Federal Court  Cour fédérale

Date: 20121024

Docket: IMM-2958-12

Citation: 2012 FC 1141

Ottawa, Ontario, October 24, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

CARLEEN CHRISTI FRANCIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"] of a decision by the Refugee Protection Division ["RPD"] by Mr. J. Gallagher that Carleen Christi Francis, a citizen of Saint Vincent and the Grenadines, was neither a "refugee" within the meaning of section 96 of the IRPA nor a "person in need of protection" under section 97 of the IRPA.

I. Facts

[2] The Applicant left Saint Vincent and the Grenadines ["Saint Vincent"] to come to Canada on September 20, 1998. She never regularized her status until she applied for refugee status on April 14, 2010.

[3] The Applicant is a homosexual and suffered from discrimination in Saint Vincent because of her sexual orientation. As a child, she was physically and sexually abused and neglected by family members and was the target of discrimination in Saint Vincent.

[4] At the age of fourteen, her mother forced her to live with her and her abusive boyfriend but was then abandoned when her mother discovered her sexual orientation. Other family members sheltered her but all required her to leave when they discovered her sexual orientation. She therefore started living on the streets and working odd jobs such as cleaning yards in Vermont.

[5] In 1990, her cousin, Mr. Julian Clarke who was a police officer and who works now as a prison guard, raped her while she was sleeping on his porch. It appears that his motivations were driven by the fact that the Applicant is homosexual as he had asked her a week before why she "did not hafe a man." Since that event, she has been living in great fear of him.

[6] Her brother and her aunt helped her pay for her ticket to come to Canada. When she arrived in Canada, she first attempted to regularize her status in 2006 but the person who offered to help committed fraud. In 2010, after speaking with a pastor, she discovered that she could claim refugee status which she did.

[7] Her refugee claim was refused by the RPD on March 5, 2012.

[8] Five days after the hearing, the Applicant's counsel filed a motion for recusal of the decision-maker, Mr. Gallagher, based on some comments he made at the hearing and on some of his previous publications. As a result of his comments after the hearing, counsel made a research and discovered that Mr. Gallagher had previously published chapters in books on Canadian immigration policy. On February 14, 2012, Mr. Gallagher dismissed the motion for recusal in a written decision, of which no notice was forwarded to the Applicant.

II. Decision under Review

[9] The decision-maker was satisfied with the evidence submitted pertaining to the Applicant's identity. He found the Applicant credible in most areas of her testimony such as the timeline and occurrence of events.

[10] However, the RPD found inconsistent the fact that a number of persons seemed to be concerned with her situation in Saint Vincent and helped her leave the country but that the Applicant claimed that no one was able to assist her. Moreover, when the RPD asked the Applicant what pushed her to leave Saint Vincent, the Applicant did not identify a clear triggering event but mentioned that she did not want to have to hide her sexual orientation anymore, that she wanted to put an end to the discrimination she suffered and that she did not feel accomplished in Saint Vincent.

[11] The RPD considered reports submitted on Saint Vincent's current situation regarding treatment of homosexuals and came to the conclusion that the testimony of the Applicant is consistent with the situation described in the said reports. Homosexuals face discrimination and are harassed and homosexual acts are condemned by the *Criminal Code* of Saint Vincent.

[12] The RPD concluded that the Applicant's discrimination did not reach the level of severity required to be considered a case of persecution as the mistreatment or the anticipation of the mistreatment was not "eminently" serious and did not occur repeatedly. The RPD found that in the present case, there is no evidence that the Saint Vincent government is "policing" the law against homosexuality or that the State is incapable of addressing physical assault complaints.

[13] As for the incident identified by the Applicant, the RPD considered that it is isolated, that it was never reported to the police and that Mr. Clarke has not pursued the Applicant since the assault during the six years she spent in Saint Vincent following the incident. The RPD found that the Applicant did not demonstrate subjective fear because otherwise she would have at least left the city of Vermont.

[14] As for the existence of an objective fear of persecution, it cannot be found to exist as there is no evidence demonstrating that Mr. Clarke would keep on harassing the Applicant should she return to Saint Vincent.

[15] The RPD determined that the Applicant is neither a Convention refugee nor a "person in need of protection."

III. Issues

1) Did the RPD breach procedural fairness by not communicating to the Applicant the written decision on the motion for recusal?

2) Did the member's comment at the hearing and his previous academic writings give rise to a reasonable apprehension of bias?

