terrorist organization - that determination will have already been made. Rather, the Minister is mandated to consider whether, notwithstanding the applicant's membership in a terrorist organization, it would be detrimental to the national interest to allow the applicant to stay in Canada: *Ali*, at paragraph 42. See also *Al-Yamani v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 381, at paragraph 12.

[13] That is, subsection 34(2) empowers the Minister to grant exceptional relief, in the face of a finding of inadmissibility that has already been made by the immigration officer: see *Ali*, at paragraph 43 and *Al-Yamani*, at paragraph 13.

[14] Unlike most of the decisions made under *IRPA*, which are made by departmental officials or members of the Immigration and Refugee Board, decisions under subsection 34(2) of the Act must

be made by the Minister him- or herself. In this regard, subsection 6(3) of *IRPA* makes it clear that the discretion to grant an exemption based on national interest under subsection 34(2) is one that vests exclusively in the Minister, and may not be delegated.

[15] To assist in the determination of applications for Ministerial relief, guidelines entitled "Evaluating Inadmissibility" have been developed to aid departmental officials in preparing recommendations for the Minister: see *Naeem v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 123, at paragraph 56.

[16] With this understanding of the context in which Mr. Momenzadeh Tameh's application arises, I turn now to consider the facts giving rise to his application.

Background

[17] The MEK is an Iranian organization whose goal it is to overthrow the current government of Iran and establish a socialist Islamic government in that country. It is listed as a terrorist entity by the Government of Canada for the purposes of Part II.1 of the *Criminal Code*.

[18] Mr. Momenzadeh Tameh first became involved with the MEK in 1979, when he was 18 or 19 years old. He says that his initial activities on behalf of the MEK included writing and distributing MEK literature, writing slogans on walls, and donating funds.

[19] In May of 1982, Mr. Momenzadeh Tameh became the leader of a four-person MEK resistance cell. As a cell leader his duties expanded to include holding demonstrations and hiding MEK members in his home.

[20] Although the MEK has been involved in a variety of violent activities over the years including bombings and the murder of civilians, there is no suggestion in the evidence that Mr. Momenzadeh Tameh was ever personally involved in acts of violence of any sort.

[21] In December of 1982, Mr. Momenzadeh Tameh was arrested by the Iranian authorities because of his MEK activities. He then spent five years in an Iranian prison. Mr. Momenzadeh Tameh asserts that he ended all involvement with the Mr. Momenzadeh Tameh when he was imprisoned.

[22] After Mr. Momenzadeh Tameh's release from prison, he and his family continued to be harassed by the Iranian authorities. In 1990, he was again arrested and was tortured by his jailers who were seeking information about the MEK.

[23] In November of 1993, Mr. Momenzadeh Tameh fled Iran. After arriving in Canada, he sought and obtained Convention refugee protection.

[24] In 1994, Mr. Momenzadeh Tameh submitted an application for permanent residence. As part of the screening process, he was interviewed by a representative of Citizenship and Immigration Canada by the name of Karen Gordon in August of 2001. Following the interview, Ms. Gordon prepared a report which noted that Mr. Momenzadeh Tameh was potentially inadmissible under the provisions section 19 of the *Immigration Act* then in effect, as being a member of a terrorist organization. Section 19 of the *Immigration Act* was the predecessor to section 34 of *IRPA*.

[25] After analyzing the facts and circumstances of the case, Ms. Gordon went on to recommend that Ministerial relief be granted to Mr. Momenzadeh Tameh under the provisions of section 19(1)(f) of the *Immigration Act*, so as to allow him to obtain permanent residency.

[26] Amongst other things, Ms. Gordon's report characterized Mr. Momenzadeh Tameh's involvement with the MEK as "minimal and low-level". The report also noted that Mr. Momenzadeh Tameh did not appear to be a threat to Canadian society.

[27] It is not clear what happened with respect to Mr. Momenzadeh Tameh's application for permanent residency over the next few years. What we do know is that, at some point, the file was transferred to the Canada Border Services Agency for further review in accordance with the provisions of the newly enacted *Immigration and Refugee Protection Act*.

