



UT Neutral Citation Number: [2024] UKUT 00417 (IAC)

**R (on the application of He) v Secretary of State for the Home Department
(Paragraph 276B(i) – Lawful residence)**

**IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

Heard at: Birmingham

Heard on: 27 June 2024

Promulgated on: 20 September 2024

Before:

UPPER TRIBUNAL JUDGE MANDALIA

Between:

**THE KING
on the application of
SHANGPING HE**

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr J Walsh
(instructed by Spencer West LLP), for the applicant

Mr M Biggs
(instructed by the Government Legal Department) for the respondent

J U D G M E N T

For the purposes of paragraphs 276A(b)(i) and 276B(i) of the immigration rules, the leave to remain relied upon to satisfy the requirement for ten years' lawful residence must have been lawful, that is, not obtained by deception or otherwise in breach of immigration laws.

JUDGE MANDALIA

BACKGROUND

1. The applicant is a national of China. The background to the claim is not in issue and is helpfully summarised in the Skeleton Argument settled by Mr Walsh in readiness for the hearing before me.

“2. [The applicant] arrived in the UK on 5 August 2006 using the name of ‘Ming Hui Ou’ and applied for asylum. That application was refused on 3 April 2007. He was granted indefinite leave to remain (ILR) on 29 March 2017 under the Legacy Programme in the name of ‘Ming Hui Ou’. The Applicant’s ILR was revoked under section 76(2) Nationality, Immigration and Asylum Act 2002 on 7 August 2019 as the Applicant had used deception with the Home Office in his applications for asylum and leave to remain. The deception was the use of a false identity, Ming Hui Ou. The Applicant’s true identity is Shangping He.

3. On 1 April 2021, the Applicant applied for leave to remain on the basis of Family Life (he has a British citizen child resident in the UK). This was granted on 30 April 2021, valid to 29 October 2023. Leave has been further extended under the same category.

4. On 6 April 2022 the Applicant applied for ILR on the basis of his long residence in the UK under paragraph 276B of the Immigration Rules. This was refused on 13 September 2022 (and 21 December 2022)...”

THE DECISIONS CHALLENGED

2. It is the respondent’s decision of 13 September 2022, as supplemented by the decision dated 21 December 2022, that is the subject of this claim for judicial review. In the decision sent to the appellant on 13 September 2022, the respondent referred to the requirements for indefinite leave to remain on the grounds of long residence set out in paragraph 276B of the Immigration Rules (“the rules”). The respondent said:

“... although you may have been resident in the UK for a period exceeding 10 years, which includes you relying on a period of SoS Immigration bail from 7 Aug 2019 until your subsequent grant of leave on 30 Apr 2021, information available to the Home Office confirms that any leave you gained and time spent in the UK prior to you being granted family private life leave to remain on 30 Apr 2021 was via deception...”

3. The respondent referred to the prior decision of 7 August 2019 to revoke the grant of ILR and said that the applicant had accrued his length of residence in the UK in full knowledge of his deception. The respondent said that had the decision maker who granted the applicant ILR been aware of the deception, the appellant would not have met the suitability requirements and he would not have been granted ILR under the Legacy scheme. The respondent considered the applicant's deception to amount to a serious attack on the UK's ability to maintain effective immigration control. The respondent referred to the general ground for refusal set out in paragraph 9.8.3A of Part 9 of the rules and concluded that the applicant had used deception in relation to a previous application and the application therefore fell for refusal under the general grounds for refusal.
4. A pre action protocol letter dated 24 November 2022 was sent by the applicant's representatives to the respondent indicating a potential challenge to the respondent's decision. In reply, the respondent issued a 'Supplementary Decision' dated 21 December 2022. The respondent acknowledged that paragraph 9.8.3A is a discretionary ground for refusal and the previous decision did not specifically set out the respondent's reasons for refusing to exercise discretion in favour of the applicant. The respondent set out the reasons for refusing to exercise discretion in favour of the applicant.

THE GROUNDS FOR REVIEW

5. The applicant claimed the respondent erred in refusing the applicant's application for indefinite leave to remain based on long residence on three grounds which can be summarised as follows:
 - i) The applicant accepts the ILR granted to the applicant on 10 February 2011 was revoked by the respondent on 7 August 2019. However, the applicant claims the leave he enjoyed between 10 February 2011 and 7 August 2019 forms part of the 'continuous lawful residence in the United Kingdom' for the purposes of paragraph 276B(i)(a) of the rules.
 - ii) The applicant acknowledges he used deception in a previous application. However, the applicant claims the application for ILR made by him on 6 April 2022 was not an application "for entry clearance, permission to enter, or permission to stay" for the purposes of paragraph 9.8.3A of Part 9 of the rules.
 - iii) It was irrational for the respondent to refuse the application relying upon paragraph 9.8.3A of the rules when the respondent has, on 30 April 2021, granted the applicant leave to remain until 29 October

2023, and did not refuse the application made by the applicant on 1 April 2021 on 'suitability grounds'.