3) Did the RPD fail to consider important evidence regarding treatment of homosexuals in Saint Vincent?

4) Are the reasons provided in the decision as to why the Applicant would not face persecution in Saint Vincent as a homosexual sufficient?

IV. Standard of Review

[16] The applicable standard of review to the two first issues is that of correctness as both relate to considerations of procedural fairness, which the Federal Court of Appeal determined should always be reviewed on the standard of review of correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, [2006] 3 FCR 392).

[17] The applicable standard of review to the RPD's assessment of evidence is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 164-166, [2008] 1 SCR 190 [*Dunsmuir*]).

[18] The determination of whether or not the reasons provided by the RPD are sufficient is subject to the standard of reasonableness. Indeed, the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*] established that the issue of whether reasons provided by a decision-maker are sufficient should be reviewed under the standard of reasonableness as it is a consideration subsumed in the broader analysis of the reasonableness of those reasons.

V. Analysis

A. *Did the RPD breach procedural fairness by not communicating to the Applicant the written decision on the motion for recusal?*

Applicant's Submissions

[19] The Applicant argues that the RPD had a duty under procedural fairness to inform her of the written decision on the motion for recusal even if it is not required to do so by the statute.

Respondent's Submissions

[20] The Respondent argues that the motion for recusal was disposed of in a procedurally fair manner as the decision-maker had no duty under statute law or procedural fairness to communicate to the Applicant the written decision on the motion for recusal. The Respondent adds that the RPD took note of the decision rendered which became part of the RPD's record on February 14, 2012.

[21] The Respondent argues that in the alternative the Court finds that the RPD should have communicated the decision to the Applicant, this cannot constitute a determinative reviewable error as the application for judicial review based on an allegation of reasonable apprehension of bias can

be made only when the final decision has been rendered (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at para 4, 400 NR 367 (FCA)) and therefore the Applicant had ample time to prepare the application for judicial review on that basis. Therefore, no prejudice arises from the non-communication of the decision.

Analysis

[22] Section 169(b) of the IRPA and Rule 61(1) of the *Refugee Protection Division Rules*, SOR/2002-228 ["RPDR"] are clear. The RPD is under a duty to give reasons for decisions "other than interlocutory decisions" and when the RPD makes a decision, "other than an interlocutory decision, it must provide a notice of decision in writing to the claimant or the protected person, as the case may be, and to the Minister."

[23] The decision on a motion for recusal is an interlocutory matter and it has been recognized by the Federal Court that decision-makers are not under an obligation to provide reasons when deciding upon such decisions (*Alhajyousef v Canada (Minister of Citizenship and Immigration)*, 2004 FC 924 at para 7, 2004 CarswellNat 2066). In the present case, the problem does not arise as written reasons have been given for dismissing the motion for recusal. As for the need to communicate the decision to the Applicant, since this is an interlocutory decision, section 61(1) of the RPDR does not impose such an obligation upon the RPD.

[24] When a statute stipulates explicitly what the obligations of the tribunal are in such cases, it is not for the Court to interpret such obligations as being in contradiction with the wording of the statute.

[25] But also important is that the Applicant has suffered no prejudice by not receiving communication of the decision. It is an interlocutory decision; no final decision was made then and the Applicant has not lost any recourses from such situation.

[26] Moreover, the Applicant cannot sustain that she suffered a prejudice from the absence of the notification of the decision on the motion for recusal; as stated by the Respondent, it is a well established rule that the Federal Court will not review an interlocutory decision until a final decision has been rendered.

B. *Did the member's comment at the hearing and his previous academic writings give rise to a reasonable apprehension of bias?*

Applicant's Submissions

[27] The Applicant submits that there was a reasonable apprehension of bias of the decision-maker because of comments he made at the hearing and because of previous publications pertaining to immigration matters. The Applicant submits that the publications are evidence of the fact that the decision-maker believes that Saint Vincent cannot produce refugees.

[28] Also, the Applicant is not satisfied with the reasons given in the decision on the motion for recusal as he claims that they insufficiently address the concerns that were raised in the motion for recusal.

Respondent's Submissions

[29] The Respondent submits that no reasonable apprehension of bias can be found in the present case because the Applicant cannot rebut the legal presumption that the decision-maker is impartial.

