

IBRAHIM MOHAMED SHERIFF NOOR v ATTORNEY GENERAL (1979) Z.R.  
183 (H.C.)

HIGH  
BWEUPE,  
29TH  
1978/HN/551

COURT

MARCH,

1979

J.

Flynote

Immigration and deportation - Deportation order - Whether courts have jurisdiction to go behind face of deportation order and query validity.

Immigration and deportation - Deportation order - Whether Minister bound to give reasons for order.

Immigration and deportation - Deportation - Residents - Whether s. 22 (1) of Immigration and Deportation Act applies to residents.

Headnote

The applicant sought a declaration that the deportation order issued against him by the Minister under s. 22 (1) of the Immigration and Deportation Act was bad in law and therefore null and void. It was established that the applicant had been a holder of a Zambian resident permit since 1963. The Minister declared his presence in Zambia "inimical to the public interest" and he was served with a notice to leave the country within forty-eight hours as a prohibited immigrant. Representations were made to the Minister on two occasions under s. 24 (1) but were rejected.

In his application the appellant asked the court to determine whether the provisions of s. 22 (2) of the Act applied to him and whether the Minister had acted lawfully in deeming him as a person whose stay in the country was inimical to the public interest.

**Held:**

- (i) Courts have jurisdiction to go behind the face of a deportation order and if reasons given are not proved, queries as to its validity can be made.
- (ii) The Minister is not bound to give reasons for the deportation under s. 22 (2) of the Act. However courts can intervene if a prima facie misuse of power is established, and the Minister will then be required to give an answer.
- (iii) The applicant lawfully gained the status of an established resident and the Minister's declaration under s. 22 (2) that his presence in Zambia was inimical to the public interest was ultra vires that Act.
- (iv) Section 26 (1) of the Immigration and Deportation Act empowers the Minister to deport a person from Zambia where that person has been sentenced to a term of imprisonment by the court.
- (v) The provisions of s. 22 (2) of the Immigration and Deportation Act did not apply to the applicant.

**Cases referred to:**

- (1) R. v Chilemba (1964) Z.R. 116.

(2) R. v Governor of Brixton Prison, ex parte Soblen, [1963] 2 Q.B. 243.

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**Legislation referred to:**

Immigration and Deportation Act, Cap. 122, ss. 22 (2), 24, 26 (1).

For the plaintiff: L.P. Mwanawasa, Mwanawasa & Co.

For the defendant: S.C. Heron, Senior State Advocate.

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**Judgment**

**BWEUPE, J.:** The applicant seeks a declaration that the decision purportedly made by the Minister of Home Affairs in exercise of his discretion under s. 22 (2) of the Immigration and Deportation Act, Cap. 122, was bad in law and therefore null and void and that the defendant should be restrained from deporting the applicant from Zambia by reason of the Minister's decision on 8th February 1977. In so doing he asks the court to determine the following questions:

- (a) Whether the plaintiff is a person to whom the provision of s. 22 (2) of the Immigration and Deportation Act under which he was so declared apply; and
- (b) Whether the Minister had acted lawfully in deeming the plaintiff as a person whose stay in Zambia was "inimical to the public interest".

On the 8th February 1977, the Minister of Home Affairs declared the applicant's presence in Zambia to be "inimical to the public interest," under s. 22 (2) of the Immigration and Deportation Act, Cap. 122. In consequence thereof a notice to leave Zambia within forty-eight hours as a prohibited immigrant was served upon the applicant on 30th September 1977. Representations were made to the Minister on two occasions under s. 24 (1) of the Act but were rejected. In the affidavit filed in support of the application the applicant deposes that he has been ordinarily resident in Zambia since 1963 and that he is the holder of a resident permit No.S. 2418/73 issued to him by the Department of Immigration at Lusaka on 13th February, 1974. Paragraphs 6 to 21 reads:

"6. That the events giving rise to my deportation are as follows: On Saturday the 9th September 1976, at about 1900 hours while I was waiting in my car for the arrival of my vegetable consignment from Kenya at the Lusaka International Airport I was approached by Mr Kamana an Immigration Officer who was accompanied by another man who was introduced as a detective police officer. The said Mr Kamana after asking me what was I doing at the Airport requested me to produce my Import Licence for the vegetables. After showing him my Import Licence Kamana asked me to accompany him to the house of his superior, Mr Tilasi and I agreed.