6. Permission to claim Judicial Review was granted by His Honour Judge Rawlings on grounds 1 and 2 only on 31 October 2023.
7. I am grateful to Mr Walsh and Mr Biggs for their clear and helpful submissions, both in writing and at the hearing before me although I have not found it necessary to refer to each and every point which they raised.
8. Before I turn to each of the two grounds upon which permission has been granted, I set out the relevant legal framework.

THE LEGAL FRAMEWORK

THE IMMIGRATION ACT 1971 ("THE 1971 ACT")

9. Section 3 of the 1971 Act provides:

"3. – General provisions for regulation and control.

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act.

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period.

(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely –

...

..."

10. Section 24A of the 1971 Act provides that a person who is not a British citizen is guilty of an offence if, by means which include deception by him, he obtains or seeks to obtain *inter alia* leave to enter or remain in the UK. The offence attracts, on summary conviction a term of imprisonment not exceeding six months and/or a fine. A conviction on indictment attracts a term of imprisonment not exceeding two years and/or a fine. Section 25 of the 1971 Act makes it an offence to facilitate the commission of a breach or attempted breach on immigration law as defined in s25(2).
11. Section 33 of the 1971 Act provides the following definitions:

“... **“immigration laws”** means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands.

“limited leave” and **“indefinite leave”** mean respectively leave under this Act to enter or remain in the United Kingdom which is, and one which is not, limited as to duration”

12. Section 33 (2) of the 1971 Act provides:

“(2) It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws”.

SECTION 76(2) NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002 (“THE 2002 ACT”)

13. Section 76(2) of the NIAA provides:

“Revocation of leave to enter or remain

...

(2) The Secretary of State may revoke a person’s indefinite leave to enter or remain in the United Kingdom if –

(a) the leave was obtained by deception.”

THE IMMIGRATION RULES

14. Paragraph 6.2 of the Immigration Rules provides:

“In these rules

...

‘Breach of immigration laws’ - a person is in breach of immigration laws for the purpose of these rules where the person is an overstayer; is an illegal entrant; is in breach of a condition of their permission; or used deception in relation to their most recent application for entry clearance or permission; and **“previously breached immigration laws”** - a person previously breached immigration laws if they overstayed or used deception in relation to a previous application for entry clearance or permission.

...

Permission to stay’ has the same meaning as leave to remain under the Immigration Act 1971 (and includes a variation of leave to enter or remain and an extension of leave to enter or remain).”

15. Applications for leave to remain in the United Kingdom on grounds of long residence are to be determined in accordance with the rules set out in Part 7

of the rules. Paragraphs 276A, and 276B to 276D of the Immigration Rules provided at the material time (September 2022):

“276A. For the purposes of paragraphs 276B to 276D.

- (a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:

...

- (b) "lawful residence" means residence which is continuous residence pursuant to:

- (i) existing leave to enter or remain; or
- (ii) temporary admission within section 11 of the 1971 Act (as previously in force), or immigration bail within section 11 of the 1971 Act, where leave to enter or remain is subsequently granted; or

...

Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

- (i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

- (ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

- (a) age; and
- (b) strength of connections in the United Kingdom; and
- (c) personal history, including character, conduct, associations and employment record; and
- (d) domestic circumstances; and
- (e) compassionate circumstances; and
- (f) any representations received on the person's behalf; and

- (iii) the applicant does not fall for refusal under the general grounds for refusal.

...

Indefinite leave to remain on the ground of long residence in the United Kingdom

276C. Indefinite leave to remain on the ground of long residence in the United Kingdom may be granted provided that the Secretary of State is satisfied that each of the requirements of paragraph 276B is met.

Refusal of indefinite leave to remain on the ground of long residence in the United Kingdom

276D. Indefinite leave to remain on the ground of long residence in the United Kingdom is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 276B is met.”

16. Finally, Part 9 of the rules sets out the general grounds of refusal. Insofar as is material the rules provide:

““Section 2: Grounds for refusal, or cancellation, of entry clearance, permission to enter and permission to stay

...

Previous breach of immigration law grounds

...

9.8.3A. An application for entry clearance, permission to enter, or permission to stay may be refused where a person used deception in relation to a previous application (whether or not successfully).”