The comments made at the hearing when contextualized show that the decision-maker was solely testing the plausibility of the Applicant's explanation as to why she did not submit a refugee claim earlier. As for the decision-maker's publications, they can in no way demonstrate that he had specifically prejudged the Applicant's case as the decision-maker had solely expressed general views on immigration-related matters. They merely demonstrate that he is a qualified person to act as a member of the RPD because he has prior relevant experience in those matters. Moreover, the Respondent adds that the writings predate Mr. Gallagher's appointment in 2010.

Analysis

[30] The test of bias is well-known and was first established by the Supreme Court of Canada in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, 9 NR 115:

> [. . .] the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[31] In the case at bar, while questioning the Applicant as to the reasons why she did not make a refugee claim earlier and as to when she was first made aware of the possibility to make a refugee claim, the decision-maker made a reference to the fact that a number of Saint Vincent citizens are now established in Canada "because of the refugee system."

[32] Mr. Gallagher has published a number of academic writings in the area of immigration law, some dealing most specifically with the Canadian refugee system and Canadian immigration policy,

in which he criticizes some aspects of the processing of refugee claims and the negative impact of mass-immigration on Canadian social cohesion.

[33] The threshold for an allegation of bias is a very high one and the onus of demonstrating the existence of such an apprehension rests on the Applicant as administrative adjudicators benefit from a presumption that they are impartial (*R. v S. (R.D.)*, [1997] 3 SCR 484 at paras 113-115, 151 DLR (4th) 193 [*R. v S.*]). The Applicant bears the onus of demonstrating that a reasonably informed person would conclude it more likely than not that the decision would consciously or unconsciously, not be fairly made.

[34] In the present case, no allegation of bias can be found to exist for the following reasons. First, Mr. Gallagher, did not make any declaration at the hearing which could be deemed as constituting ground for reasonable apprehension of bias as the comments made by Mr. Gallagher have to be contextualized. It was appropriate to inquire as to why the Applicant had not heard about the Canadian Refugee System since many of the Applicant's compatriots had successfully dealt with it. Therefore, a reasonable person having heard the decision-maker's comments would have understood the context within which they were said.

[35] In one of his publications, Mr. Gallagher illustrated his proposition that the refugee system, in its current state, has given rise to "anomalous decision-making" as it is too generous in conferring refugee status. References were made to Saint Vincent as an example among a number of other countries that produced refugees. Mr. Gallagher's critical scholarly comments about the refugee system were not specifically targeting Saint Vincent citizens making refugee claims but are to be

considered as a broader, more general evaluation of the refugee system's processing of refugee claims originating from a number of countries. In light of this, it is not appropriate to consider that a reasonable person would have reasons to believe that the decision-maker had specifically predetermined the Applicant's case because of the scholarly comments made.

[36] As for the second publication, which addresses mass immigration to Canada, Mr. Gallagher's writing focused on his views that allowing mass immigration will eventually threaten Canada's social cohesion. This academic article discusses a societal question that is unrelated to the case at bar. Therefore, it cannot be said that because of such written views, Mr. Gallagher had predetermined the Applicant's case. A reasonable person could not come to such conclusion.

[37] It is not because a person has expressed prior views through academic work on a subject matter that such a person should be disqualified as a decision-maker. To the contrary, having had such experience may be a valuable asset and may help in making such persons better decision-makers. On this subject, Justice Cory in *R. v S.*, above, made the following comments:

> [119] The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial
>
> > does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and

> perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

[38] As for the reasons given by Mr. Gallagher in his decision not to recuse himself, they are sufficient as he correctly applied the test for bias as set out in *Committee for Justice and Liberty*, above, and considered whether his past writings and comments could constitute a valid ground for reasonable apprehension of bias. He also addressed the duty of RPD members under the *Code of Conduct for Members of the Immigration and Refugee Board of Canada*, to decide every case on its merits and to not be influenced by any extraneous factors.

C. *Did the RPD fail to consider important evidence regarding treatment of homosexuals in Saint Vincent?*

Applicant's Submissions

[39] The Applicant claims that the RPD erred in law by not considering some important pieces of evidence and that this constitutes a reviewable error as important evidence needs to be specifically analyzed in the RDP's reasons. He cites *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 17, 1998 CarswellNat 1981 (FCTD) [*Cepeda-Gutierrez*] to support his argument.

[40] Furthermore, it is submitted that the RPD failed to deal specifically with a document (VCT103276.E) which includes a report by Caribbean Vulnerable Communities to the effect that the laws prohibiting homosexual acts are still enforced as of September 2009. It is also argued that

the report also contains information contrary to the RPD's finding that the State is equipped to offer adequate protection as it identifies cases where apprehended homosexuals were discriminated against by the police.