[28] In 2005, a "Briefing Note" was prepared for the Minister of Public Safety and Emergency Preparedness by Alain Jolicoeur, the President of the Canada Border Services Agency with respect to Mr. Momenzadeh Tameh's application for Ministerial relief.

[29] In accordance with the process described in the "Evaluating Inadmissibility" Guidelines, Mr. Momenzadeh Tameh was provided with a draft copy of the Briefing Note, and was given the opportunity to make further submissions in response to the document, which he did. The Briefing Note, along with copies of all of Mr. Momenzadeh Tameh's submissions and Ms. Gordon's report, was then provided to the Minister for his consideration.

[30] After reviewing some of the facts and circumstances surrounding Mr. Momenzadeh Tameh's situation, the Briefing Note concluded with the recommendation that Ministerial relief not be granted to Mr. Momenzadeh-Tameh. In this regard, the document states that:

> The MEK is an organization listed as a terrorist entity by the Government of Canada for the purpose of Part II.1 of the *Criminal Code of Canada*. Mr. Momenzadeh-Tameh was imprisoned in Iran for 5 years for his activities on behalf of the MEK. While Mr. Momenzadeh-Tameh maintains that he was a supporter of the MEK

and not an official member, his activities onbehalf of the Mujahedin do not reflect those of a supporter. His activities included writing and distributing anti-government literature, writing slogans on walls, donating funds, holding demonstrations and hiding MEK members at his home. In May 1982, Mr. Momenzadeh-Tameh was promoted in the organization to leader of a MEK resistance cell. By his own admission, Mr. Momenzadeh-Tameh clearly demonstrated that his role represented more than mere support to the organization.

Although Mr. Momenzadeh-Tameh may not consider himself to be a member of the MEK, his actions can be attributed to furthering the goals of that organization. Furthering the goals of an organization known to have been involved in the acts outlined in section 34 of *IRPA* is integral to maintaining an organization's functioning. In accordance with jurisprudence, it is not necessary that an individual personally commit an act of terrorism or be involved in the management of the organization; it is only required that he or she has knowledge of the essential nature of the organization and that there is an objective manifestation of the agreement to participate in the affairs of the organization. Mr. Momenzadeh-Tameh openly stated that he was aware that the MEK used violence to further their cause. He therefore, had the necessary knowledge of the nature of the organization and through his activities, directly contributed to furthering the goals of the MEK.

While Mr. Momenzadeh-Tameh appears to have established himself in Canada, his membership and activities on behalf of the MEK and his strong allegiance to an organization committed to the use of violence to achieve their political goals outweigh any national interest that would enable CBSA to make a recommendation that Mr. Momenzadeh-Tameh be granted Ministerial relief. Therefore, his presence in Canada is, in our opinion, detrimental to the national interest.

If you agree, Mr. Momenzadeh-Tameh will not be granted permanent residence. However, Mr. Momenzadeh-Tameh is recognized as a Convention Refugee in Canada. There is no evidence at this time to suggest that he is a danger to society, as such, he cannot be removed from Canada pursuant to section 115 of *IRPA*.

If you do not agree and the reasons for your decision are not included in the text above, please provide the rationale for your decision.

[31] On November 15, 2007, Minister Day accepted Mr. Jolicoeur's recommendation and refused Mr. Momenzadeh Tameh's application for Ministerial relief. It is common ground that having accepted the recommendation contained in Mr. Jolicoeur's memorandum, the memorandum must be taken as the Minister's reasons for decision: see *Miller*, previously cited, at paragraph 62.

[32] It is the Minister's decision refusing Mr. Momenzadeh Tameh's application for Ministerial relief that underlies this application for judicial review.

Standard of Review

[33] As was noted at the outset of this decision, Mr. Momenzadeh Tameh raises two issues on this application. He asserts firstly that the Minister erred by failing to consider relevant factors in exercising the discretion conferred on him by subsection 34(2) of *IRPA*. Mr. Momenzadeh Tameh also says that the Minister breached the duty of fairness owed to him by failing to provide adequate reasons for his decision.