GROUND 1: PARAGRAPH 276B(I) OF THE RULES

17. Mr Walsh submits the leave the applicant enjoyed from 10 February 2011 to 7 August 2019 was valid leave in that it was issued and granted pursuant to the powers of the respondent under section 3 Immigration Act 1971. He refers to the definition of ‘lawful residence’ for the purposes of paragraphs 276B to 276D set out in paragraph 276A of the rules:

““lawful residence” means residence which is continuous residence pursuant to: (i) existing leave to enter or remain...”

18. Mr Walsh submits the subsequent revocation of leave on 7 August 2019 did not operate so that the leave was either void *ab initio* or was a *nullity*. The simple effect of the revocation was to cancel the leave and bring it to an end. The leave remained ‘lawful’ until revoked on 7 August 2019. Mr Walsh refers to the decision of the Supreme Court in *Hysaj v Secretary of State for the Home Department* [2017] UKSC 82. He submits Lady Hale clarified that nullity – which means that the person losing citizenship never actually was a British citizen – will be appropriate only when an applicant applies for citizenship impersonating another real person, who in turn has the characteristics required to get citizenship. By contrast, where an individual uses a false identity created by him (or someone on his behalf) and in that identity he

acquires the characteristics needed to obtain citizenship, as the respondent accepted, the grant of citizenship is valid, albeit that the person may later be deprived of it under section 40 of the British Nationality Act 1981.

19. Mr Walsh submits that by analogy, the ILR granted to the applicant here should be treated as being valid until 7 August 2019 when it was revoked. The ILR was granted to the applicant in accordance with the 1971 Act and remained valid and therefore lawful until revoked.
20. Mr Walsh submits the interpretation of 'continuous lawful residence' in the way he urges does not lead to any absurdity. Paragraph 276B of the rules, he submits, provide an 'amnesty', or an 'indulgence', in respect of those who have resided in the UK for the prescribed period without any requirement that the leave was tied to any particular category of leave. Although the applicant secured ILR in February 2011 outside the immigration rules by deception, the leave can still, rationally, be considered to be 'lawful residence' until revoked. It would be open to the respondent to have regard to the 'deception' when considering whether there are any reasons why it would be undesirable for the applicant to be given ILR when considering the requirement at paragraph 276B(ii) and whether the application falls for refusal under the general grounds for refusal when considering the requirement at paragraph 276B(iii) of the rules.
21. Mr Biggs submits that although paragraph 276A(b) of the rules does not expressly state that leave to remain in breach of immigration laws, and specifically leave obtained by deception, does not count as lawful residence, the language of paragraphs 276A(b) and 276B(i) must be interpreted sensibly and in context, and with a view to the purpose of the rule: *Mahad v. Entry Clearance Officer* [2009] UKSC 16, [2010] 1 WLR 48 at [10]. He submits the 1971 Act makes it clear that a person is in the UK unlawfully if they are in the UK in breach of immigration laws, as defined by section 33 of the 1971 Act. It is apparent, he submits, that a person is in breach of immigration laws, and is therefore unlawfully in the UK, if they reside in the UK with leave obtained by deception.
22. In *Hysaj*, the issue before the Supreme Court was whether the misrepresentations made by the appellants in their applications for citizenship made the grant of that citizenship a nullity, rather than rendering them liable to be deprived of that citizenship under sections 40 and 40A of the British Nationality Act 1981. The appellant there was informed in 2012 that his grant of his citizenship was a nullity because he had obtained British citizenship on a false basis. He sought judicial review of the decision to treat his citizenship as void. The appeal to the Supreme Court was compromised by the parties. The Supreme Court clarified that the proper course was not to

treat the applicant's British citizenship as a nullity but to make an appealable decision to deprive him of the same.

23. Here, the question is not, as Mr Walsh submits, whether the grant of any leave relied upon is 'valid' or a 'nullity'. It is, as Mr Biggs submits, a question of the proper interpretation of the words 'continuous lawful residence' in paragraph 276B(i) of the rules.
24. The principles for the interpretation of the Immigration Rules were referred to by Lord Briggs (with whom Lord Kitchin, Lord Burrows, Lady Rose and Sir Declan Morgan agreed) in *R (Wang) v Secretary of State for the Home Department* [2023] UKSC 21. He said:

"29. It was common ground between counsel that the leading authority on the general principles to be applied in interpreting the Immigration Rules is *Mahad v Entry Clearance Officer* [2010] 1WLR 48 and, in particular, the following two passages in the judgment of Lord Brown of Eaton-under-Heywood JSC. The first is his citation at para 10 from Lord Hoffmann's judgment in *MO (Nigeria) v Secretary of State for the Home Department* [2009] 1WLR 1230, para 4:

"Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."

