AGF Arbeitsgemeinschaft der deutschen Familienorganisationen e.V.

The Right to Family Reunification – The European Directive and national implementation in the current discussion

AGF Expert Meeting on 22 June 2012

On the occasion of the current European debate, experts from politics, administration, associations and research discussed the European Directive on family reunification from the family point of view.

Background

Families whose members come from non EU Member States are subject to the European regulations on family reunification. The relevant EU Directive stipulates under what conditions the reunification of family members from third countries can take place. They pursue the goals of facilitating family reunification in the EU and maintaining existing family ties. Thereby, not only is so-

Directive 2003/86/EG, Preamble, Art.4:

"Family reunification is a necessary way of making family life possible. It helps to create socio-cultural stability facilitating the integration of third-country nationals in the Member State."

cio-cultural stability created and the integration into the country of immigration facilitated, but as well as that a family life is made possible, something which goes without saying for most families.

The Directive on the right to family reunification applies to:

- Non EU citizens, („third-country nationals"), who legally reside in a Member State and wish for their non EU-citizen family members to join them, as well as
- Citizens of certain EU Member States, who have not already exercised their right to freedom of movement but wish to reunite with their family members from third countries.

Family reasons form a core aspect of immigration. One of the most important reasons behind immigration to Germany is immigration which takes place via family reunification. Over 23 percent of total immigration results directly from family reunification. However, this trend is declining, due not least to parallel developments such as the expansion of the EU laws governing freedom of movement.

In 2007, based on the European provisions in force, Germany's Immigration laws were revised. The then introduced German language exam places great hurdles in front of many families. As a result thereof, couples are forced to live long periods separated from each other, even in situations where they have children. Indeed, for grandparents from non EU Member States it is nigh on impossible to take care of their grandchildren residing in Germany, or to be cared for themselves in the periphery of their children. According to the German legal position, grandparents do not belong to the core family and as a result, can rarely join their families. In other states, too, the national rules for family reunification are severely criticised as being a massive interference with the unalienable right to family life.

Many governments of the Member States are, vice versa, demanding more restrictive European regulation. The EU Commission appealed for a discussion on the Directive, not only due to the above but also because the European Directive is being differently interpreted between the Member States themselves. The framework of this discussion provided the opportunity for, not just the Member States, but also NGOs and further stakeholders to state and explain their positions.

The AGF expert discussion on family reunification followed up on this debate. Representatives from politics, administration, academia, as well as from European associations discussed the application of family reunification in the Member States, its consequences for families and the necessary action required.

Results and Conclusion

Family perspectives need to be in the foreground.	Families have a right to family reunification. A self determined life should be made possible for them. Therefore, their perspectives need to be placed in the foreground.
Increase in restrictive regulations	On the whole, there is a trend towards further restrictions among the Member States. Germany, Austria and the Netherlands are its pioneers. Family reunification is being further connected with immigration control and integration policy.
Apprehensions in relation to quantity and integration	Family reunification is often seen as being difficult to control and therefore problematic immigration. Above all, the quantity of family members to join with their family is a subject up for discussion, as well as the suspected integration problems and socio-economic attributes of the immigrating family members.
Negative, individual cases as benchmark for restrictions	The subtle fears in terms of possible fraud lead to generalisation of individual, distinct cases - which further burdens the families. Studies, however, show that actual abuse of the system is very limited.
Narrow definition of „family"	The definition of „family" continues to be narrowed, to the extent that siblings, grandparents and grandchildren are excluded from family reunification. The continued expansion of the domestic family definitions does not find an equivalent in immigration law.
Couples are forced to marry and then being suspected of a „fake" marriage	The realities of family constellations are hardly taken into account. Cohabitation without a marriage certificate, as well as other forms of family are not considered. Instead, marriage is a requirement for reunification, which in turn forces couples to marry. Subsequently, such couples are then exposed to the suspicion of having a „marriage of convenience".
Certain prejudices towards families are produced and strengthened via reunification measures	Traditional family roles and images as well as intra family dependencies are partially facilitated by the implementation of the national regulations, while at the same time, immigrants themselves are being accused of such practices.
Women in particular are placed at a disadvantage	Women in particular are placed at a disadvantage via the restrictive regulations. A lack of day-care facilities for children creates further difficulties for female migrants to participate in the required integration and language courses. In this respect, a gender specific analysis is clearly necessary.
Pre-entry-language tests are completely controversial	Compulsory pre-entry-language tests are used by Germany, Austria, the Netherlands and Great Britain. They are legally and politically the most controversial measures. Integration courses after arrival are, on the other hand, basically accepted.
Further inquiries are necessary	Further research regarding sensible and functional sanctions for infringements is needed, as well as regarding the violations themselves in detail. Altogether, the motives behind the restrictive application of the Directive need to be thoroughly investigated and increasingly addressed by the NGOs themselves.
Interpreting the Directive rather than renegotiating	In the European debate a strong tendency stands out in clear opposition of a new discussion on the EU Directive, but, on the other hand in support of interpretative guidelines

