The Nature of Immigration Detention

Migrants often face two types of detention; criminal and administrative. Certain acts such as irregular entry, using false documents, irregular stay, breaching the conditions on an immigration permit are often criminalised by host states and as a result migrants may find themselves in criminal detention facing the punitive consequences of these acts. At other times migrants may be subject to administrative detention, e.g. when being held for identification purposes or for deportation purposes. It is generally understood that the objective of administrative detention is to guarantee that another measure, such as deportation or expulsion, can be implemented.

In South Africa migrants face a mix of both administrative and criminal detention depending on what they have been picked up for. This pamphlet will deal with specific issues of arrest detention and deportation under the Immigration Act and the Refugees Act.

II. Important Sections under the Immigration Act, 2002 as Amended by Act 19 0f 2004

a. Administrative Justice Rights

Section 8: Review and Appeal Procedures

(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and—

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph *(a),* that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision—

(a) in a case contemplated in subsection (1)*(a)*, and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(b) in a case contemplated in subsection (1)*(b)*, shall not be removed from the Republic before the Minister has confirmed the relevant decision.

(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.

(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.

(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.

(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.

In terms of the Immigration Act an "illegal foreigner" is defined as means a foreigner who is in the Republic in contravention of this Act. This section is important as it codifies the administrative justice principles that have to apply during arrest detention and deportation proceedings. It emphasizes that an immigrant needs to be given full written reasons when any negative administrative action is taken; that the immigrant should be informed of his or her right to appeal, in writing, and the authority to whom they should appeal. The procedures set out in Section 8 above need to be complied with otherwise the arrest, detention and deportation is unlawful.

DHA does not in practice apply these principles. They do not issue any forms to immigrants informing them of the reason of detention or their write to appeal and if you are trying to assist a friend or someone-else who is in detention the first step is to ask them what forms they have received. If they have not received any forms then you can go to a lawyer to help you challenge the detention.

Form 2 and 3 displayed below this in the annexure section are of particular importance in terms assessing the legality of the action taken by DHA officials.

b. Administrative Arrest and Detention for the Purposes of Identification

Section 41 of the Immigration Act allows the DHA to ask you for identification and requires that every person, when asked by a police or immigration officer, to identify themselves as a citizen, a permanent resident or a foreigner.

Section 41: Identification

(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

(2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence.

If the official is not satisfied that the person is lawfully within the Republic, the official may detain that person without a warrant from the court until it can be established that the person may remain in the Republic.

The official has an **obligation to conduct an investigation** into whether that person is in fact legally in South Africa. The procedure regulating this is set out in Regulation 32 of the Immigration Act Regulations.

Regulation 32: Identification

32. An immigration officer or police officer shall take the following steps in order to verify the identity and status of the person contemplated in section 41(1) of the Act:
(a) Access relevant documents that may be readily available in this regard; or
(b) Contact relatives or other persons who could prove such identity and status; and
(c) Access departmental records in this regard.

In terms of the law an immigration officer or police officer must have **reasonable grounds** to stop and detain someone, they also may not use racial profiling as a ground to detain someone. One of the most often cited reasons that police give when questioned why they pick up suspected illegal foreigners is that “their skin is black and dark”, this is clearly discriminatory and unreasonable.

However if a foreigner is not carrying his original permit at the time of being questioned this may be a reasonable grounds for arrest. If the person has a permit, but the officer suspects that it is fraudulent, that officer must be able to state why he or she thinks it is fraudulent. Examples would be missing elements from the permit, spelling mistakes in the pro forma sections or stamps that are not the right size or user the wrong font.

There have been instances where people have been arrested because the address has not been kept up to date with the refugee reception office. Although this is a clear condition on the face of the permit, it is extremely difficult to access the refugee reception office to change such a detail. Until such time as DHA is able to efficiently process applications, it is submitted that it is unreasonable to expect asylum seekers to modify such details on their permits.

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In terms of the **length of detention for purposes of identification** this section must be read with section 34 (2) of the Immigration Act, which clearly shows that the detention cannot exceed 48 hours.