7. That on arrival at Mr Tilasi's house and after being introduced, Mr Tilasi asked me to show him my Import Licence and when this was done, he then asked me to produce my Resident's Permit. At the time, all I had was a photostat copy of the Permit and Mr Tilasi then took me to his office at the Immigration Headquarters where he prepared in my presence a "Notice to Appear Before an Immigration Officer" which he served on me and he requested me

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to appear before himself within 7 days with the original copy of my Residents' Permit together with 'original documents which warranted the issue of the said' Resident Permit by which he explained that any document showing that I had been in Zambia since 1963, would suffice e.g. UNIP Card. A copy of the said Notice is now produced and shown to me as Exhibit 'IMSN 3'.

8. That I reported before Mr Tilasi on 16th September 1976, when I gave him my said Resident Permit together with my UNIP Card and an invoice of certain personal items bought by me in Zambia sometime previously. He kept these document and told me to report back on 23rd September 1976.

9. That on 23rd September 1976, Mr Tilasi told me to go back and that he would write to me when he had completed his investigations into the manner by which I had been issued the Resident's Permit.

10. That on the evening of 28th October, 1976 while I was at the Ndola Airport I was arrested by Police Officers who told me that they were arresting me on Orders from Lusaka Police. I was taken to Ndola Central Police Station where I was detained in cells until the following day when I was driven to Lusaka at the Central Police Station there.

11. That at Lusaka Central Police Station the Officer who dealt with me was Detective Inspector Ngulube. I asked him for the reason of my arrest and he could not tell me except to ask me whether I had given any money to Mr Tilasi. When I refused he accused me of lying and proceeded to asking several questions including the following to which I answered as follows:

	<i>Questions</i>	<i>Answers</i>
Did you meet Tilasi. .	. .	Yes at his office.
Did Tilasi ask you about anything	Yes, he asked me when I	came to Zambia.
Didn't you promise to meet Tilasi at some Bar within Lusaka	No in fact I don't even drink	
Didn't you meet Tilasi anywhere else	No	

12. That on 30th October 1976 my Advocate Mr Mwanawasa came to see me at Lusaka Central Police Station and he told me that he had spoken to Mr Ngulube who said that he was to charge me with Official Corruption for which I was to appear before the Subordinate Court on Monday 1st November 1976.

13. That later that day, Mr Ngulube and I drove to Ndola where he searched my house and took my National Registration Card together with correspondence from the Ministry of Home Affairs in connection with my application for a Resident Permit as well as Zambian Citizenship.

14. That we returned to Lusaka the same day and on arrival he released me from his custody saying that I had no case to answer

but that he would take me to Mr Tilasi who would decide what he wanted to do with me. He returned all the documents taken by him at Ndola. When we saw Mr Tilasi he asked me to see him the following morning at his office. When I reported to Mr Tilasi the following morning he asked me to go away and told me that he would contact me if there was any need.

15. That prior to this incident on 12th October 1976 my wife and I were served with a Notice to appear before an Immigration Officer. I saw my advocates at Ndola who advised me to see the Regional Immigration Officer and gave me a letter dated 12th November 1976, to take with me a copy of which is now shown and produced to me as Exhibit 'IMSN 4'. This time we saw Mr Ngulube, Immigration Officer to whom we gave all the documents he wanted from us except my Resident's Permit which I told him was still with Mr Tilasi at Lusaka.

16. That on 30th November, 1976 my advocates acting on my instructions wrote to the Chief Immigration Officer inquiring when my Resident Permit would be returned and for a letter confirming the fact that Mr Tilasi was keeping the Permit a true copy of the said letter is now shown and produced to me as Exhibit 'IMSN 5'.

17. That there was no reply to that letter but in or about end of December, I left for Kenya to attend my mother's funeral and did not return until middle of September 1977. I am however informed by my advocates and verily believe that Mr Tilasi wrote to them on 17th March 1977 advising that I could see Mr Kamana at Ndola to provide me with the 'necessary papers' that I might require. A copy of his said letter is now shown and produced to me as Exhibit 'IMSN 6'.

