Federal Court of Appeal | Cour d'appel fédérale

Date: 20110328

Docket: A-295-10

Citation: 2011 FCA 110

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
MAINVILLE J.A.

BETWEEN:

TAO LI

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on March 15, 2011.

Judgment delivered at Ottawa, Ontario, on March 28, 2011.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: DAWSON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] Paragraph 295(3)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations*") requires that the fee for processing an application for a permanent resident visa as a member of the family class be paid together with the fee for processing the related sponsorship application. Since a family class sponsorship application for a parent or grandparent is contingent on the successful approval of the related sponsorship application, which may take a few years to be processed, the appellant asserts that the advance fee payment requirement for the family class permanent resident visa application is inconsistent with the concept of a user fee under section 19 of the *Financial Administration Act*, R.S.C. 1985, c. F-11.

[2] Mosley J. of the Federal Court, in reasons reported as 2010 FC 803, dismissed the appellant's judicial review application seeking, among other things, a declaration that paragraph 295(3)(a) of the *Regulations* is *ultra vires* section 19 of the *Financial Administration Act*. However, Mosley J. certified the following question pursuant to paragraph 74(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), thus giving rise to the appeal of his judgment to this Court:

> Is *Immigration and Refugee Protection Regulation* 295(3)(a), as applied to sponsored immigrant visa applications made by parents and grandparents, *ultra vires* on the ground it is inconsistent with s. 19 of the *Financial Administration Act*?

[3] For the reasons set out below, I would answer "no" to this question and consequently dismiss this appeal.

Context and background

[4] Under the former *Immigration Act*, R.S.C. 1985, c. I-12, a Canadian citizen or permanent resident in Canada seeking to sponsor a member of the family class had to file a sponsorship application and pay a single processing fee of $500 for the principal applicant and each adult dependent, and $100 for each dependent under 19 years of age. These fees covered the processing of both the sponsorship and the related permanent resident visa, and were not subject to refund. If a sponsorship applicant failed to satisfy the requirements of sponsorship, the related permanent resident visa application was nevertheless forwarded for processing and assessment at the appropriate visa post, even though that application was invariably rejected due to the lack of an eligible sponsor.

[5] Effective June 28, 2002, the *Immigration Act* was repealed and replaced by the IRPA. The new *Regulations* adopted under the IRPA set out a new fee structure for applications under the family class. Previously, there was one set of fees for one process having two parts. The new fee structure identifies two fees for two closely related services: a $75 fee for processing the sponsorship application and a $475 fee for processing the permanent resident visa application of a principal applicant, with additional fees for processing the visa applications of any accompanying family members. The family class permanent resident visa application fee is paid at the same time as the related sponsorship application fee, but can now be refunded.

[6] The processing time for family class sponsorship applications concerning parents and grandparents has significantly increased since the IRPA first came into force in 2002. The additional delays are in part the result of the decision of the government to prioritize applications within the family class through a so-called “Family Class Re-Design Initiative” under which the applications of spouses, common-law partners, conjugal partners and children are prioritized so as to significantly reduce the overall processing time for both sponsorship and permanent resident visa applications. This is achieved by the requirement for joint sponsorship and permanent resident visa applications (the completion and submission of which are coordinated by the sponsor) and through the government’s commitment to process 80% of the applications for both sponsorship and permanent residence within 6 months of the submission of the completed joint applications.

[7] This initiative has reduced the average processing time of sponsorship applications related to spouses, common-law partners, conjugal partners and children, which stood at 54 days as of March

2010. However, it has also contributed to a longer average processing time for applications related to parents and grandparents, which are not prioritized within the family class. A sponsorship application for a parent or grandparent continues to be processed independently from its related permanent resident visa application, which can be submitted only after the sponsorship application has been approved. None of these applications are given any priority. As of March 2010, the average processing time of sponsorship applications related to parents and grandparents stood at 34 months.

The reasons of the applications judge

[8] The applications judge recognized that the enabling authority for the impugned fee structure under the *Regulations* was section 19 of the *Financial Administration Act*, which requires that when user fees are prescribed, they must be paid for a service provided by or on behalf of the government by users or classes of users of that service, and may not exceed the cost to the government of providing the service. The applications judge also recognized that the fees related to the family class permanent resident visa applications must be paid upfront with the related sponsorship application and, in the case of sponsored parents and grandparents, considerably in advance (approximately 34 months) of the visa applications themselves. He also acknowledged that the processing of the visa applications was contingent on the prior approval of the related sponsorship application. However, he found that only approximately 2.5% of sponsorship applications were refused, and that in the event of such a refusal, the related visa application fees were refundable.