Once a person is established to be an illegal foreigner the Immigration Act states that the illegal foreigner "shall be deported". Section 32 of the Immigration Act sets out the provisions in relation to illegal foreigners and should be read with Section 34 which sets out the provisions in relation to deportation and detention of illegal foreigners. Before analysing these two sections it is important to state that there is **a lacuna between the Immigration Act and the Refugees Act** when it comes to dealing with foreigners who intend applying for asylum but have not yet done so and are "illegal foreigners" in terms of the Immigration Act. This issue will however be dealt with under the discussion of the provisions applying to refugees later on in this manual.

c. Detention and Deportation under the Immigration Act.

Once a foreigner has been proved to be an illegal foreigner under Section 32 he must be deported. Section 34 then applies. Section 34 makes provision for detention for the purposes of deportation and detention for purposes other than deportation. A brief discussion of both types of detention will follow below the cited provisions of the Act.

32: Illegal Foreigners

(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.
(2) Any illegal foreigner shall be deported.

(10) A person who escapes or attempts to escape from

Section 34 needs to be read with Regulation 28 of the Immigration Regulations

Section 34: Deportation and Detention of Illegal Foreigners

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be … foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deport… detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned—
(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decis…
(b) may at any time request any officer attending to him or her that his or her detention for the purpose … which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragra… language that he or she understands;
(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate p…
(e) shall be held in detention in compliance with minimum prescribed … dignity and relevant human rights.
(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her de… arrest or the time at which such person was taken into custody for examination or other purposes, provided that … extended to four p.m. of the first following court day.
(3) The Director-General may order a foreigner subject to deportation to deposit a sum sufficient to cover in wh… deportation, detention, maintenance and custody…
(4) Any person who fails to comply with an order made in terms of subsection (3) shall be guilty of an offence and liab… to imprisonment not exceeding 12 months.
(5) Any person other than a citizen or a permanent resident who having been—
(a) removed from the Republic or while being subject to an order issued under law to leave the Republic, retur… with such order; or
(a) refused admission, whether before or after the commencement of this Act, has entered the Republic, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 1… arrested without warrant and deported under a warrant issued by a Court and, pending his or her removal, be d… by the Director-General.
(6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his o… terminate at that time.
(7) On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the p… immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she sha… custody of the immigration officer or police officer bearing such warrant.
(8) …
(9) The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in … the master of such ship and not of the immigration officer or the Director-General, and such master shall … maintenance of such person while so detained.

Regulation 28: Deportation and Detention of Illegal Foreigners

28. (1) The detention and deportation of an illegal foreigner contemplated in section 34(1) of the Act shall be by means of a warrant issued by an immigration officer, which warrant shall substantially correspond to Form 28 contained in Annexure A.
(2) The notification of the deportation of an illegal foreigner contemplated in section 34(1)*(a)* of the Act shall be in a form substantially corresponding to Form 29 contained in Annexure A.
(3) The confirmation of deportation contemplated in section 34(1)*(b)* of the Act shall be on a form substantially corresponding to Form 30 contained in Annexure A.
(4) An immigration officer intending to apply for the extension of the detention period in terms of section 34(1)*(d)* of the Act shall:
(a) within 20 days following the arrest of the detainee, serve on that detainee a notification of his or her intention on a form substantially corresponding to Form 31 contained in Annexure A;
(b) afford the detainee the opportunity to make representations in this regard within three days of the notification contemplated in paragraph *(a)* having been served on him or her; and
(c) within 25 days following the arrest of the detainee, submit with the clerk of the court an application for the extension of the period of detention on a form substantially corresponding to Form 32 contained in Annexure A.
(5) The minimum standards with regard to detention as contemplated in section 34(1)*(e)* of the Act are as determined in Annexure B.
(6) A court may authorise the extension contemplated in subregulation (4)*(c)* on a form