30. The second is Lord Brown JSC's own contribution, later in para 10:

"Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."

25. The wider context in which the interpretation of paragraph 276B must be considered is that under the statutory framework a person may be given leave to enter or remain either for a limited or for an indefinite period. Paragraph 267B is concerned with those that have established a period of long residence in the UK. It is not, as described by Mr Walsh, an 'amnesty' or indulgence' but recognises a particular category of applicant, that is, those who can establish an entitlement to indefinite leave to remain on the ground of long residence. At the heart of the rule is the requirement that the applicant has had at least "10 years continuous lawful residence in the UK". Paragraph 276A of the rules provides an exhaustive definition of the words 'continuous residence' and 'lawful residence' (see Dyson LJ (as he then was) in *MD (Jamaica) v Secretary of State for the Home Department* [2010] EWCA Civ 213, para.25), but not 'continuous lawful residence'.

26. By operation of s3 of the 1971 Act, a person who is not a British citizen shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of or made in accordance with the 1971 Act. A person may be given leave to enter the United Kingdom (or, when already here, leave to remain). A person who therefore has an entitlement to be in the UK in accordance with the 1971 Act (or any other Act) or by operation of the rules, is lawfully in the UK.
27. Section 24A provides that a person is guilty of an offence if, by means which include deception by him, he obtains or seeks to obtain, *inter alia*, leave to enter or remain in the UK. As Mr Biggs submits 'residence' with leave to remain that has been obtained by deception is therefore unlawful. Similarly they are in the UK in breach of immigration laws as defined in paragraph 6.1 of the rules.
28. Obtaining leave to remain by deception entails being in the UK unlawfully, and also constitutes a breach of immigration law for the purpose of the offence created by section 25 of the 1971 Act. In *R. v Dhall (Harpreet Singh)* [2013] EWCA Crim 1610, the appellant appealed against his conviction following his guilty plea to a charge of assisting unlawful immigration by the preparation and submission of fraudulent high-skilled worker extension applications to the United Kingdom Border Agency in respect of Indian nationals who had limited leave to remain in the UK. He was charged with an offence contrary to s25(1) of the 1971 Act. Fulford LJ said, at [20]:

"... Mr Seymour conceded – in our view wholly accurately – that when this appellant submitted the false documents to the United Kingdom Border Agency, he did an act which facilitated the commission of a breach of immigration law by those individuals who were not citizens of the European Union and whose applications for an extension of leave, in due course, were granted. It was accepted that he knew or had reasonable cause for believing that he was facilitating the commission of a breach of immigration law (viz . sections 1 and 3 of the Act) by the applicants who fell within that category (thereby committing an offence under section 25). Mr Seymour conceded that as regards being in the UK ("to be in the State") for the purposes of section 25(2) , there is no distinction between (a) an applicant who, having originally been lawfully in the UK, secured an extension of leave by means which included deception (e.g. for present purposes, this was facilitated by submitting a false application or documents), and (b) an applicant who, having originally been lawfully in the UK, remained in this country after the expiry of his leave (e.g. for present purposes, his continued presence – which had become unlawful – was facilitated by another). Mr Seymour acknowledged there was no arguable basis for submitting that the former situation was not capable of being covered by the definition of an immigration law. That concession was expressly influenced by the decision in *R v Javaherifard* [2005] EWCA Crim 3231; [2006] IAR 185..."

29. Paragraph 276B(i) prescribes in clear terms the requirement for 'continuous lawful residence'. It is the period of continuous lawful residence imposed by the rules that is the springboard to the application. There is no reason not to give the language of the rule anything other than its plain and ordinary meaning. It is implicit that the period of ten years' residence must be 'continuous' and 'lawful'. The question here is whether leave granted but subsequently 'revoked' is nevertheless 'lawful'.
30. Paragraph 276A(b)(i) of the rules defines lawful residence as "residence which is continuous residence pursuant to (i) existing leave to enter or remain...". Mr Walsh submits the applicant's residence in the UK during the period that he held ILR, albeit obtained by deception, remains continuous residence pursuant to existing leave to enter or remain. The difficulty with that submission is that it leads to the absurdity that it is to treat the fruits of the deception as something that is lawful.
31. With the wider statutory and legal context in mind, and given the purpose of the relevant rules, the respondent and Parliament simply cannot have intended paragraph 276A(b) and 276B(i) to mean that residence in the UK that is unlawful and amounts to a criminal offence under the statutory scheme, is treated as lawful residence. When interpreted purposively and in context, lawful residence must, as Mr Biggs submits, exclude leave obtained by deception, and therefore unlawfully. Any other interpretation of the rule would be absurd. It would be to treat someone who is otherwise in the UK unlawfully and is potentially guilty of a criminal offence as being lawfully resident in the UK. As Lord Sales (with whom Lord Reed, Lord Leggatt and Lord Stephens agreed) said in *R. (PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] 1 WLR 2594, at [43]:

"The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used..".