[9] Turning his attention to the interpretation of the *Financial Administration Act*, the applications judge found at paragraphs 45 and 47 of his reasons that, read as a whole, in a manner consistent with the modern approach to statutory interpretation, subsection 19(2) of that act does not "preclude the imposition of a fee to recover the costs incurred by the government in providing services well in advance of the delivery of those services" and does not "require that the service for which the fee is charged be performed in a reasonable time-period" nor does it "impose a temporal limitation on the delivery of the services for which the fee is charged."

[10] Relying on the decision of the Supreme Court of Canada in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 (*Eurig*) the applications judge found that for user fees to be valid, a reasonable connection or clear nexus must exist between the quantum of the fees and the cost of providing the corresponding service. He further found, based on the evidence, that a clear nexus had been established between the service cost and the fees charged for permanent resident visa applications related to parents and grandparents, even though these fees were paid well in advance of the service.

[11] Relying on the decision of Rouleau J. in *Canadian Shipowners Assn. v. Canada*, [1997] F.C.J. No. 1002 (QL), 137 F.T.R. 216, aff'd [1998] F.C.J. No. 1515, 233 N.R. 162 (F.C.A.), the applications judge concluded that, in considering whether a regulation lawfully imposes user fees under the enabling authority of the *Financial Administration Act*, the practical realities of providing the service must be taken into account. In this case, he found, at paragraph 58 of his reasons, that the timing of the permanent resident visa application fees reflected the practical reality of processing sponsorship and permanent residence applications, and he agreed "that this is effectively one

service". He accepted the evidence that collecting the fees together for both applications "reflected the need for efficiency in an already lengthy process, by processing two fees at once and by doing so early on so that services are not delayed later."

The standard of review

[12] This appeal concerns the *vires* of paragraph 295(3)(a) of the *Regulations*. Therefore, the Court is not dealing with judicial review of administrative action, to which the principles established in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 apply, but with appellate review of the decision of a judge of first instance rejecting an administrative law challenge to the validity of regulations brought by way of an application. In these circumstances, the principles of appellate review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 apply: *Saputo Inc. and Kraft Canada Inc. v. Canada*, 2011 FCA 69 at para. 9.

[13] The determination of the validity or *vires* of regulations on administrative law grounds is subject to the correctness standard: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 at para. 5; *Parks Canada v. Sunshine Village Corp.*, 2004 FCA 166, [2004] 3 F.C.R. 600 at para. 10; *Canada (Attorney General) v. Mercier*, 2010 FCA 167, 404 N.R. 275 at paras. 78-79.

[14] In an appeal involving a constitutional challenge, where it is possible to treat the constitutional analysis separately from the factual findings that underlie it, deference is owed to the initial findings of fact: *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009

SCC 53, [2009] 3 S.C.R. 407 at para. 26; *CHC Global Operations (2008) Inc. v. Global Helicopter Pilots Association*, 2010 FCA 89, 401 N.R. 37 at para. 22. I see no reason why the same approach should not be used where the challenge is based on administrative law principles rather than on constitutional law principles.

The position of the appellant

[15] The appellant states, relying on *Eurig*, that section 19 of the *Financial Administration Act* requires a nexus between the user fees collected and the service provided. For the appellant, no such nexus can exist when user fees are charged in advance for applications which do not exist and which have no possibility of existing until approximately 34 months after the fees are actually paid. The net result is that the government financially benefits from the permanent resident visa application processing fees paid years in advance of any processing cost being incurred for the related services.

[16] The appellant contends that this result is contrary to section 19 of the *Financial Administration Act*, which restricts user fees to services actually provided in consideration of the fees paid, and which consequently does not allow for the collection of two fees where the service related to the second fee is contingent on the successful completion of the first service.

[17] The appellant thus alleges that the applications judge erred in finding that the processing of the sponsorship application and of the related family class permanent resident visa application are effectively one service, and in finding that a clear nexus exists between the cost of processing the permanent resident visa application and the fees paid for this service.

The position of the respondent

[18] The respondent supports the decision of the applications judge in all aspects. The respondent contends that subsection 19(2) of the *Financial Administration Act* is the legislative reflection of the principle that government should not profit by the service fees it charges, but that this provision does not prevent the government from collecting service fees in advance of delivering a service. As the applications judge found, the practical realities of providing services must be taken into account when determining how and when to collect the fees associated with the services. Paragraph 295(3)(a) of the *Regulations* reflects the practical reality that the sponsorship and permanent resident visa applications are effectively two parts of one service, and also reflects the practical need for efficiency in an already lengthy immigration process.