18. That upon seeing my advocates and being advised of the said letter, I went to see Mr Kamana at the Ndola Immigration Office and asked for my papers. He told me that he had no papers to give me but that he was going to detain me at Kansenshi Prison pending arrangements for my deportation contending that my travel documents were not in order.

19. That after personal representations, my advocates on 27th September 1977 filed an Originating Notice of Motion for the issue of a Writ of Habeas Corpus at Ndola High Court in Cause No.1977/HN/623 which was to be heard by the Honourable Mr Justice Moodley on 6th October 1977 had it not been for the fact that my advocates withdrew it after I had been served with the said Notice to Prohibited Immigrants and Deeming Declaration on 30th September 1977 when I was also released from detention at Kansenshi Prison.

20. That following the service of the said documents my advocates on 1st October 1977 appealed to the Minister on my behalf in terms of Section 24 of the Immigrant Act. A copy of their said letter is now shown and produced to me as Exhibit 'IMSN 7'. My advocates received a reply from the Permanent Secretary

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dated 29th November 1977 advising that the appeal had been unsuccessful. A copy of the said reply is now produced and shown to me as Exhibit 'IMSN 8'.

21. That on my instructions my advocate Mr Mwanawasa went to the Ministry of Home Affairs at Lusaka to make personal representations on my behalf where I am advised by him and verily believe that he was advised to lodge a second appeal to the Honourable Minister of Home Affairs. A copy of my advocate's second appeal on my behalf dated 5th January 1978 is now shown and produced to me as Exhibit 'IMSN 9'. To date there has been no reply

to the said appeal."

The Senior State Advocate, Mr Heron has filed an Affidavit in opposition of which paras. 3 to 5 reads:

"3. That I have in my custody a file No. N18/70, subject matter Ibrahim Mohamed Sherrif Noor, belonging to the Immigration Department of The Republic of Zambia.

4. That from that file I am now producing herewith a true copy of a letter dated 15th November 1976 addressed to the Honourable A.M. Milner, M.P., Minister of Home Affairs by Mr A. Simataa, Chief Immigration Officer, the said copy of the letter is shown to me and produced as 'Exhibit A'.

5. That I also produce from that file a copy of a letter dated 24th November 1976 addressed to Mr A. Simaa, Chief Immigration Officer, Lusaka, by Honourable A.M. Milner, M.P., Minister of Home Affairs, the said copy of the letter is shown to me and produced as 'Exhibit B'."

For easy reference "Exhibit A" referred to in Mr Heron's affidavit reads:

"CONFIDENTIAL

The Honourable AM Milner, MP,  
Minister of Home Affairs,  
P.O. Box 1862,  
Lusaka

Re: IBRAHIM MOHAMED SHERRIF NOOR

The above named person is a Kenyan national born at SIALO, Kenya in 1946. Mr Noor holds a certificate of status as an established resident which was issued to him on 18th February 1974.

2. In August this year our Crime Intelligence Unit here received information to the effect that the above named person had obtained his certificate of status as an established resident on the strength of forged documents and that he did not qualify for Zambian residence status by virtue of having entered the country (Zambia) after 31st December 1963.

3. In order to confirm the reports the Unit instituted investigations into how he obtained his certificates of status as an established resident.

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4. On 9th September, 1976 he was intercepted at Lusaka International Airport by the Unit. He was on the same day brought to this office where he was issued with Immigration Form 2 to report to Immigration within seven days in order to produce the original copies of his documents which warranted the issue of a certificate of status to him. The purpose for the production of such documents was to prove their genuineness because it was not possible to prove forgery in the absence of the original copies.

5. After he was issued with the said documents by Mr BS Tilasi the Investigating Officer, he made a request of wanting to know Mr Tilasi's house or possibly meeting him privately in town. Consequently Mr Tilasi refused to accept such appointment.

6. On the expiry of the seven days said above Mr Noor reported at Mr Tilasi's office with an excuse that he was unable to produce the documents in question due to the illness of his

wife which resulted into him being unable to look for the same in his house. He was on that day given a further period of seven days.

