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## REMOTE HEARINGS

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1. On 23.03.2020 the Government announced a UK-wide 'lockdown' in response to the Covid-19 pandemic. As a consequence, in-person hearings in the Family Court were no longer possible. Alternate hearing methods had to be utilised and the concept of 'remote hearings' became a dominant feature in many public law proceedings. A remote hearing is any hearing which does not take place in person. There are a number of methods by which remote hearings can take place, such as telephone, Skype and CVP.
2. Over the following weeks and months there has been a steady stream of guidance and case law relating to remote hearings. The purpose of this training is to provide an accessible road map through the guidance relating to remote hearings in public law proceedings as of 18.06.2020.

### **Which cases are suitable for remote hearing?**

3. The President's Guidance on Remote Hearings dated 19.03.2020 lists the following as hearings which may be considered to be suitable for remote hearing:
  - a. All directions and case management hearings;
  - b. Emergency Protection Orders;
  - c. Interim Care Orders;
  - d. Issues Resolution Hearing.
4. This list is not exhaustive. Other cases may be suitable for remote hearing. The decision whether to proceed with a remote hearing is to be decided on a case-by-case basis and not as a consequence of a blanket policy.
5. If a hearing is not suitable to be heard remotely, the court may accommodate an in-person hearing if it finds that there are exceptional circumstances. The Remote Family Court v.4 states: *'live court-based hearings should now be confined only to exceptional circumstances where a remote hearing is not possible and yet the hearing is sufficiently urgent to mean that it must take place with those involved attending court in a manner which meets the social distancing requirements'*.
6. On 09.04.2020 the Lord Chief Justice, Master of the Rolls and the President issued guidance setting out a number of indicators designed to assist judges in deciding whether a particular hearing should be heard remotely, and if so, what form of remote hearing should be adopted. At this stage, the guidance was that a case is unlikely to be suitable for remote hearing if parents and/or lay witnesses are to be called. The indicators were as follows:

*'Generally:*

- a. *If all parties oppose a remotely conducted hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way;*
- b. *Where the final hearing is conducted on the basis of submissions only and no evidence, it could be conducted remotely;*
- c. *Video/Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing'*.

7. The President published a document called 'The Family Court and Covid-19: The Road Ahead' on 09.06.2020. This document is important and should be read in full. This guidance removes the presumption that a case is unlikely to be suitable for remote hearing where parents and/or lay witnesses are to be called. Instead, the guidance to be applied is now that such cases may not be suitable for a fully remote hearing. The guidance then states:

*'Consideration should be given to conducting a hybrid hearing (with one or more of the lay parties attending court to give their evidence) or a fully attended hearing. Where it is not possible to conduct a hybrid hearing or fully attended hearing, the court may proceed to hold a remote hearing, where, having regard to the child's welfare, it is necessary to do so; in such a case the court should make arrangements to maximise the support available to lay parties'.*

8. Fabricated or Induced Illness fact-finding hearings are not suitable for remote hearings, see Re P (A Child: Remote Hearing) [2020] EWFC 32 (discussed below).
9. The fact care and placements orders are sought in relation to a child is not, in itself, a reason not to proceed with a remote hearing, see Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583.

#### **Which platform should be used for remote hearings?**

10. In relation to platforms for remote hearings, the President gives the following guidance:
  - a. In terms of remoteness, a remote hearing over the telephone is the most remote option other than a paper or an email-based process.
  - b. Telephone hearings may be well suited to short case management or review hearings, they are unlikely to be suitable for any hearings where evidence is to be given or where the hearing is otherwise of substance.
  - c. Where a suitable video platform is an available and viable option, video rather than telephone, should be used for the conduct of a remote hearing<sup>1</sup>.
  - d. CVP should be used where it is available.
11. Re B (Children: Remote Hearing: Interim Care Order) [2020] EWCA Civ 584 confirms that there is a qualitative difference between a remote hearing conducted over the telephone and one undertaken via a video platform. Where video hearing facilities are available, this should be the default option in urgent cases.
12. The President's latest guidance contains the following checklist to assist with determining the format of the hearing:
  - a. Can the issues be determined fairly and justly at a fully remote hearing (having regard to checklist C below)?

<sup>1</sup> I have already drafted a user-friendly Skype guide for use in Derbyshire, which may assist if you are struggling with Skype.