The Right to Family Reunification in Germany

*Input by **Dr Christian Klos**, head of the department for Immigration law in the Federal Ministry of the Interior and subsequent discussion.*

Dr Klos presented the implementation of the family reunification Directive in Germany and clarified the position of the German federal government in relation to the potential revision. Points of discussion were notably the compulsory language test, fraud prevention and the current legal developments in Europe.

The situation of family reunification

The family reunification of third country nationals in/to Germany is subject to different rules, depending on whether or not they are reuniting with Germans, citizens of the European Union or citizens from third countries. The reunification with citizens from an European Member State (except Germany) is not subject to the currently discussed Directive on family reunification. In these cases there are notably fewer requirements for the reunification.

However, the reunification to Germans is, in general, only possible for the core family, i.e. for the spouse and minors, as well as custodial parents. Also the required language acquisition must be proven prior to entry. Dr. Klos confirmed that this leads to a so called "reverse discrimination". Citizens from other EU Member States are placed in a better position in comparison to German citizens. Further entry requirements apply in cases where the reunification of third country nationals to join other third country nationals is concerned (for example proof of income and residence permit).

There are exceptions to the language acquisition requirement for family members from certain so called „privileged states", for example the USA, Canada, New Zealand, Israel and also for highly qualified professionals via the EU "blue card". The immigration of a skilled labour force is desirable according to Dr. Klos and would be further supported by the possibility of easier family reunification. According to political decisions, immigration law allows for differences in treatment between individuals or groups of states.

The Language Test

The obligatory language test as a requirement of reunification for third country nationals has been in place since 2007. The language abilities required by this test correspond to the lowest level A1 of the general European reference framework and accounts for an active vocabulary of approximately 300 words as well as a passive vocabulary of approximately 600 words. Dr. Klos agreed that the language test presented a hurdle which can lead to delays in the family reunification. This was however a conscious political decision in order to ease the integration of the immigrating family members and also as a means of avoiding the development of parallel communities. At the same time, this requirement should also curb dependencies in particular of women joining their families in Germany.

One of the most controversial requirements where family reunification is concerned, is the acquisition of language abilities in the third member country of the family member

Dr. Klos also highlighted that those joining family members gave an overall positive assessment of the language acquisition requirement. According to a Rambøll study, over 88 percent of the participants found this to be a sensible measure. Problems are however posed by the transitional periods that could occur, in some cases, between the successful language acquisition in the country of origin and the subsequent language and integration course in the country of reunification. These integration courses are of such importance to the German Federal government that since 2005 they have been further supported with a total of over one billion Euro.

It was expressly pointed out by the participants that the study quoted merely asked if the language acquisition would be helpful for further life in Germany. This ho-

wever, does not imply that the 88 percent are in favour of such language tests. Nor does it present evidence that the desired objectives of integration have in reality been achieved. Informative evaluation results are urgently required in this area.

A further problem is presented by the fact that certain people simply do not have the possibility of acquiring the required language test as a result of lack of access to courses. Here, Dr. Klos referred to the German "hardship case" clauses, which release people with disabilities and those with other restrictions from the obligatory language test. He further acknowledged however that the language test could still present a challenge for other people and indeed, difficulties could not be completely ruled out. In principal, learning the German language would be possible even without the support of the Goethe Institute, although a temporary stay in the next bigger town might possibly be required. However, there is no duty for the state to provide guarantee for a language course. Thus, in principle everyone is responsible themselves for the language acquisition. Still, courses should particularly be available where the demand is high.