7. When the seven days elapsed he sent his friend Mr Musha a Zambian to report to Mr Tilasi's office with an excuse that his wife was still ill. Mr Tilasi gave further extension of seven days. When this seven days expired, Mr Noor failed to report to Mr Tilasi's office.

8. However, four days later on 21st October 1976 Mr Musha was again sent to Mr Tilasi's office with a request for further extension but this time Mr Tilasi ordered Mr Musha to leave his office in order to go and bring Mr Noor. Mr Musha then promised to do so the following day.

9. On 22nd October 1976 in the morning Mr Noor reported to Mr Tilasi's office with some of his documents leaving behind voters card No. 8070/145 which was a centre of our investigations because earlier investigations had proved that the same belonged to MISS TAITAS ANNE of House No. C11, Chifubu, Ndola. When he was asked as to why he had left it behind, he said that he had failed to find it. But when Mr. Tilasi also asked him as to whether the card was his, he confessed to say that it was not his. Mr Tilasi then asked him to go back to Ndola in order to fetch it.

10. As he was leaving the office he proposed to meet Mr Tilasi at his Hotel Room, at Lusaka during lunch hour. He also mentioned that he was going to tell Mr. Tilasi the truth as to when he entered the country and where his documents came from.

11. Consequently since Mr Tilasi was suspicious about such a meeting he requested the Senior Crime Intelligence officer Mr M. Muyunda to make arrangements with CID to provide the necessary cover. The coverage arrangements were made but when Mr Tilasi met subject at the place said above between 1300 and 1330 hours the recording system failed to materialise because it was not possible to get a room where such machines could operate.

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However, Mr Tilasi re-arranged the meeting to take place in the evening after he was offered a bribe of K400.00 to enable him drop investigations and destroy some of the records on the file.

12. Mr M. Muyunda was briefed the same day at 1415 hours and he made the necessary arrangements with his officer Mr Musonda to provide the necessary coverage for an arrest.

13. At 1830 hours Mr Tilasi met Mr Noor along Kafue Road as arranged. He was bribed with K400.00 which is in my safe. During the hand over Mr Noor confessed he had entered the country for the first time in 1966 and that he was then working as a driver. He also revealed that the documents he produced were obtained from his friends and that the purpose of the money was to enable Mr Tilasi drop the case because the certificate was obtained improperly. The conversation was then being recorded in a tape which is now being kept by Mr Musonda at Force Head-quarters.

14. After Mr Noor handed over the money Mr Tilasi drove to the spot where the arresting was to take place but to his disappointment the arresting officers were still seated in their vehicle contrary to the arrangements and as a result they failed to keep up with him as he had to get into his car and drive away. They tried to follow him there but all in vain.

15. However, on 27th October, 1976 he was arrested in Ndola by our newly opened Crime Intelligence Unit at our Ndola Regional Office and was handed over to the Police the same day on instructions from our Unit there. Police in Ndola brought him to force Head-quarters

where all his criminal charges were dropped because of insufficient evidence.

16. Lack of evidence came as a result of the failure of the Police to arrest him on the act of bribery and also the none availability of the original voters card which the Police failed to fetch from his house when they conducted a search on 30th October 1976.

17. From the foresaid information it has been agreed upon that subject be recommended for deportation and that K400 in question now in my safe be paid to Government Revenue. The reason for such action is to bar him from entering Zambia any more in order to carry out such illicit activities on our officers. In this respect I should be grateful if subject would be deemed Prohibited Immigrant in terms of Section 22 (2) of the Act, Cap. 122.

A Simataa,  
CHIEF IMMIGRATION OFFICER

c.c. The Senior Crime Intelligence Officer,  
Force Headquarters,  
LUSAKA"

The learned Senior State Advocate, Mr Mwape has contended:

(a) that the court has no power to go behind the order of deportation made by the Minister;

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(b) that the Minister is not bound to give reasons for his decision; and

(c) that there was no obligation on the part of the State to file an affidavit in opposition.