Added to that, here, the rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used.

32. If a person is in the UK in breach of the immigration laws or previously breached immigration laws because they used deception in relation to their most recent application for entry clearance or permission or used deception in relation to a previous application for entry clearance or permission, it would be odd to say that none the less, the person is present lawfully in the UK for the purpose of calculating the ten year period under paragraph 276B(i)(a).

33. Properly construed, the rule is concerned to define “lawful residence”, which cannot sensibly extend to unlawful residence under the statutory scheme. It follows that it was implicit in paragraphs 276A(b)(i) and 276B(i) of the rules in effect at the material time, that the leave to remain relied upon to satisfy the requirement for ten years’ lawful residence must have been lawful, that is, not obtained by deception or otherwise in breach of immigration laws.
34. Here, the respondent noted that although the applicant may have been resident in the UK for a period exceeding 10 years, the time spent by the applicant in the UK with ILR between 10 February 2011 and 7 August 2019 was obtained by deception and with full knowledge of the deception. The applicant’s presence in the UK during that period was not ‘lawful’. It follows that the applicant’s residence in the UK while he held ILR was not lawful residence for the purposes of paragraph 276B(i) of the Immigration Rules.

GROUND 2: PART 9, PARAGRAPH 9.8.3A OF THE RULES

35. Mr Walsh submits the respondent was also wrong to rely upon the discretionary ground for refusal set out in 9.8.3A of Part 9 of the rules. He submits the applicant did not use deception in any of the circumstances contained in the rule (i.e. permission to enter, stay etc). Mr Walsh submits that unlike other routes to ILR set out in the rules, paragraph 276B acts as, what he describes as an ‘amnesty’ or ‘indulgence’ for those who have resided in the UK for the prescribed period. It is perhaps unsurprising therefore, Mr Walsh submits, that the general grounds for refusal in Part 9 of the rules do not extend to applications for ILR under paragraph 276B of the rules.
36. In reply, Mr Biggs submits it is uncontroversial that the applicant used deception in respect of a previous application. He submits the applicant’s claim that paragraph 9.8.3A of the rules does not apply because an application for ILR under paragraph 276B is not an application for “permission to stay”, is simply misconceived. I agree.
37. As I have already set out, by operation of s3(1)(b) of the 1971 Act, a person who is already in the UK may be given leave to remain for a limited or for an indefinite period. For present purposes, indefinite leave as defined in section 33 of the 1971 Act is simply leave which is not limited as to duration. “Permission to stay” is defined in paragraph 6.2 of the rules and has the same meaning as leave to remain under the 1971 Act. There is no qualitative distinction, or difference in kind, between limited leave and indefinite leave under the 1971 Act. They are both forms of leave to remain. There is no reason why an application for ILR under paragraph 276B should be treated any different to any other application for ILR. It is for all intents and purposes an application for leave to remain under the 1971 Act or for permission to stay under the rules. An application for ILR under paragraph 276B of the rules is

therefore also an application for “permission to stay” for the purposes of paragraph 9.8.3A of the Immigration Rules.

38. Paragraph 9.8.3A expressly provides that an application for permission to stay may be refused where a person used deception in relation to a previous application, whether or not successfully. It would as Mr Biggs submits be absurd if paragraph 9.8.3A did not apply to those seeking ILR given that the reasons underling the rule apply with greater force to those seeking indefinite leave to remain than to those seeking merely limited leave to remain. It makes no sense whatsoever that those seeking ILR pursuant to paragraph 276B of the Immigration Rules should be able to rely upon deception used in a previous application for leave, when those seeking a less permanent status cannot.
39. It follows that it was open to the respondent to have regard to the discretion to refuse the application made by the applicant under the general grounds for refusal. In the decision dated 21 December 2022 the respondent considered the matters relied upon by the applicant. The respondent noted that the applicant knowingly practiced deception previously by withholding his true identity and said that in all the circumstances the respondent does not deem it appropriate to apply discretion in favour of the applicant and grant indefinite leave to remain. The applicant does not challenge the reasons given by the respondent and the decision to refuse the application because the applicant does not meet the additional requirement in paragraph 276B(iii) was plainly open to the respondent.
40. I therefore dismiss the claim for Judicial Review.

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