[34] Insofar as the merits of the Minister's decision is concerned, a decision to grant or refuse an application for Ministerial relief is a discretionary one, and should thus be accorded significant deference: see *Miller*, at paragraph 42, and *Al-Yamani*, at paragraphs 38 and 39, both previously cited.

[35] As the Supreme Court of Canada observed at paragraph 51 of *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, the standard of reasonableness will generally apply when reviewing the exercise of a discretionary power. This is especially so where, as here, the power conferred on the Minister cannot be delegated, and the Minister himself has considerable expertise in matters of national security and the national interest.

[36] As a consequence, I agree with the parties that the merits of the Minister's decision are to be reviewed against the standard of reasonableness. In reviewing a decision against the reasonableness standard, the reviewing court must consider the justification, transparency and intelligibility of the decision-making process. The court must also consider whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir*, at paragraph 47.

[37] Given my conclusion with respect to the first issue, it is not necessary to address the standard of review with respect to the sufficiency of the Minister's reasons.

Analysis

[38] As was noted in the preceding section of these reasons, a decision to grant or withhold Ministerial relief under subsection 34(2) of *IRPA* is a highly discretionary one. It is up to the Minister to decide the relative weight to be ascribed to various portions of the evidence, and it is not the function of a reviewing court to second-guess the Minister in this regard: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at paragraph 34.

[39] That said, the Minister can only carry out a thorough assessment and balancing of all of the relevant factors if the Minister is fully and fairly apprised of these factors. For the reasons that follow, I am satisfied that this did not happen in this case, with the result that relevant evidence was overlooked by the Minister.

[40] Before turning to review the substance of the Minister's decision against the reasonableness standard, it is helpful to start by reiterating that in an application for Ministerial relief made pursuant to subsection 34(2) of *IRPA*, it is the applicant who bears the onus of satisfying the Minister that his or her presence in Canada would not be detrimental to the national interest: see *Miller*, at paragraph 64, and *Al-Yamani*, at paragraph 69, both previously cited.

[41] As was noted earlier, the "Evaluating Inadmissibility" guidelines have been promulgated to assist the Minister in determining whether the continued presence of an applicant in Canada would be contrary to the national interest. Such guidelines are a useful indicator of what will amount to a reasonable interpretation of the power conferred by section 34(2) of *IRPA*: *Al-Yamani*, at paragraph 70.

[42] The fact that a decision may have been reached in a manner contrary to the directives contained in Ministerial guidelines will be of assistance in assessing whether the decision was an unreasonable exercise of the discretion conferred by the Act: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 72 and *Naeem* at paragraph 56.

[43] While it is by no means necessary for the Minister to address each and every one of the many different factors identified in the Guidelines in every application for Ministerial relief, those factors that are central to the grounds being advanced in support of a particular application must be addressed: see *Al-Yamani*, at paragraph 91.

[44] Section 13.6 of the "Evaluating Inadmissibility" Guidelines explains the concept of national interest in the following terms:

> Persons who have engaged in acts involving espionage, terrorism, human rights violations and subversion, and members of organizations engaged in such activities including organized crime, are inadmissible to Canada. The ground of inadmissibility may be overcome if the Minister of PSEP is satisfied that their entry into Canada is not contrary to the national interest.
>
> Whereas criminal rehabilitation is specific and results in a decision that the person is not likely to re-offend, the concept of national interest is much broader. The consideration of national interest involves the assessment and balancing of all factors pertaining to the applicant's entry into Canada against the stated objectives of the *Immigration and Refugee Protection Act* as well as Canada's domestic and international interests and obligations.
>
> Section 13.7 of the Guidelines provides guidance to departmental officials regarding the preparation of submissions to the Minister in relation to requests for Ministerial relief.

[45] In order to ensure that relevant considerations are addressed in the materials prepared for the Minister's consideration, section 13.7 of the Guidelines stipulates that "In order to assess the current situation regarding the ground of inadmissibility, evidence must be produced to address the questions stated in the following table…".