- b. Is it necessary to conduct all or part of the hearing with some of the parties in attendance at court ('a hybrid hearing')?
- c. Where a remote hearing or hybrid hearing is to be held it should be undertaken via video link, unless the court determines that a telephone hearing will be sufficient, or a video link is not available;
- d. Where a telephone hearing is to take place it should be undertaken via BT MeetMe Dolby Plug-in, if available;
- e. Consideration should be given to access to the hearing by media or legal bloggers [FPR 2010, r 27.11, PD278 and PD36J];
- f. Where in ordinary circumstances arrangements would be made for a child to meet the judge the court should strive to establish a means by which the judge and the child may 'meet', albeit this may, in some circumstances, have to be via a video link rather than face-to-face;
- g. The court should give at least three days' notice of the platform that is to be used for any remote hearing.

#### **Decision making: should a remote hearing take place?**

13. The most useful starting point is Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583. In this case, the Court of Appeal allowed an appeal against a decision to proceed with a hybrid final hearing where care and placement orders were sought. The first instance judge had directed that the parents were to attend court to give their evidence when all other parties were to give evidence remotely. The father had significant difficulties engaging with the remote hearing process, which included dyslexia, a tendency to become easily frustrated and a lack of access to technology.
14. Re A provides three 'cardinal points':
  - a. The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion.
  - b. Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance aimed at supporting the judge or magistrate in deciding whether or not to conduct a remote hearing in a particular case.
  - c. The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered.
15. The court then listed a checklist of factors that are likely to influence the decision on whether to proceed with a remote hearing, namely:
  - a. The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?
  - b. Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;
  - c. Whether the parties are legally represented;
  - d. The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include: access to and familiarity with the necessary technology, funding,

- intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing) and other matters;
- e. Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;
  - f. The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;
  - g. The scope and scale of the proposed hearing. How long is the hearing expected to last?
  - h. The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;
  - i. The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;
  - j. Any safe (in terms of potential Covid-19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or the magistrates.
16. Re A is clear that the judgment does not create a blanket policy that final hearings where care and placement orders are sought cannot proceed. The decision to proceed with a remote hearing must be made on a case by case basis.
17. For an example of how the court is applying the Re A checklist, please see A Local Authority v M [2020] EWHC 1086 (Fam).
18. In Re P (A Child: Remote Hearing [2020] EWFC 32 the court held that the decision to proceed with a remote hearing may not turn on the category of case or the seriousness of the decision, *‘but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working’*.
19. Re P was a fabricated or induced illness case which, by its very nature, was factually detailed and complex. The court found that *‘given the wealth of factual detail that is to be placed before the court in relation to their mother’s actions over the last three or four years, for her to have a full real-time ability to instruct her legal team throughout the hearing, not just by a phone call at the end of each witness’s evidence, seems to me to be a prerequisite for her to be able to take an effective part in a fair process at the trial of issues such as this’*.
20. The fact that Re P involved such complex factual issues caused the Judge to conclude that it is important that the court could see the parties in the court room, particularly the mother. The following was stated:

*‘The reason for having the very clear view that I have is that it simply seems to me impossible to contemplate a final hearing of this nature, where at issue are a whole series of allegations of factitious illness, being conducted remotely. The judge who undertakes such a hearing may well be able to cope with the cross-examination and the assimilation of the detailed evidence from the e- bundle and from the process of witnesses appearing over Skype, but that is only part of the judicial function. The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the*

postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment. I do not consider that a remote hearing for a final hearing of this sort would allow effective participation for the parent and effective engagement either by the parent with the court or, as I have indicated, the court with the parent. I also consider that there is a significant risk that the process as a whole would not be fair' (emphasis added).

21. Please note that Re P was an extremely complex case where, plainly, the mother's presentation and reactions were likely to be of significant interest to the Judge. In those circumstances, it was necessary for the Judge to be able to see the mother and observe her response to the evidence as it unfolded. This may not be required in all other cases. For example, in A Local Authority v M [2020] EWHC 1086 (Fam) Lieven J considered Re P and the concerns the court had in relation to the assessment of a witness's demeanour. On this issue, Lieven J referred to the case of SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391, which contains the following useful quotes:

- a. *'Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges 'in a permanent position of disadvantage as against the trial judge'. That is because it has been increasingly recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth...'*
- b. *'No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.'*

22. Lieven J highlighted that in Family and Criminal courts lay witnesses routinely give evidence via video link when they are considered to be vulnerable. The procedure for doing so is dealt with extensively in PD3AA. Lieven J stated *'it therefore must follow that the giving of evidence in this way does not undermine the fairness of the process either for the individuals concerned or the parties'*.