[19] In this case, although the *Regulations* contain different fee structures for sponsorship applications and sponsored permanent resident visa applications, the respondent argues that they are enacted for one class of users, namely persons who wish to process family class applications.

Statutory Framework

[20] Subsections 19(1) and (2) of the *Financial Administration Act* provide for the adoption of regulations prescribing user fees:

19. (1) The Governor in Council may, on the recommendation of the Treasury Board,	**19.** (1) Sur recommandation du Conseil du Trésor, le gouverneur en conseil peut :
(*a*) by regulation prescribe the fees or charges to be paid for a service or the use of a facility provided by or on behalf of Her Majesty in right of	*a*) fixer par règlement, pour la prestation de services ou la mise à disposition d'installations par Sa Majesté du chef du Canada ou en son

Canada by the users or classes of users of the service or facility; or	nom, le prix à payer, individuellement ou par catégorie, par les bénéficiaires des services ou les usagers des installations;
(*b*) authorize the appropriate Minister to prescribe by order those fees or charges, subject to such terms and conditions as may be specified by the Governor in Council.	*b*) autoriser le ministre compétent à fixer ce prix par arrêté et assortir son autorisation des conditions qu'il juge indiquées.
(2) Fees and charges for a service or the use of a facility provided by or on behalf of Her Majesty in right of Canada that are prescribed under subsection (1) or the amount of which is adjusted under section 19.2 may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility to the users or class of users.	(2) Le prix fixé en vertu du paragraphe (1) ou rajusté conformément à l'article 19.2 ne peut excéder les coûts supportés par Sa Majesté du chef du Canada pour la prestation des services aux bénéficiaires ou usagers, ou à une catégorie de ceux-ci, ou la mise à leur disposition des installations.

[21] Subsection 20(2) of the *Financial Administration Act* allows for the refund of money paid to a public officer for any purpose that is not fulfilled, less any amount attributable to any service rendered:

(2) Where money is paid by any person to a public officer for any purpose that is not fulfilled, the money may, in accordance with regulations of the Treasury Board, be returned or repaid to that person, less such sum as in the opinion of the Board is properly attributable to any service rendered.	(2) Les fonds versés à un fonctionnaire public à des fins non réalisées peuvent, conformément aux règlements du Conseil du Trésor, être restitués à celui qui les a versés moins le montant régulièrement imputable, selon le Conseil, à un service rendu.

[22] Paragraph 295(1)(a), subsection 295(3) and section 304 of the *Regulations* were adopted pursuant to section 5 of the IRPA and paragraph 19(1)(a) and subsection 20(2) of the *Financial Administration Act* in order to prescribe the following fees for the processing of sponsorship applications and related permanent resident visa applications for members of the family class:

295. (1) The following fees are payable for processing an application for a permanent resident visa:	**295.** (1) Les frais ci-après doivent être acquittés pour l'examen de la demande de visa de résident permanent :
(*a*) if the application is made by a person as a member of the family class	*a*) si la demande est faite au titre de la catégorie du regroupement familial :
(i) in respect of a principal applicant, other than a principal applicant referred to in subparagraph (ii), $475,	(i) dans le cas du demandeur principal autre que celui visé au sous-alinéa (ii), 475 $,
(ii) in respect of a principal applicant who is a foreign national referred to in any of paragraphs 117(1)(*b*) or (*f*) to (*h*), is less than 22 years of age and is not a spouse or common-law partner, $75,	(ii) dans le cas du demandeur principal qui est un étranger visé à l'un des alinéas 117(1)*b*) ou *f*) à *h*), est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait, 75 $,
(iii) in respect of a family member of the principal applicant who is 22 years of age or older or is less than 22 years of age and is a spouse or common-law partner, $550, and	(iii) dans le cas d'un membre de la famille du demandeur principal qui est âgé de vingt-deux ans ou plus ou qui, s'il est âgé de moins de vingt-deux ans, est un époux ou conjoint de fait, 550 $,
(iv) in respect of a family member of the principal applicant who is less than 22 years of age and is not a spouse or common-law partner, $150;	(iv) dans le cas d'un membre de la famille du demandeur principal qui est âgé de moins de vingt-deux ans et qui n'est pas un époux ou conjoint de fait, 150 $;
(3) A fee payable under subsection (1) in respect of a person who makes an application as a member of the family class or their family members	(3) Les frais prévus au paragraphe (1) à l'égard de la personne qui présente une demande au titre de la catégorie du regroupement familial ou à l'égard des membres de sa famille sont :
(*a*) is payable, together with the fee	*a*) exigibles au moment où le