In *R. v Chilemba* (1964) ZR at p. 116 it was held that courts have jurisdiction to go behind the face of a deportation order and query its validity. S. A de Smith, *Judicial Review of Administrative Action*, 3rd Edn, puts the matter as follows at p. 256:

"Hitherto Courts have held that they cannot go behind the Statement by a competent authority (in the absence of proof of bad faith) that it was satisfied that the statutory condition for the exercise of the power existed. This is now not law and the position is that if prima facie grounds can be established for the proposition that the Authority could not have been so satisfied, a Court will be entitled to hold the act or decision invalid unless the authority itself persuades the Court that it did in fact genuinely form the opinion which it claims to have held."

Paragraph 1009 p. 522 of Halsbury's Vol. 1, 3rd Edn also states:

"1009. The Secretary of State may also make a deportation order if he deems it to be, conducive to the public good to do so. The exercise of the Secretary of State's discretion in making a deportation order can not in general be interfered with by the Court. It is an executive and not a judicial Act.

But there are dicta which support the view that in very exceptional cases the Court has

power to go behind an order for deportation or for arrest and detention pending deportation ..."

It seems to me that there is now that school of thought supported by judicial dicta in *R. v Chilembe* (1) and *R. v Brixton Prison Governor ex parte Soblen* (2) that the law at present is that courts have jurisdiction to go behind the face of deportation and if reasons given are not proved the courts have also jurisdiction to query the validity of the deportation order made by the Minister. Hence Mr Mwape's first submission would fail.

I agree with Mr Mwape's second argument that the Minister is not bound to give reasons under s. 22 (2) of the Act but as to his third submission that there was no obligation by the State to file an affidavit in opposition S.A. de Smith at pp. 129 and 251 *Judicial Review of Administrative Action*, 3rd Edn, has expressed the following views:

"If no reason for an administrative decision are preferred at all, it does not follow that the Courts are powerless to intervene, for if a person seeking to impugn such a decision establishes a prima facie of misuse of power by the administrative authority failure by that authority to offer any answer to the allegations may justify an inference that its reasons were bad in law or that it had exercised its powers for a legally inadmissible purpose."

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I hold the view that there was no error by the State in filing an affidavit in opposition. This was done in an honest attempt to persuade the court from making an inference that there has been a misuse of a discretionary power or that it has exercised its powers for a legally inadmissible purpose. The question at stake is, however, as to whether the Minister acted *intra vires* the act in exercising his discretion in making the order thereon. The affidavits filed on both sides have to be scrutinised to find the answer. The affidavit purporting to persuade the court filed by Mr Heron, the Senior State Advocate, has, in my view, no evidential value because he has not stated that the facts contained in "Exhibit A" are true. The contents of "Exhibit A" are based on what Mr Simataa was told by Mr Tilasi. Neither Mr Simataa nor Mr Tilasi has been called to give evidence. The tape which is alleged to have been recorded relating to the conversation between Tilasi and the applicant at the time the alleged bribe of K400.00 was made, has not been produced despite the fact that it is still in the custody of Mr Musonda at Force Headquarters in Lusaka. Nor has Mr Musonda himself been called to give evidence. Even if Mr Heron had deposed to the truthfulness of Mr Simataa's letter the mere production of the letter whose contents are based on information given in the dark by Mr Tilasi to his Chief Immigration Officer who also in turn related it in dark to the Minister of Home Affairs would have served no useful purpose to the court.

Nevertheless in his last para. 16 Mr Simataa concludes:

"16. From the foresaid information it has been agreed upon that the subject be recommended for deportation and that the K400 in question now in my safe be paid to Government Revenue. The reason for such action is to bar him from entering Zambia any more in order to carry out such illicit activities on our officers. In this respect I should be grateful if subject would be deemed Prohibited Immigrant in terms of Section 22 (2) of the Act, Cap.



122."

And the Minister replies on 24th November 1976:

"May I refer to your Confidential Minute dated 5th November 1976 reference No. S. 2418/73 concerning a Mr Ibrahim Mohamed Sheriff Noor.

2. Your report makes very sad reading indeed. I cannot understand how the Police failed to arrest Mr Noor when they had sufficient evidence that he was corrupting an Immigration Official. I will follow up this part of the report with those concerned.