[46] The Guidelines then go on to list numerous questions that are to be addressed in preparing a recommendation for the Minister in connection with an application for Ministerial relief. After listing the relevant questions to be addressed in a Briefing Note for the Minister, the Guidelines conclude by stating that:

> The recommendation should include a supporting rationale.
>
> The rationale should demonstrate a thorough assessment and balancing of all factors relating to the entry into Canada of the person in accordance with the explanation of national interest as noted in Section 13.6 of this chapter.

[47] Having carefully examined the matter, I am satisfied that notwithstanding the significant deference to be paid to Ministerial decisions of the sort in issue in this case, Minister Day's decision must be set aside, as the rationale provided for refusing Mr. Momenzadeh Tameh's application for Ministerial relief does not demonstrate a thorough assessment and balancing of all of the relevant factors.

[48] By way of example, one of the questions identified in the Guidelines as relevant to applications for Ministerial relief is "Has the person adopted the democratic values of Canadian society?"

[49] In order to answer this question, the Guidelines identify several additional questions to be addressed, including:

- What is the applicant's current attitude towards the regime/organization, his membership, and his activities on behalf of the regime/organization?

- Does the applicant still share the values and lifestyle known to be associated with the organization?

[50] Another question is “Have all ties with the regime/organization been completely severed?” In answering this question, the Guidelines also ask, amongst other things:

- What are the details concerning disassociation from the regime/ organization? Did the applicant disassociate from the regime/organization at the first opportunity?

[51] A review of the Briefing Note provided to the Minister in this case discloses that it fails to fairly address the available evidence on these points.

[52] For example, as concerns Mr. Momenzadeh Tameh’s current attitude towards the MEK, the Briefing Note observes that “Mr. Momenzadeh Tameh indicates that he ended all involvement with the MEK when he was imprisoned.” This statement is true, as far as it goes, but does not provide the Minister with a full or fair summary of the available evidence on this point.

[53] The record suggests that Mr. Momenzadeh Tameh has, over the years, demonstrated a desire to distance himself from the MEK. This is evidenced by the fact that when the MEK endeavoured to re-recruit Mr. Momenzadeh Tameh in 1991, he refused to re-associate himself with the organization. Counsel for the Minister conceded at the hearing that this was a relevant consideration that was not referred to in the Briefing Note.

[54] Further information with respect to Mr. Momenzadeh Tameh's current attitude towards the MEK is contained in Ms. Gordon's report of her August 2001 interview with Mr. Momenzadeh Tameh, which records him as stating that:

> [H]e feels very negative about [the MEK]. He stated that they are wrong and they ruined his life. He stated that he is still against the Regime in Iran because of what they do but that he is also against the MEK. He stated that he did not think that the MEK was any better than the Regime.

[55] Ms. Gordon went on to describe Mr. Momenzadeh Tameh as having been "forthright and cooperative" during the interview, noting that he harboured very strong emotions toward the MEK. It is clear from a review of the report as a whole that Ms. Gordon found Mr. Momenzadeh Tameh's disavowal of the actions of the MEK to be entirely credible.

[56] In recommending that Ministerial relief be granted to Mr. Momenzadeh Tameh, Ms. Gordon elaborated on his current attitude toward the MEK, stating that:

> Subject stated that he no longer supports the MEK and feels very negative toward them. When discussing this topic subject was very adamant about his negative feelings regarding the MEK and stated that the group has essentially ruined his life. He states that he frequently asks himself why he became involved with them initially and in retrospect wishes that he never had. Subject was very emphatic when he spoke about his opinions regarding the MEK.

[57] While it is true that Ms. Gordon's report was attached as an appendix to the Briefing Note, none of the information discussed above was referred to in the Briefing Note. Given the workload of Ministers of the Crown, I share Justice Strayer's view that merely attaching information to a

Briefing Note not will suffice to demonstrate that highly relevant information relating to an application for Ministerial relief was indeed considered by the Minister: see *Kanaan v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 241, at paragraph 4. See also *Soe v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 461, at paragraphs 19-22.