23. Lieven J therefore concluded that the parents in that case should give evidence remotely and that a fair hearing could still be achieved via remote means.

24. The decisions in Re P and A Local Authority v M reiterate that decisions in relation to proceeding with a remote hearing should be considered on a case by case basis.

### **Efficient case management**

25. The latest guidance from the President states that clear, focused and very robust management of cases will be vital in the coming months. As a consequence, *'the parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions; and oral hearing will encompass only that which is necessary to determine the application before the court'*.
26. The President has recommended the following checklist to assist with narrowing the issues:
- a. What issues are or can be agreed?
  - b. Which of the remaining issues in the case is it necessary for the court to determine?
  - c. Can those issues be determined without an oral hearing?
  - d. If not, for which issues is an oral hearing necessary?
  - e. What oral evidence is necessary to determine those issues?
  - f. The time estimate for each witness (including cross-examination) is to be reduced to the likely minimum necessary for the court to determine the issues to which it relates.
27. The local authority will need to think carefully about the findings it seeks to prove threshold and be in a position to justify why any proposed finding is necessary to resolve the proceedings. If the proposed finding is not necessary, the court's case management powers permit it to curtail that line of litigation.
28. The representatives for the respondents will also need to be able to justify why certain witnesses are required. It will not be acceptable to insist on calling every witness to challenge every issue.

### **The remote hearing**

29. The President's latest guidance contains the following checklist for optimising fairness of remote hearings:
- a. The court should consider what options are available to support lay parties and enhance their ability to engage in a remote hearing. The options may include:
    - I. Attendance at a venue away from the party's home (for example a room at court, solicitor's office, counsel's chambers or a local authority facility);
    - II. Arranging for at least one of the party's legal team to accompany them (whilst observing social distancing);
    - III. Establishing a second channel of communication between the lay party and their lawyers (for example by email, communication app or telephone during the hearing);
  - b. Cases should be clearly timetabled with a start and planned finish time – where a witness template has been completed by the advocates and approved by the judge it must be complied with, save in exceptional circumstances;
  - c. Regular short breaks should be provided in a hearing of any length;
  - d. The overall length of the hearing should be reasonable, taking account of the need for breaks and of the acknowledged additional pressure of engaging in a remote court process;

- e. Prior to the start of the hearing, all advocates should have communicated with each other in an advocates meeting;
- f. All participants should be logged in and ready to start the hearing at the appointed hearing time;
- g. Advocates should ensure that they are available not only for the proposed length of the hearing but also for a reasonable period thereafter to de-brief their client and communicate with other advocates over the drafting of the order and any ancillary matters;
- h. At the start of each hearing the judge should make a short statement explaining the ground rules for the remote hearing;
- i. The judge should ensure that there is a means for a party to give instructions to their advocate during the hearing;
- j. Where the hearing involves a litigant in person, the judge should 'check in' regularly with any litigant in person to ensure that they are hearing, understanding and following the proceedings;
- k. At all times a remote hearing should be conducted with the degree of seriousness and respect that is evident at a fully attended hearing;
- l. The court should consider how best to arrange for the involvement of any interpreter or intermediary in the hearing;
- m. The court should ensure that lay parties have access to the electronic bundle (unless this is not necessary, for example by reason of the hearing being an interim hearing where a party is represented and not required to give evidence).

30. In Re B the Court of Appeal also made the following comments:

*'...The first and most important [factor] must be whether it is just to the parties to proceed with them giving their evidence remotely. They must be able to follow the questions and be able to give their best answers. If the technology works, and they are in a position to understand the documents, then in principle a remote hearing is capable of being fair. As Mr Goodwin and Mr Verdan have pointed out, vulnerable witnesses routinely give evidence remotely in the family and criminal courts. Subject to all the protection in PD3AA, the assumption must be that such a process is capable of being fair and meets the requirements of Article 6. A judge will have to be astute in a remote hearing to ensure the witness is following the question and where appropriate has the relevant document. It is easier to do this in a live hearing because one can see more easily what the witness has in front of them, and sometimes tell by their body language if they are completely lost. However, it is perfectly possible with a little sensitivity to do the same task remotely'* (emphasis added).