Respondent's Submissions

[41] The Respondent submits that the RPD does not have to mention every piece of evidence in its decision and recalls that it is not the role of the Federal Court to reassess the evidence submitted by the parties (*Antrobus v Canada (Minister of Citizenship and Immigration)*, 2012 FC 3 at para 6, 2012 CarswellNat 29).

Analysis

[42] In the case at bar, the decision-maker considered the evidence pertaining to Saint Vincent's general non acceptance of homosexuality and specifically identified two reports in its decision, namely the United States Department of State, *Country Reports on Human Rights Practices* and the *Response to Information Request*, Number VCT103851.E.

[43] It is a long-standing principle that a decision-maker is not under a duty to comment on every piece of evidence (*Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317 at para 3 (FCA)). A statement by the decision-maker that he considered the evidence that was placed before him is generally satisfying for a reviewing court, subject to the following comments (*Cepeda-Gutierrez*, above, at para 16).

[44] However, the more important a piece of evidence is, the most the burden on the decision-maker to address it increases. In the context of state protection, the words of the late Justice Layden-Stevenson in *Castillo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 56, [2004] FCJ 43 at para 9 (QL), are particularly instructive in this case:

> "The question of effective state protection was identified as the central issue. Where evidence that relates to a central issue is submitted, the burden of explanation increases for the board when it assigns little or no weight to that evidence or when it prefers specific documentary evidence over other documentary evidence. Here, there is virtually no indication that the RPD considered the applicants' documentary evidence or the submissions of their counsel in relation to the issue of state protection. The applicants were entitled to know that the board had not ignored these matters. A general statement that all of the evidence was considered, in the circumstances, does not suffice."

[45] In the case at bar, the RPD failed to address the documentary evidence that states that as of 2009, there are reported cases of men apprehended by the police for committing homosexual acts. Such evidence is important as it may explain the Applicant's objective fear of returning to Saint Vincent. The RPD's finding "that there is no indication that the Saint Vincent government is "policing" the law against homosexuality" is therefore erroneous. The RPD was under a duty to comment on the relevant documentary evidence and explain why in the specific case such risk does not exist.

[46] The RPD failed to address important documentary evidence and the conclusion that the Applicant does not face an objective risk of persecution is therefore unreasonable.

D. *Are the reasons provided in the decision as to why the Applicant would not face persecution in Saint Vincent as a homosexual sufficient?*

Applicant's Submissions

[47] The Applicant submits that the RPD's conclusion that "homosexuality in Saint Vincent is not publicly accepted and generally practiced covertly" is a strong indication that she should live a closeted lifestyle in Saint Vincent. She argued that such a finding is contrary to the principle that a case of a refugee is made when expecting the person to dissociate from the group that faces discrimination would require them to renounce to his or her human rights, which were recognized by the Supreme Court in *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 70, 128 DLR (4^{th}) 213.

[48] In general, the Applicant argues that the RPD made an error when it determined that, based on the evidence submitted, homosexuals do not face discrimination at the level of persecution.

Respondent's Submissions

[49] In response, the Respondent submits that without reliable evidence showing that should the Applicant go back to Saint Vincent, her cousin, Mr. Clarke, would go after her, no such conclusion can be inferred and the evidence before the decision-maker is to the effect that he did not try to pursue her during the six years preceding her departure for Canada and that the incident was never reported to the authorities.

[50] It is also argued that the RPD reasonably concluded that the Applicant should have at least left the town of Saint Vincent after the traumatic event and correctly drew a negative inference from the fact that she stayed for six years after the triggering event of her refugee claim. Moreover, the

Respondent argues that even though the decision-maker did not draw a negative inference from the fact that she waited to claim refugee status in Canada, this Court should consider this as evidence pointing to a lack of subjective fear.

[51] In order for acts of discrimination to amount to persecution, there must be evidence that the acts are serious and occur on a systemic basis and such evidence is lacking in the present case.

Analysis

[52] The RPD adequately established that the Applicant had shown to suffer discrimination on the basis of her sexual orientation. Homosexuals have been recognized to constitute a social group that can be the target of persecution (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 78, 20 Imm LR (2d) 85 [*Ward*]). The RPD found that the Applicant's testimony corroborates the documentary evidence demonstrating that homosexuals face discrimination in Saint Vincent.