As a result of the costs, systematically weak infrastructure in the country of origin, a lack of access to what's on offer as well as a result of varying educational requirements, the language acquisition is delayed in many cases of family reunification

The language test as a requirement for reunification is currently being discussed, both on political as well as on legal basis. Dr. Klos also pointed out that in the opinion of the German federal government the test is compatible with article 7(2) of the European Directive on family reunification, as well as with the existing EU association agreement with Turkey. No opposing highest court jurisprudence on the matter currently exists.

The decision of the ECJ (European Court of Justice) in the Dereci case, in which a Turkish man wished to join his Austrian wife, was not based on a language test. The Federal Government is convinced in their legitimate continuance of the language tests, even when faced with the doubts expressed by the European Commission.

Fraud and Abuse

The existing rules regarding family reunification in Germany should not only promote integration, but also counteract arising instances of abuse and fraud.

Dr. Klos emphasized that individual case reports identify the phenomena of a "forced marriage" or a "marriage of convenience" as significant. In these cases reliance on the provisions of family reunification is contrary to their statutory intention. Furthermore, there are corresponding regulation gaps within the Directive on family reunification. Germany together with 7 other states which include France and Spain among others, will take action on the European level in relation to these issues.

The participants pointed out that according to the survey the suspected cases of misuse of the Directive compromise approximately one percent. Dr. Klos emphasised that the states are authorized to establish general conditions for entry and residence. The necessary individual case assessment is conducted by the German consular offices.

Germany's position on the revision of the existing EU Directive

In addition to the discussion on the revision of the substance of the EU Directive, the question as to whether a fundamental revision should be carried out or "additional notes on interpretation" would be preferred, arises. The European Commission, as well as the participating stakeholders, currently prefer the creation of an interpretive document. In general, there is a fear of a much more restrictive Directive in case of are-opening.

According to Dr. Klos it is almost impossible via such interpretive guidelines, to realise the need of action identified by the stakeholders. Directives naturally leave states plenty of scope for implementation. They create a legal framework with the ECJ as supervisor of state compliance. Interpretive guidelines would have absolutely no binding effect on states.

The EU commission with its' „interpretation assistance" should help to ensure that the goal of the Directive on family reunification shall no longer be undermined.

Matthias Petschke, head of the European Commission's Representation in Germany, emphasised in this context, that the European Commission is in contact with all stakeholders and that the viewpoints in the wake of the EU consultation as well as the general positions of the NGOs from the 15th of May 2012, shall play an important role in the revision of the Directive. The decision to have an „interpreting" document is based on the recommendations of the participating stakeholders and is in many other areas a very normal procedure. These guidelines on interpretation are legally unobjectionable and shall follow the principles of the important ECJ decisions. These planned interpretive guidelines should, above all, ensure the correct application and implementation of the Directive.

Within the discussion, especially concerning proportionality and appropriateness of measures, Germany has been called upon to take a closer look in order to ensure that the goals of the European Directive on Family Reunification are not undermined. In this respect, consideration also needs to be given as to which measures are possible where government violations against the European Regulation on Family Reunification occur.

Among the participants the question was finally posed as to why Germany, in relation to the language tests and the association agreement with Turkey, continues to wait on the ECJ judgment, while Austria on the other hand, would, in the same position, already act. A precedent setting case would be necessary; however, it will indeed never come. As has been previously witnessed in the Netherlands, States, when facing such a possible fundamental decision, issue a visa and thereby conclude the concrete legal case. Dr. Klos commented, that the price of a general precedent setting case would be a long wait for a visa for an individual. However, violation of contract proceedings could also be considered. The Austrian case Dereci does not call for any direct, legal action in Germany.

An Overview of Family Reunification in the EU: Austria

*Input by **Albert Kraler**, Researcher and head of the research program at the International Centre for Migration Policy Development (ICMPD) in Vienna. Albert Kraler participated in the international study on the subject of migration and currently coordinates the research project „Family Reunification – a barrier or facilitator of integration".*

Kraler illustrated the growing discussion on family reunification in the EU and in this respect reported on the recent adjustments of the corresponding regulations in Austria.

Family Reunification: An obstacle to integration?

According to Albert Kraler, family related migration in Austria has become a central point of controversy in the debate concerning migration and integration. On the one hand it is a form of immigration which is founded on human rights, and which can, to a certain extent, be hardly controlled by the state. On the other hand, family reunification has become one of the quantitatively most important forms of legal immigration.