### **Appeals against remote hearing decisions**

31. At the moment, remote hearings are a topic of interest and there has therefore been a series of Court of Appeal cases discussing these issues. However, it should be remembered that the decision whether to proceed or not with a remote hearing is a case management decision over which the first instance judge has a wide discretion.

32. In Re C (Children) (Covid-19: Representation) [2020] EWCA Civ 734 Jackson LJ stated the following:

*'To conclude, as was said in Re A, the means by which an individual case may be heard is a case management decision over which the first instance court will have a wide discretion*



*based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. For specialist judges, these are becoming routine decisions, and as time goes on a careful evaluation of the kind made in this case is no more likely to be the stuff of a successful appeal than any other case management decision' (emphasis added).*

### **Other issues**

33. There have been three recent cases which demonstrate issues that have arisen during the course of remote hearings.
34. The first is Re B (Children: Remote Hearing: Interim Care Order) [2020] EWCA Civ 584. A decision to grant an interim care order and authorise a plan of interim removal was overturned by the Court of Appeal. The local authority applied on an urgent basis for an interim care order and a short-notice hearing was listed by the court. The hearing took place via telephone before a Recorder, who had been working for 10.5 hours by the time he was required to give judgment in this case at first instance. The hearing process was complicated by the local authority changing its care plan from seeking an interim supervision order to seeking the removal of the child under an interim care order in response to the children's guardian filing a position statement supporting removal. The child resided with his grandmother. Counsel for the grandmother felt 'hopelessly unable' to represent her, due to difficulties in obtaining instructions remotely, particularly when the local authority's position was evolving.
35. The Recorder heard submissions from all parties and granted the local authority's application for an interim care order. The child was removed from the care of his grandmother that evening.
36. The Court of Appeal found that the evidence relied upon in support of the argument that the child should be removed was inadequate. The Court of Appeal also found the hearing process was unfair and should have been adjourned. The following was stated:

*'...The evidence did not remotely justify his peremptory removal and there is nothing in the judgment that is capable of persuading us that it did. Our further observation is that, no doubt partly because of the exigencies of the remote process, there was a loss of perspective in relation to the need for an immediate decision about Sam. This was a classic case for an adjournment so that a considered decision could be taken about removal, if indeed that option was going to be pursued after reflection. An adjournment would have enabled the parties and the court to have all the necessary information. As it was, crucial information was lacking, and its absence was overlooked by the court' (emphasis added).*

37. The Court of Appeal also rejected the assertions of the children's guardian that the 'lockdown' was a relevant factor in the decision whether or not to authorise the interim removal of a child:

*'...The pressured way in which the proceedings developed may have felt like an emergency to the professionals, but it was not an emergency for Sam. We also firmly dismiss the proposition that the current 'lockdown' provides a reason for the removal of a child where none would otherwise exist. It is possible to envisage a case at the margins where face-to-face supervision is so important that a child would not be safe without it, but this case and most others like it fall nowhere near that category. Our overall observation in this*

*respect is that unfortunately Sam's voice was not heard at a critical moment in the proceedings and his interests were not protected by his Guardian, whose recommendation set in train the sequence of events that followed'* (emphasis added).