substantially corresponding to Form 32 contained in Annexure A.
(7) The detention contemplated in section 34(2) of the Act shall be in a form substantially corresponding to Form 33 contained in Annexure A.
(8) An immigration officer, when enforcing payment in terms of section 34(3) of the Act of a deposit, shall -
(a) serve an order substantially corresponding to Form 34 contained in Annexure A on the illegal foreigner concerned to deposit the required amount; and
(b) if that deposit has not been paid, endorse the order contemplated in paragraph *(a)* to the effect that the deposit has not been paid and file a copy of that order with the clerk of the court of the district in
which such illegal foreigner is detained pending his or her removal from the Republic.
(9) The warrants contemplated in section 34(7) of the Act shall -
(a) in respect of the removal of an illegal foreigner, be in a form substantially corresponding to Form 35 contained in Annexure A; or
(b) in respect of the release of an illegal foreigner, be in a form substantially corresponding to Form 36 contained in Annexure A.
(10) A person contemplated in section 34(8) of the Act shall be notified that he or she is an illegal foreigner on a form substantially corresponding to Form 37 contained in Annexure A, and the declaration to the master of the ship contemplated in that section shall be on a form substantially corresponding to Form 38 contained in Annexure A.
(11) The amount which the owner of a ship shall forfeit in terms of section 34(9)*(a)* and *(d)* of the Act shall not exceed R10 000.

Section 32(2) read with 34 of the immigration Act requires an "immigration officer" to deport an " illegal foreigner". An immigration officer may detain an illegal foreigner for the purposes of deportation for a maximum of 30 days without a warrant. At the inception of this period the foreigner should be informed of his administrative justice right to challenge this detention and his right to request that a court confirm the detention within 48 hours (see Form 29), if the immigration fails to get such confirmation from a magistrate then the continued detention is unlawful and the foreigner must immediately be released. Before the expiration of the 30 day period, the immigration official must apply to a magistrate to extend the period of detention but the magistrate may not extend the detention for longer than 90 days. Thus total detention for the purposes of deportation cannot exceed 120 days. The Act is silent on what should happen if someone is not deported within the 120 days but lawyers have in the past demanded the immediate release of detainees and been granted such by courts.

In very practical terms the process that DHA uses in regard to detention for the purposes of deportation contravenes all the principles and provisions laid out in the Immigration Act and Regulations. The process states that once a foreigner has been found to be an illegal foreigner (Form 2 needs to be issued), a "Notice of Deportation" (Form 29) must be given to that person. The notice must be conveyed in a language that the foreigner understands, this could be a verbal translation. Most detainees are never informed of their right to challenge the initial detention, nor are they ever informed of other administrative rights in a language they understand. If however they are informed and do want to challenge the detention then the immigration officer has to apply to a magistrate to confirm further detention (Form 30 would then have to be signed by the magistrate).

Before the expiration of 30 days the immigration officer has to issue a "Notice to Foreigner of Intention to Apply to Court for Extension of Detention" (Form 31). This notice must be accompanied by an affidavit that the immigration officer has attested to on why the deportation process cannot happen in this period.

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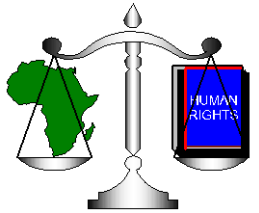

The application by the immigration official takes place on a pro forma notice “Application to Court for Extension of Detention and Authorisation by Court for that Extension” (Form 32). In practice the supporting documents mentioned in this application are never presented and in Krugersdorp (the district in which Lindela is situated) it is not unheard of for a batch of the applications to be presented and merely rubber stamped without magistrates applying their minds to the matter.

In terms of the foreigners’ right to challenge the initial detention under Section 34 (1) (b) and the right to challenge detention for longer than 30 days, it is not stated in law, but DHA does not give foreigners the right of appearance in front of a magistrate. The general practice is merely for an immigration official to appear in front of a magistrate and request confirmation of this, this may be challengeable in court given that one party is allowed to be present while the other party is being detained at the discretion of that party.

In terms of the length of detention one tactic that DHA often uses to fudge the length of detention is calculating the length of detention that foreigners have stayed in Lindela and then using that as an indicator for total detention, but most often foreigners are arrested in far off places and kept at police stations pending removal to Lindela. It is essential that this time is included calculating actual detention.