3. After having read your report I agree that Mr Noor be deported and steps will be taken against Mr Tilasi. He is not fit to be in the Department. I thank you for bringing this matter to my attention."

It is clear from the above quoted Minister's letter that what prompted the Minister's action was the recommendation made by Mr Simataa that the applicant should be deported because of the alleged assertion of Mr Tilasi that the applicant had given him K400.00 as a bribe. The court is now asked to determine whether on the evidence before it the applicant's presence in Zambia would be said to be inimical to the public interest.

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I have already held that Mr Simataa's letter (Exhibit A) has no evidential value other than that it purports to tell the court what motivated the Minister of Home Affairs to declare the applicant's presence to be inimical to the public interest. It has also purported to give the background as to what led the immigration officials to open a file on the applicant. However, its contents cannot be treated as rebutting the applicant's affidavit. In that affidavit which has not been challenged the applicant has established that he is a holder of a resident permit No. S. 2418/73 obtained on 13th February 1974, and that he obtained it by virtue of the fact that he came to Zambia in 1963. He further states that in that same year he obtained a UNIP card which he produced as evidence to establish his residence in Zambia for over four years. He also obtained the national registration card and made an application for Zambian citizenship. All these documents (a) resident permit; (b) UNIP Card; (c) national registration card; and (d) application for citizenship were deposited and are still with the immigration officials.

There is no evidence to challenge the applicant's affidavit to the effect that he obtained the resident permit lawfully. Section 2 of the Immigration and Deportation Act, Cap. 122 defines "established resident" as meaning:

"In relation to any date, a person who is not a citizen or prohibited immigrant and who has been ordinarily and lawfully resident in Zambia or the former protectorate of Northern Rhodesia or both for the period of four years immediately proceeding that date."

and in *Radebe* (1972) ZR at p. 216 Doyle, C.J., had this to say:

"In order to be an established resident one has to reside in Zambia lawfully for a period of four years immediately prior to the date in question."

There is no question that the applicant obtained his resident permit by using forged documents because that has not been established by evidence in court. It is, therefore, my view that for all intents and purposes the applicant has lawfully gained the status of an established resident. I am, therefore, satisfied that the applicant has not violated the provisions of the Immigration and Deportation Act. Prima facie, therefore, the Minister of Home Affairs declaration that the applicant's presence in Zambia was inimical to the public interest was *ultra vires* that Act.

It may be contended that the fact that there was an allegation that the applicant bribed the Immigration Official, Mr Tilasi, would perhaps be justified for the Minister to act under s. 26 (1) of the Immigration and Deportation Act. For easy reference that section reads:

"26. (1) After receiving particulars under Section 33 of the Penal Code, the Minister (unless the term of imprisonment is set aside on appeal) at expiration of the sentence pursuant to a warrant under his hand deport such person from Zambia."

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I must say that this section empowers the Minister to act where a person has been sentenced to a term of imprisonment by the court. This is not the case here. The applicant, according to the evidence before this court, came to Zambia in 1963; married to a Zambian; has children; obtained UNIP Card in 1963; a holder of a resident permit and national registration card; and has applied for citizenship. It would, in my view, be contrary to natural justice that a person who has been in Zambia for fifteen years married with children and is an established resident, would be thrown out of the country on information provided to the Minister in the dark corner by an official who might have had an interest of his own to serve. It is trite law that such a person should have been given an opportunity to answer the charge before a court of law. It behoves those in the corridor of power, therefore, to strive to be more cautious and adhere to the axiom of equitable principle that no man shall be condemned unheard.

For the foregoing reasons I hold that the exercise of the Minister's discretion under s. 22 (2) of the Deportation Act was *ultra vires* that Act as the applicant was an established resident who had been in Zambia for fifteen years. In the circumstances, I hold that the applicant is not a person to whom the provisions of s. 22 (2) of the Immigration and Deportation Act under which he was declared apply and that the Minister did not act lawfully in deeming the applicant's presence in this country to be inimical to the public interest. I would, therefore, allow the application with costs against the State.

Application allowed

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