[58] Moreover, even though a decision-maker is not required to mention every piece of evidence considered, the more probative the evidence that is not referred to in reasons for a decision, the more likely a reviewing court will be to conclude that the evidence was overlooked: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* [1998] F.C.J. No. 1425, 157 F.T.R. 35 at paragraphs 14 to 17.

[59] I note that Mr. Momenzadeh Tameh has raised an issue as to the status of Ms. Gordon's report and whether it amounts to a "recommendation" within the meaning of the Guidelines. I do not need to resolve this issue for the purposes of this application. Regardless of whether the document amounted to a "recommendation" or not, it contained clearly probative information relating to Mr. Momenzadeh Tameh's application for Ministerial relief which should have been specifically referred to in the Briefing Note.

[60] Before leaving this area, I would also observe that the impression created by the failure to specifically refer to the evidence discussed above in the Briefing Note is all the more misleading, given the unqualified reference in the concluding paragraph of the Recommendation section of the

Briefing Note to Mr. Momenzadeh Tameh's "strong allegiance to an organization committed to the use of violence to achieve their political goals".

[61] Another relevant area of inquiry identified by the Guidelines relates to whether the applicant's entry into Canada would be offensive to the Canadian public. In order to answer this question, the Guidelines list several additional questions to be addressed, including "Is there evidence to indicate that the person was not aware of the atrocities/criminal/terrorist activities committed by the regime/organization?"

[62] With respect to this issue, the Briefing Note states that "Mr. Momenzadeh Tameh openly stated that he was aware that the MEK used violence to further their cause". The Briefing Note then goes on to state that "He therefore had the necessary knowledge of the nature of the organization and through his activities, directly contributed to furthering the goals of the MEK."

[63] Once again, the information provided to the Minister, while technically true, does not amount to a full or fair summary of the relevant evidence. What is missing from the statement quoted above is any reference to when it was that Mr. Momenzadeh Tameh became aware of the violent tactics of the MEK.

[64] Mr. Momenzadeh Tameh's October 3, 2005 submissions to the Minister specifically address this issue. According to Mr. Momenzadeh Tameh, at the time that he joined the MEK

the organization was a legitimate political party that presented itself as a peaceful political alternative, and not as a terrorist organization.

[65] Mr. Momenzadeh Tameh further stated that it was not until he was imprisoned that he learned of the violent tactics employed by the MEK. It was as a result of this knowledge that he then severed his ties with the organization.

[66] It should be noted that there is some corroboration of Mr. Momenzadeh Tameh's evidence on this point in the independent evidence documenting the evolution of the MEK. That is, the country condition information in the record suggests that although the MEK had resorted to violent tactics in the early 1970's, in the first couple of years after the overthrow of the Shah (that is, the period between 1979 to 1981), the MEK limited itself to non-violent tactics in opposing the Islamic regime that had assumed power in Iran. This was the period in which Mr. Momenzadeh Tameh started working for the organization.

[67] It was not until mid-1981, after a series of attacks by government forces, that the MEK began using violence, including terrorist tactics, in advancing its political agenda.

[68] It was up to the Minister to decide how much weight to attribute to Mr. Momenzadeh Tameh's evidence as to what he knew of the terrorist tactics of the MEK and when he knew it. However, if the Minister was not made aware of this clearly relevant evidence, he could not assess

and balance all of the relevant factors in determining whether Mr. Momenzadeh Tameh's presence in Canada would be detrimental to the national interest.

Conclusion

[69] The failure of the Briefing Note to refer to clearly relevant evidence means that the decision under review lacks the justification, transparency and intelligibility required of the decision-making process. Moreover, having failed to consider and balance all of the relevant factors in assessing Mr. Momenzadeh Tameh's application for Ministerial relief, it cannot be said that the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[70] As a consequence, the application for judicial review is allowed.

Certification

[71] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to the Minister of Public Safety and Emergency Preparedness for re-determination; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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