payable under subsection 304(1), at the time the sponsor files the sponsorship application; and (*b*) shall be repaid in accordance with regulations referred to in subsection 20(2) of the *Financial Administration Act* if, before the processing of the application for a permanent resident visa has begun, the sponsorship application is withdrawn by the sponsor.	répondant dépose sa demande de parrainage, à l'instar des frais prévus au paragraphe 304(1); *b*) restitués conformément aux règlements visés au paragraphe 20(2) de la *Loi sur la gestion des finances publiques*, si la demande de parrainage est retirée par le répondant avant que ne débute l'examen de la demande de visa de résident permanent.
304. (1) A fee of $75 is payable for processing a sponsorship application under Part 7.	**304.** (1) Des frais de 75 $ sont à payer pour l'examen de la demande de parrainage présentée sous le régime de la partie 7.
(2) The fee referred to in subsection (1) is payable at the time the application is filed.	(2) Les frais prévus au paragraphe (1) doivent être acquittés au moment du dépôt de la demande.

Analysis

[23] A nexus must exist between the user fees charged by government and the cost of the associated service provided: *Eurig* at para. 21; *620 Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 S.C.R. 131 at para. 19. However, "courts will not insist that fees correspond precisely to the cost of the relevant service. As long as a reasonable connection is shown between the service provided and the amount charged, that will suffice" (*Eurig* at para. 22). Though this test was developed within the context of distinguishing between a tax and a user fee for constitutional purposes, it is nevertheless instructive for interpreting the *Financial Administration Act* as it relates to user fees. The fundamental issue raised by this appeal is whether such a reasonable connection

can be found to exist where the payment of user fees is made substantially in advance of the actual service and in circumstances where the service may, in some cases, never be provided.

[24] The first question to address is whether the *Financial Administration Act* precludes the payment of user fees in advance of the service they relate to. If the *Financial Administration Act* does not preclude advance payments of user fees, it must then be determined whether it nevertheless precludes the collection of user fees for a service which is contingent on the successful completion of a related service.

[25] The provisions of the *Financial Administration Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act, and the intention of Parliament: *Bell ExpressVu Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26. This approach is buttressed by section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object."

[26] Section 19 of the *Financial Administration Act* does not prescribe that fees for a service or the use of a facility may only be charged after the service is provided or after the facility has been used. In interpreting this provision, the "Court must take the statute as it finds it. In the absence of limiting words in the statute, the Court will not read in limitations": *Sunshine Village Corp. v. Canada (Parks)*, 2004 FCA 166, [2004] 3 F.C.R. 600 at para. 18. There is nothing in section 19 which restricts the authority of the Governor in Council to adopt regulations requiring the payment

of user fees prior to the actual delivery of the service. The restriction set out in section 19 simply requires that the fees not exceed the cost of providing the service or the use of the facility. This can be achieved by adequately projecting the cost of providing the service or the use of the facility at the time the fees are prescribed or collected.

[27] In my view, restricting the collection of user fees until after the related government service has been provided runs counter to the very purpose of section 19 of the *Financial Administration Act*, which is to ensure that, in appropriate prescribed situations, users of a government service assume at least part of the cost of providing the service. The fulfillment of this purpose implicitly suggests that the payment of the fees can be required in advance of the service in circumstances deemed appropriate by the Governor in Council. This avoids situations where some users refuse to pay after the delivery of the service, leaving the government with the costly and time consuming task of collecting the fees through various after service collection means.

[28] In addition, subsection 20(2) of the *Financial Administration Act* and the related *Repayment of Receipts Regulations, 1997*, SOR/98-127 allow for the refund of any money that has been paid to a public officer for any purpose that has not been fulfilled, less any sum that is properly attributable to the service rendered. This is an additional indication that a requirement to pay fees in advance of services can be prescribed under section 19 of the *Financial Administration Act*.

[29] The appellant argues that even if the fees can be collected in advance of the service, in this case no service can in fact be provided until the sponsorship application has been dealt with, a

process which, in March of 2010, was estimated to take approximately 34 months to complete. Since the permanent resident visa application is contingent on the approval of the sponsorship application, the appellant asks how a nexus or reasonable connection can be established between the fee collected for this visa application and the service this fee relates to when such service is simply a potentiality rather than a reality?

[30] The applications judge dealt with this question by taking into account the practical realities of providing the service. He found that though two services were in fact being paid for, one actual service (processing the sponsorship application) and one potential service (processing the permanent residence application), this simply reflected the practical realities of processing family class immigration requests, and that, in effect, only one service was being provided.