Family reunification is one of the problematic forms of migration. Policies in this area often follow the fear of an uncontrollable reunification and apprehensions as regards misuse.

According to Kraler, the debate reveals the problems at three various levels: the quantitative dimension regarding the restricted controllability of the joining family members, suspected integration problems as well as social characteristics from family migrants.

Following the period of the recruitment of guest workers, family migration has become the most important form of immigration for third country nationals. However, Kraler highlighted that family reunification still only involves a comparatively small amount of people. The political context is nevertheless commanded by the fear of uncontrollable family migration and a general suspicion of abuse.

Immigrant families would often be regarded as a „dysfunctional system" with integration problems especially in the areas of education and upbringing of the second-generation immigrants, co-ethnic marriage tendencies and different values and norms. Family migrants would primarily be attributable to have a low education and low professional qualifications. As a result of this general perception, many migrants are expected to remain unemployed after arrival and therefore claim social welfare payments. The comparison to economically motivated migration lead toan increase in social selection, even in cases of family reunification. Reunification as an intrinsic value is thereby marginalized.

Kraler also pointed out, that these problems of perception regarding family migration have resulted in numerous and mostly restrictive reforms since the 1990's. In a process of the, „travelling of ideas", Member States have adapted discussion topics and measures from each other.

Family Reunification in Austria

Austria, in its three biggest reforms from 2005 until 2011, has also adopted legislation from other Member States, substantially from Germany and the Netherlands.

Austria tries to control the immigration via family reunification with socio-economic selection and obligatory integration measures.

The majority of applications for family reunification concern the reunification to Austrian citizens, who, like Germans in Germany, are also subject to a so called "reverse discrimination". There is basically a quota system in place in Austria that controls the total immigration.

In 2005 significant restrictions were undertaken in the settlement and residence legislation (NAG). With the establishment of a uniform minimum rate of income, the existing income requirements were thereby increased.

In 2012 a couple must be able to prove a net income of € 1.221, and in addition € 125,72 per child. Furthermore, since 2009 the costs of living as well as regular credit repayments shall also be counted on top of this. According to Kraler, these minimum rates of income requirements present the biggest hurdle for family reunifications.

In order to prevent abuse in the form of forced marriages or child marriages, the Austrian government increased the minimum age of spousal reunification to 21 years in 2009.

In two steps in 2003 and 2011, the language requirements were considerably raised. According to a so called "integration agreement" the level A2 has to be reached after having lived in Austria for two years. For a permanent residence in Austria the language level B1 is required. Language abilities to the level A1 are already required prior to entry. This places a difficult hurdle in particular for the less educated migrants.

Subsequent to the judgement of the ECJ Turkish family members are no longer subject to the restrictive entry conditions.

In contrast to Germany, the Dereci case lead to an administrative order in Austria. As a direct reaction to the ECJ judgement and due to the association agreement with Turkey, all Turkish migrants are exempted from the tests and prerequisites which normally are demanded, as long as they demonstrate willingness to work. A change in legislation or an information campaign did not, however, result from the decision.

A Lack of Legal Security for Families

The numerous restrictive measures which it has come to in Austria in the last few years has, according to Kraler, resulted in an increasingly complex legal situation, which presents massive problems for the Austrian authorities as well as for the applicants. A further problem is created by the narrow definition of "family" where the reunification of third state nationals, to whom no reunification of parents or adult children is possible. The reunification of siblings is in general not even provided for unaccompanied minors.

Generally, the families are facing the problem of a long duration of the proceedings, which currently last approximately nine months and which are not purposefully controlled by the authorities. The process takes even longer for unaccompanied minors, according to NGOs at least 2 years. The provision of the necessary documents as well as the operations of the embassies as "guardians of entry" further complicates the situation for the families.

The Austrian regulations are making permanent cohabitation more difficult.

With regard to the integration agreement after entry into Austria, Kraler also noted significant deficiencies. Since the introduction of pre-entry language tests, a literacy course is no longer available afterwards. The impact of language tests before entry still lack clear evaluation. However, it is already possible to deduce that there has been a decline in applicants from Turkey. Due to the lack of possibilities for childcare or of courses offered at suitable times, particularly mothers of little children are often hindered to attend integration courses. Since 2003, a clause exists in Austria that allows to revoke the residence permit in case of non-compliance with the integration agreement. There has been no case to date in which this clause has actually been applied. A revocation of a residence permit would generally also not be possible according to Article 8 of the ECHR (Protection of family and private life). However, in these cases no further permanent residence permit will be granted.