38. The Court of Appeal also commented that it was open to counsel for the grandmother to request a stay in the implementation of the interim care order pending appeal.
39. Re B demonstrates the pressure that remote hearings can place upon the judiciary, advocates and parties and how this can lead to difficulties. It also demonstrates the significant problems that can arise when advocates find they are unable to obtain instructions from clients during remote hearings, particularly in circumstances where another party's position has fundamentally changed.
40. The second case is Re C (Children) (Covid-19: Representation) [2020] EWCA Civ 734. In this case Williams J (at first instance) had heard evidence from several experts remotely during a fact-finding hearing. Williams J then had to consider whether to continue and hear evidence from the parents remotely or adjourn to another date when a hybrid hearing or fully in-person hearing could take place. The options before the court were:
  - a. Continue with the fact-finding hearing and take the evidence of the lay parties immediately;
  - b. Adjourn to a hearing on 24.06.2020;
  - c. Adjourn to a hearing in September or October 2020.
41. Williams J applied the Re A checklist and reached the conclusion that, whilst the evidence of the lay parties was not complex, it carried significant importance and allowing that evidence to be given in-person would therefore be a material advantage. Williams J was not able to facilitate an in-person hearing immediately because the mother had recently been exposed to the Covid-19 infection. Proceeding with the hearing immediately was therefore ruled out as a realistic option.
42. Williams J therefore considered whether to adjourn the fact-finding hearing on a part heard basis to either 24.06.2020 or October/September. All of the lay parties were able to attend a hearing on 24.06.2020. Unfortunately, the mother's leading counsel could not attend the June hearing because she would be required to continue shielding.
43. Williams J found that a fair hearing could still be achieved if the mother's leading counsel could not attend in-person. Williams J accepted that proceeding in June would mean that the mother could not easily interact with her leading counsel and this would have an impact on how the mother feels at court. However, whilst the presence of leading counsel is desirable, it is not essential to the provision of a fair hearing.
44. Williams J was concerned about the significant delay for the children if the matter was adjourned to September/October, particularly when the children had already been in foster care since May 2019.
45. The mother sought to appeal the decision of Williams J and argued that the decision '*breaches a very fundamental principle of natural justice and prejudices her client's right to participate effectively in the hearing*'. It was also argued that Williams J did not deal with the inequality of arms that his decision creates.

46. Jackson LJ, hearing the appeal, concluded that the proposed part-heard hearing does not threaten any breach of the mother's right to a fair hearing, let alone the fundamental breach that has been claimed. Jackson LJ was not satisfied that the absence of the mother's leading counsel would prevent the mother participating effectively in the hearing. Jackson LJ was also not satisfied that this created an inequality of arms amongst the parties and that any disparity caused by the absence of the mother's leading counsel was likely to be slight.
47. Jackson LJ also agreed with Williams J that the length of the delay is a relevant factor. Jackson LJ stated, *'the real possibility of an indefinite postponement was also something the judge could not fail to take into account'*.
48. It is likely that advocates who have to shield during the pandemic will face the same difficulties as the mother's leading counsel in Re C. However, this judgment makes it clear that the inability of leading counsel to attend in person does not, in itself, constitute a breach of the Article 6 rights of their client.
49. The stance taken in Re C is consistent with the President's latest guidance 'The Road Ahead', which states:
- 'Those professionals who, unfortunately, are required to shield or in some other vulnerable group, are entitled to expect that the judiciary will be sympathetic to their situation and, will take all reasonable steps to make arrangements for the hearing to proceed which take account of their difficulties. Where, however, it is not possible, despite all best endeavours, to accommodate the absence of a professional who must avoid coming to a court building then, unless the interests of the child, fairness and justice can be met in another way, the court hearing should proceed in their absence, with any necessary arrangements being made to cover for the absent professional'*.
50. Lastly, in Lancashire County Council v M (Covid-19 Adjournment Application) [2020] EWFC 42 MacDonald J refused the father's application to adjourn a final hearing. The court was able to accommodate a fully in-person hearing in Manchester. The father was not willing to travel to Manchester during the pandemic and was only willing to attend a fully attended hearing if this took place in Preston. The mother adopted a similar position. The local authority offered to fund taxis for the parents to transport them to and from the hearing each day to avoid the need to use public transport. The court directed that the hearing was to take place in person in Manchester unless the parents refused to travel by taxi to court in which case the matter would take place on a hybrid basis with the parents giving evidence from a location in Preston.
51. Local authorities will need to be prepared to make offers to fund transport, similar to what was offered in LCC v M to assist parents in attending hybrid or in-person hearings if they are unable or unwilling to travel by public transport.

### **Conclusion**

52. The President's latest guidance (The Road Ahead) and Re A are essential reading for advocates who will be appearing at remote hearings.
53. The key factors to remember are:

- a. Decisions whether or not to proceed with a remote hearing are case management decisions over which the judge has a wide discretion.
- b. Decisions whether or not to proceed with a remote hearing are to be made on a case-by-case basis.
- c. The Re A checklist is to be applied when deciding whether to proceed with a remote hearing.
- d. Adjourning to await a fully attended hearing is unlikely to now be an option. The court will need to consider whether fairness can be achieved via fully remote or hybrid means if an in-person (socially distanced) hearing is not available.
- e. Efficiency is always key, but particularly so at the moment. Advocates will need to apply the President's case management checklist and justify their case management proposals.
- f. The court will only allow issues to be litigated if they are necessary to resolve the proceedings.

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**18 June 2020**

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