[53] But, in *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)* 2004 FC 282 at para 29 [*Sadeghi-Pari*], this Court found that requiring a person to suppress their sexual orientation amounts to persecution:

> "The meaning of persecution, as set out in the seminal decisions of *Canada (Attorney General) v. Ward*, 1993 CanLII 105 (SCC), [1993] 2 S.C.R. 689 and *Chan v. Canada (Minister of Employment and Immigration)*, 1995 CanLII 71 (SCC), [1995] 3 S.C.R. 593, is generally defined as the serious interference with a basic human right. Concluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution."

[54] It was an obligation upon the RPD to specifically discuss why the Applicant, as a homosexual living in a place where it has been demonstrated that homosexuals are harassed, would not be subjected to persecution as she cannot live her sexual orientation openly. Although the facts in *Sadeghi-Pari*, above differ from the case at bar as the Applicant in the said case had effectively been apprehended for homosexual acts, it remains that the RPD should have discussed why the Applicant does not face such a risk. The Applicant had specifically expressed that one of the triggering events that caused her to leave Saint Vincent was, in addition of her fear of Mr. Clarke, the fact that she had to live a closeted life as a homosexual.

[55] Furthermore, the RPD also failed to analyze in its decision the Applicant's desire to adopt a child that she had clearly expressed. The decision-maker had to discuss why she would not have to abandon her dream of adopting a child with her partner, as a homosexual woman in Saint Vincent.

[56] Having said that, the RPD reasonably concluded that, as for her fear of her cousin, the fact that the Applicant remained in the town of Saint Vincent during the six years that followed the triggering event of her claim pointed to a lack of subjective fear of persecution.

[57] Although the RPD did not mention the fact that the Applicant's late refugee claim demonstrates a lack of subjective fear, it may have been one of the facts of the case that supported its decision not to grant the Applicant refugee status. This is consistent with the principle established in *Newfoundland and Labrador Nurses' Union*, above at para 12, according to which a reviewing court must pay attention to what could be offered in support of a decision and that "it must first seek to supplement them before it seeks to subvert them."

[58] However, when we apply this principle to the case at bar, it remains that on the issue of whether or not repressing one's sexual orientation amounts to persecution, the reasons provided by the RPD are insufficient and that it is not this Court's role to supplement them. Moreover, the Federal Court of Appeal in *Turner v Canada (Attorney General)*, 2012 FCA 159 at para 40, 431 NR 327 established that " having regard to the record before the tribunal, [the reasons] must "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes . . ." The RPD's failure to deal with some very important evidence related to the Applicant's alleged subjective fear makes this decision insufficient.

[59] In conclusion, the RPD came to an unreasonable conclusion that the discrimination faced by the Applicant does not amount to persecution. Based on the evidence that was submitted, its finding does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above at para 47).

VI. Questions for Certification

[60] The Applicant suggested the two following questions for certification:

> "Do Member Gallagher's previous publications give rise to a reasonable apprehension of bias, his oath of office notwithstanding?"
>
> "When the Refugee Protection Division fails to address, in its reasons, an issue that involves either a question of fact or of fact and law, does the Supreme Court of Canada's decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 allow a Federal Court judge sitting on a judicial review to perform his or her own assessment of that issue based on the evidence in the record in order to determine whether or not the decision was reasonable?"

[61] The Respondent argues that the first question is not of general importance and should not be certified. He suggested that the second question be certified as follows:

> "Given the decision of the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, can the Federal Court, sitting in judicial review, consider facts not expressly mentioned in the reasons of an administrative tribunal, but contained in the record, in order to determine whether a conclusion reached by that same tribunal is reasonable?"

[62] For the reasons given, it will not be necessary to consider certifying any of the questions submitted. The RPD's decision is found not to be reasonable for not having dealt with some of the issues such as suppressing one's own sexual orientation, which may amount to persecution or affirming that Saint Vincent government is not "policing" the law against homosexuality without having the proper documentary evidence to support such a statement. A new panel will be able to deal with all relevant issues including the ones mentioned above.

[63] The Applicant is claiming costs against the Respondent. I do not see why in the present case this Court should depart from the general rule of not granting costs in immigration cases, except when special reasons warrant it (*Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, s 22).

ORDER

THIS COURT ORDERS THAT:

1. The application for judicial review is granted;

2. The matter is referred to a new panel in order to deal with all the issues; and

3. No question is certified and no costs will be granted.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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