An Overview of Family Reunification in the EU: The Netherlands

*Input by intervention of **Betty de Hart**, Lecturer at the Law Faculty of the University of Nijmegen, research associate in the university's own Centre for Migration Law*

In her presentation, Betty de Hart described the application of the European Directive on family reunification in the Netherlands, as well as the changes planned by the government to migration law and the impacts of such on the affected families.

Income and Language Requirements

90 percent of family reunification in the Netherlands constitutes reunification to citizens of the Netherlands. Yet, efforts have been made to reduce the influx of family members and to control it in terms of socio-economic factors and desired family models. Correspondingly, the regulations are continually increasing in austerity as are the requirements for migration:

The restrictive interpretation of the Directive in the Netherlands often prevents cohabitation as a family.

The income and language requirements are some of the highest in the EU. On top on this, an increasing intensification of the requirements is planned.

The required migration income level for applicants was set in 2004 at 120 percent of the Dutch social minimum income(currently € 1,156 net/month). This led to a 37 percent decrease in reunification with a particularly noticeable reduction in applications from Turkish women. The applicants had to put all their forces into earning more money, which naturally affects their health, family life and personal education as a result. This required high level of income has been strongly criticised by the EU and in 2010 following the Chakroun decision, the level was finally reduced to 100 percent. Since the 1st of July 2012, it amounts to € 1,572,70 gross/month.

In addition to the income requirements a minimum age for spousal reunification was set at 21 years of age, in 2004. In 2006 the Netherlands introduced compulsory pre-entry language and integration tests. The required language efficiency was increased in 2011 from level A- to level A1. From the year 2010, further integration requirements have to be complied with after entry in order to gain permanent residency.

With the introduction of the income and language requirements, the number of migrants up until 2009 fell by approximately 40 percent. A strong decline is particularly noticeable in those applicants from Morocco and Turkey.

Immigration and integration policy are being joined together- this mainly results in an increased burden on the families affected.

According to de Hart, the Dutch government is planning further increases in regulation austerity. These include the limitation of family reunification to the „core family" members, the introduction of a one year waiting period up until family reunification as well as a 5 year waiting period after marriage up until allocation of an individual residence permit. To date, also non-married couples or couples without an official registration of their same sex partnership and, under certain conditions, grandparents could be reunited. This would no longer be possible if the plans were implemented. However, same sex couples may receive an entry visa for their marriage in order to avoid their discrimination, since a marriage in the foreign country is often not possible.

Generally there are many exceptions in the Netherlands and varying requirements for various nationalities. This applies mainly to migrants with a Turkish citizenship, because of the association agreement. Thereby, it is often difficult to recognise a clear logic behind the regulations in Dutch residency law.

Integration Test

As of 2006 an integration test including a language test is to be carried out in the country of origin of the applicant before family reunification. There are no clear re-

gulations as to who can prepare applicants for the test and thereby provide them with the required knowledge. Betty de Hart critically noted that this offer is left to the open market.

With the law brought in 2006, the integration tests abroad have been widely privatised. The preparation is left to the open market and the immigrating family members must bear the costs. The state is merely responsible for conducting the tests.

The introduction of these tests not only leads to a decline in the applicants in total, but indeed also to the removal from selection of those migrants with low education. This test poses problems in particular for those who do not have access to the Dutch embassy, or who come from another culture of writing or who have very little experience with computers. De Hart emphasised that the decline does not take into account those persons who do not apply due to problems with the test in the first place. Despite these well known difficulties, the requirements of the integration test were further intensified in 2011.

If a person fails the additional integration test, which has to be passed within three years after entry, he or she in turn will not receive a permanent residence permit. Added to this, the social benefits of this person will also be reduced. Furthermore the Netherlands are planning in the future to remove the residence permit of those who do not successfully integrate. However, it remains unclear as to how this could be practically implemented.

High administration costs in the Netherlands prevent a lot of families from immigrating to reunite with their families.