For **detention other than for deportation** the immigration official may only hold the foreigner for a maximum of 48 hours from the time of arrest provided that if the period of time expires on a non- court day it shall be extended to four p.m. on the first following court day. This is to allow for identification of the foreigner, or if the foreigner is in possession of documents that are suspected to be false to allow for the examination of those and possible prosecution under this act for this or other immigration offences.

If Section 34 (2) is read with Regulation 28(7) and Form 33 it is clear that the immigration official may request a Station Commander or Prison Warden to hold the foreigner at a police station or in a prison. However it is imperative to note here that this is still administrative detention and as such the detainee cannot be held with other remandees or prisoners.

Immigration officials have used the power to detain foreigners at various locations in a mala fide manner especially when it comes to foreigners suspected to be terrorists. They have used their power to hold foreigners incommunicado and have moved them periodically from police station to police station. When human rights lawyers search for these individuals it has often been hard to track them because the occurrence book and other records of the police station do not reflect the detainee. The justification that police give is that they do not hold records of what immigration officials do in the cells (this argument seems a bit facetious as in most cases involving suspected terrorists police officials from crime intelligence have been closely involved and they merely use the Immigration Act as it is a somewhat easier way to detain and interrogate suspects).

d. Criminal Detention and Prosecution under the immigration Act

The discussion above has already alluded to some elements of criminal detention under Section 34(2) of the Immigration Act. It is important to note that certain acts are regarded as criminal offences under the act and a person found guilty of an offence may be imprisoned or subjected to a fine. For instance, entering the Republic without the correct visa or failing to have the appropriate transit visa if transiting the Republic is regarded as a criminal offence. Criminal offences can be found in various provisions of the Immigration Act but what is interesting is that Section 49 of the Immigration Act sets up criminal offences and Section 50 sets up administrative offences.

In terms of administrative offences the only penalty is a fine that is imposed by the Director General .In terms of **criminal offences** the foreigner has to be brought before a magistrate within 48 hours and the usual criminal procedures apply. In the event of a foreigner being criminally prosecuted under this act it is suggested that there may be allowance to then hold him or her with other remandees or prisoners.

e. Children in Detention

The Immigration Act is silent about children in detention with only a few statements about conditions in Annexure B of the Immigration Regulations which provide that children should be kept separately from adults in detention provided that children with guardians or parents should not be separated from them and that unaccompanied minors should not be detained. In reality while several court cases have been brought against DHA to entrench these rights practice varies according to the region in which children are apprehended. These conditions are more likely to be respected in big urban cities where NGO’s and social workers are involved but in border areas like Musina it is not uncommon to find children detained together with adults and unaccompanied minors being detained as well. The basic rule of thumb is to always be vigilant about children in detention and always involve a social worker and the Children’s Court so that the Commissioner will have some oversight processes in regard to measures being taken in regard to detention and deportation of the child.

III. The Scheme under the Refugees Act of 1998 as amended by Act 33 of 2008.

Arrest and detention and deportation have a much more limited scope under the Refugees Act. This section will firstly deal with the intersection between the Immigration Act and Refugees Act in terms of dealing with asylum seekers who do not have appropriate permits and then look at the other provisions under the Refugees Act in relation to arrest and detention.

The endless advocacy and litigation against DHA has made it common knowledge that it is extremely difficult to access the recognised Refugee Reception Offices in order to apply for asylum. Thus many asylum seekers wait months before getting through the door to lodge an application. The fact that the Refugees Act only allows an application to be lodged at one of seven locations in the country also makes it hard for asylum seekers to lodge the application. Thus bona fide asylum seekers may be in the country without documentation. The problem arises when the provisions in relation to the principle of non-refoulement conflict with the provisions on "illegal foreigners" under the Immigration Act.

a. Non-Refoulement.

This international law principle has two broad sources, refugee law and the laws preventing torture (Art 3 of CAT). It is an assertion that no person may be returned to a country where he or she would face persecution, a threat to physical freedom and safety or torture. Section 2 and Section 24 (4) of the Refugees Act are relevant and should be juxtaposed with Section 32 of the Immigration Act (cited above).

Section 2: General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

2. Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any
other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-
(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

Section 24: Asylum Seeker Permit

24. (4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-
(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or
(b) such person has been granted asylum.