[31] I agree with the appellant that in this case two services are being provided, for which two separate fees are collected. Paragraph 295(1)(a) and section 304 of the *Regulations* clearly distinguish between the sponsorship application processing fee and the permanent resident visa application processing fee. Therefore, I would not characterize the processing of the sponsorship application and the processing of the visa application as one service, but rather as two closely related processing services within the family class selection process.

[32] Nevertheless, the practical realities of providing both services may be taken into account in assessing whether section 19 of the *Financial Administration Act* has been complied with: *Canadian Shipowners Assn. v. Canada, op. cit*. In this case, the practical realities are that the

sponsorship application has no independent utility from the permanent resident visa application and both applications are interrelated and interdependent. The sponsorship application is submitted solely in contemplation of the permanent resident visa application. Subsection 13(1) of the IRPA sets out that a Canadian citizen or permanent resident may "sponsor a foreign national who is a member of the family class." One may only be a member of the family class if sponsored (subsection 117(1) of the *Regulations*). Likewise, subsection 130(1) of the *Regulations* refers to "a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class" and such sponsor must file "a sponsorship application in respect of a member of the family class." It stands to reason that a sponsorship application cannot be made in the absence of an identified member of the family class who intends to make an application for a permanent resident visa as a member of that class.

[33] Moreover, in those rare cases where a sponsorship application is not approved, the sponsor is given an opportunity to withdraw his sponsorship application, thus allowing the fees collected for processing the permanent resident visa application to be refunded in accordance with subsection 20(2) of the *Financial Administration Act*. Paragraph 295(3)(b) of the *Regulations* provides that the fees "shall be repaid".

[34] Consequently, a nexus or reasonable connection can be established between the fees collected for the permanent resident visa applications and the cost of processing these applications even if these fees are collected in advance along with the related sponsorship application. The sponsorship application is inextricably related and intertwined with the related permanent resident

visa application. Requiring the simultaneous payment of the fees for both applications can thus be justified under the nexus or reasonable connection test, particularly in light of the fact that the fees for processing the visa application can be refunded in the event the sponsorship application is not successful.

[35] The appellant however also claims that the government profits from the 34 months during which it holds the fees prior to incurring the cost of the service, and that this is contrary to section 19 of the *Financial Administration Act.* Although it is true on a theoretical level that the government could gain interest on these amounts or could avoid interest charges through reducing borrowings proportional to the amounts collected, this, if established, would not offend section 19 of the *Financial Administration Act*. Since the Governor in Council may prescribe that user fees be collected in advance of the service they relate to, it is inherent to the scheme of the *Financial Administration Act* that such fees will be deposited and managed in accordance with the applicable statutory and regulatory provisions relating to public monies. This is intrinsic to the management of such monies and in no way offends section 19 of the *Financial Administration Act*. The appellant has not referred to any other legislative provision which could sustain his argument on this point. In any event, no evidence has been submitted establishing that a benefit is, in fact, received by government through the payment of these fees in advance of the service, nor as to the quantum of that alleged benefit.

[36] The underlying rationale of the appellant's argument seems to be that it is unreasonable for the government to collect the permanent resident visa application processing fees some 34 months

in advance of the service they relate to when it would be easy for the government to amend the *Regulations* in order to address the issue. The appellant submits at paragraph 42 of his memorandum “that the Minister should be required to notify an applicant when he is prepared to provide the service of determining an application for permanent residence and to then provide the applicant with the opportunity to pay the applicable fee for the service of determining an application for permanent residence if he wishes to proceed with that application.”

[37] The problem with this rationale is that it implies that the Court may enter into the realm of policy decision making. There are often competing demands on government services and it is the role and responsibility of government to address these competing demands. Sometimes hard choices need to be made, such as prioritizing the administrative processing of the applications of spouses and children within the family class. These choices may impact others competing for the same or similar government services. However, it is the responsibility of government, not of the courts, to determine the appropriate corrective regulatory measures, if any, to address such impacts. In the absence of a legislative or constitutional constraint on the regulatory choices made by government, courts will not interfere to compel their own regulatory preferences: *Thorne’s Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 at p. 111; *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655 at para. 26.

Conclusion

[38] I would answer the question certified by the applications judge as follows:

Question: Is *Immigration and Refugee Protection Regulation* 295(3)(a), as applied to sponsored immigrant visa applications made by parents and grandparents, *ultra vires* on the ground it is inconsistent with s. 19 of the *Financial Administration Act*?

Answer: No.

[39] I would consequently dismiss this appeal.

"Robert M. Mainville"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-295-10
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MOSELY, DATED AUGUST 5, 2010, DOCKET IMM-804-09	
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CONCURRED IN BY:	**DAWSON J.A.** **LAYDEN-STEVENSON J.A.**
DATED:	March 28, 2011

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