On the whole, the applications for a permanent residency permit have declined from 28,000 in the year 2008 to 10,000 in the year 2011.

Fees

For many families the high costs of immigration to the Netherlands pose a further obstacle. The fees are supposed to cover the entire costs for the administrative process of the immigration. The fee for a long term visa for example is € 1,250. Adding the language and integration courses, the costs per application amount to approximately € 5,000. EU citizens on the other hand merely pay an administration fee of € 40 for their immigration.

The Dutch government has not reacted to date, to the ECJ judgements, that stated these fees as not permissible.

Denial of Family Reunification

The denial of family reunification to EU Member States with third country nationals is increasing. This is an express tendency in the Member States which reflects the presumption, that marriages to foreigners are generally considered marriages of convenience.

A particularly illustrative example is the procedure concerning the treatment of refugees: The immigration of children of refugees is only possible with great difficulty (between January and June 2011 there has been a reported 97 percent denial in such cases).

Also it is problematic that parents from third country states with children in the Netherlands have no right to family reunification.

The position of the Netherlands on the European Directive

The Netherlands have been attempting to campaign for more restrictive changes to the European Directive on Family Reunification, among the other Member States for quite some time now. However, this suggestion was not supported, among others due to the fact that further legislation would need to be changed in order to introduce the changes suggested by the Netherlands. On the Netherlands national level, due to the current political situation, there appears to be no changes to the restrictive legislation in sight.

The previous plan of the Netherlands to only allow family reunification every 10 years, has, as reiterated by de Hart, no longer been pursued. However, this proposal has not been removed from the table as the government also mentioned it in their response to the Greenpaper. Future developments will depend on the results of the elections for a new government on the 12th of September 2012.

The European Consultation Process on the Right to Family Reunification

*Input by **Paola Panzeri**, policy officer at the Confederation of Family Organisations, in the European Union (COFACE).*

Paola Panzeri gave a brief overview of the current debate on the right to family reunification at the EU level and furthermore, reported on the current status of the consultation process.

Standpoints of the governments and NGOs

The most current implementation report on the Directive for family reunification dates back to 2008. Accordingly, the EU Commission with its EU Green Paper, in November 2011 presented the question of opening and reviewing the Directive, as well as the question concerning the necessary regulatory requirements of family reunification. During the consultation deliberations, the Netherlands was the single Member State which actively wanted to open the guideline. The other Member States expressed a preference for „soft" European regulatory mechanisms in order to make possible changes.

On International Family Day over 70 NGOs appealed for the protection of the family life of migrants and refugees.

There were unanimous views regarding the structuring of family reunification among the NGOs that participated in the consultation. In furtherance thereof, on the 15th of May a joint appeal was issued, which were signed by 75 NGOs in Europe and has received considerable attention within the European discussion, in particular from, among others, Cecilia Malmström, the EU Commissioner for Home Affairs.

Paola Panzeri gave an inside view of the „Integration Forum", that took place at the end of May. There, the majority of the present government representatives did not favour a re-opening of the guideline. Nonetheless, they above all else highlighted the abuse of the Directive on family reunification. Individual, distinguished cases were being cited as a basis for necessary changes. Panzeri reported that this highly prejudicial discussion also influences the public's image of family reunification. Thereby, ever increasing standards of entry into countries are being set, which, to a certain extent, are not even achieved by the states own citizens.

What kind of Europe do we want to live in?

The general director for Home Affairs of the EU commission, Stefano Manservisi, has presented himself at the "Integration Forum", as being fundamentally open for discussion, results however appear to be uncertain. The Commission has indicated that no opening of the Directive shall follow, but interest definitely exists concerning better implementation of the guideline. The guidelines goal, to support family reunification shall be retained, without any doubt. The Commission is firmly convinced that the decision making powers of the various Member States is often overstepped. The interpretations of the Directive should not become a barrier to family reunification.

The European Commission wishes to continue to support the furtherance of family reunification.

The interpretation of the Directive by various Member States should not become a barrier to reunification.

Panzeri suggested that, despite the positive approach of the EU Commission, the pressure emanating from the Member States should not be underestimated. In this respect, it would be urgently necessary that the NGOs continue to work further on the topic of Family Reunification. This correspondingly calls for more precise questions as regards data and information.

Further Information can be found under:
http://ag-familie.de

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