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It is submitted that in light of the absolute prohibition on torture and persecution in international law and under our Constitution the provisions of the Refugees Act trump the provisions of the Immigration Act in this regard and any attempt to deport a foreigner without allowing him or her the right to either apply or finalise an application for asylum would be unlawful.There is a specific provision in the Immigration Act which tries to assist asylum seekers who have not yet had the opportunity to make their way to the reception centres. Section 23 of the Immigration Act is labelled "Asylum Transit Permit" and allows for the following:

Section 23: Asylum Transit Permit

(1) The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only.

(2) Despite anything contained in any other law, when the permit contemplated in subsection (1) expires before the holder reports in person to a Refugee Reception Officer at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act No. 130 of 1998), the holder of that permit shall become an illegal foreigner and be dealt with in accordance with this Act.

Under a prior version of the Immigration Act the words" port of entry" did not appear in this section and foreigners were easily able to obtain asylum transit permits at whichever office of the DHA they approached. The practice by immigration officials has been to strictly construe this provision and only issue the permits if a foreigner presents himself at a port of entry. Given that most asylum seekers are afraid to present themselves at the border or do not have official documents and therefore "jump the fence" the benefits of this provision have been limited. Once again Section 23 (2) contradicts the provisions of international and national law in that a foreigner may not be able to physically access the reception office in the 14 days that he has this transit permit and therefore find himself an "illegal foreigner" again. Immigration authorities who find immigrants in places other than a port of entry who wish to apply for asylum have the discretion to issue you with a form which is called a "notice by an immigration official to appear in front of the Director – General" issued in terms of Section 7 (1)(g) read with Section 333 (4) (c) of the Immigration Act, legitimising the immigrants status in the country until they can find a Refugee Reception Centre.

b. Detention of Asylum Seekers

The Refugee Act sets out separate provisions for the detention of asylum seekers and refugees. Section 22 and Section 23 apply to the detention of asylum seekers.

Section 22: Asylum Seeker Permit

…..

(6) The Minister may at any time withdraw an asylum seeker permit if-

(a) the applicant contravenes any conditions endorsed on that permit; or

(b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or

(c) the application for asylum has been rejected; or

(d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5.

(7) Any person who fails to return a permit in accordance with subsection (2), or to comply with any condition set out in a permit issued in terms of this section, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.

Section 23: Detention of Asylum Seeker

23. If the Minister has withdrawn an asylum seeker permit in terms of section 22(6),

he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity

These two provisions allow for the Minister to withdraw the permit under very limited circumstances. It should be noted that even if the Minister orders withdrawal of the asylum seekers permit and detention of the person this cannot be for deportation purposes as it would violates the principle of non- refoulement. Thus **an asylum seeker will have the right to remain in the country until he has exhausted all review and appeal proceedings**.

c. Detention and Removal of Refugees

If someone has been granted refugee status, they have proved to the state that they have a well-founded fear of being persecuted or being tortured or killed if returned to their home country. Once they have met this burden of proof it is extremely difficult to remove them form South Africa. It is for this reason that the Refugees Act constrains the detention and removal of refugees, Section 28 and 29 set out the provisions relating to detention and removal of a refugee from South Africa. Even **if a refugee is found to be a national security risk, he may be detained but he may not be removed to his home country**.

Section 28: Rights of Refugees in Respect of Removal from Republic

28. (1) Subject to section 2, a refugee may be removed from the Republic on grounds of national security or public order.
(2) A removal under subsection (1) may only be ordered by the Minister with due regard for the rights set out in section 33 of the Constitution and the rights of the refugee in terms of international law.
(3) If an order is made under this section for the removal from the Republic of a refugee, any dependant of such refugee who has not been granted asylum, may be included in such an order and removed from the Republic if such dependant has been afforded a reasonable opportunity to apply for asylum but has failed to do so or if his or her application for asylum has been rejected.
(4) Any refugee ordered to be removed under this section may be detained pending his or her removal from the Republic.
(5) Any order made under this section must afford reasonable time to the refugee concerned to obtain approval from any country of his or her own choice, for his or her removal to that country.

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