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[17/03/1999; Court of Appeal (England); Appellate Court]
Re V.-B. (Abduction: Custody Rights) [1999] 2 FLR 192

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

17 March 1999

Beldam, Ward, Mantell LJJ

In the Matter of V.-B.

A Levy QC and D Burles for the Appellant

P Scriven QC and J Reddish for the Respondent

WARD LJ: On 21 August 1998 the mother of M now aged 8 and A not yet 4 years old left the Netherlands where the children had been habitually resident and established themselves in a new home in Wales whence the mother hails. The father is a Dutchman. He applied for the return of the children under the Hague Convention on the Civil Aspects of International Child Abduction which was given the force of law pursuant to the Child Abduction and Custody Act 1985. The mother had to acknowledge that she removed the children from Amsterdam without the father's consent or the leave of the Dutch court but she has contended that the removal should not be considered wrongful within the meaning of Article 3 of the Convention because it was not in breach of the father's rights of custody. On 21 January 1999 Sumner J upheld that submission and dismissed the father's application. The father has appealed to us with our leave. The sole issue in the appeal is whether or not there has been a breach of his rights of custody, and, more particularly, does he have any such rights.

The factual background.

The mother and father married in Cardiff in 1989. They made their matrimonial home in Amsterdam. It was an unhappy marriage. On 1 July 1997 they entered into a Divorce Agreement which included the following terms with reference to the children:

4.1 The parties deem it in the interests of their minor children that the wife shall exercise parental responsibility over them. They shall request the Court to rule accordingly.

4.2 (The) parties shall set the visiting rights between the husband and the children as follows: every other (weekend) . . .

4.3 The wife shall inform the husband of any matters of importance relating to the children. The parties shall consider the following to be important matters: any decisions which have to be made

-about the choice of school and vocational training;

-about medical treatment and operations;

-about residence abroad for a period of longer than one month."

The agreement also set out the arrangements for the division of their property and for the payment of maintenance by the husband to the wife for herself and the children.

On 30 July 1997 the District Court in Amsterdam pronounced their divorce and, in the translation of the order before us:

" charges - insofar this is not excluded through an earlier legal decision - the wife with exercising the authority of the minor children of the parties . . . decides on the scope of the visiting rights (every alternate weekend) . . . decides that the agreed arrangement as stated in the covenant attached to the original of this decision, shall form part of this decision."

The effect of that agreement and the order both as a matter of the domestic law of the Netherlands and within the meaning of the Convention will require detailed consideration in a moment. To continue, however, with the chronology, I can pass over the detail of the several disputes which arose after the divorce. It is sufficient to recount simply that the mother complained that the father was failing to pay the ordered maintenance for herself and the children regularly or at all. His case was that he was making other payments in lieu thereof. On 24 April 1998 the mother wrote to her lawyers, who forwarded the letter to the father, saying:

"I will stay with my children in the Netherlands, in Amsterdam, so long as my husband keeps on paying alimony . . . Everyone in his full senses will understand that, without any further financial elbow-room, in a foreign country I am forced to move abroad" (It was her emphasis).

In their covering letter to the father, her lawyers wrote:

"(Our) client will stay with the children in the Netherlands. She will only be able to do so if you pay the alimony on time."

The difficulties continued. Eventually she sold her home in Amsterdam. The father had, it seems, been led to believe that she was going to rent property elsewhere in the city but, having received advice from her lawyers that she was free to leave the jurisdiction without the court's or the father's permission, she did so, allegedly because he had threatened her. She wrote to him on 18 August 1998 saying:

"I have told you on countless occasions that I would return to England if you were to continue to control our lives in a negative way . . . I consider that I have done everything to be able to continue in the Netherlands so that you could have regular contact with the children, but you have done everything possible to make life unbearable for us here."

The mother refused to disclose her whereabouts. The father eventually traced the family to South Wales and consulted solicitors in Cardiff in October. Perhaps a little unusually it was his Cardiff solicitors, not his Amsterdam lawyers, who requested the Lord Chancellor's

Department to assist in launching his application under the Hague Convention and the originating summons was duly issued on 22 October 1998.

The scheme of the Hague Convention.

Although its terms are increasingly well known, it is necessary to recite some of its provisions. Article 1 provides that:

The objects of the present convention are -

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Article 3 provides:

The removal or retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Article 5 provides:

For the purposes of this Convention -

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

Different remedies are given for the breach of rights of custody and for breach of rights of access. If the child has been wrongfully removed or retained then Article 12 provides that the court "shall order the return of the child forthwith." Under Article 21, however, application can be made "to make arrangements for organising or securing the effective exercise of rights of access." The proceedings are then instituted "with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject." It is to be noted that Article 12 finds its place in Chapter 3 of the Convention dealing with 'return of children' whereas Article 21 is in Chapter 4 dealing with 'rights of access'.

The proper approach to the construction and application of 'custody rights' within Article 5 of The Convention.

The starting point, as established by Re F (Minor: Abduction: Rights of Custody Abroad) [1995] Fam 224, [1995] 3 All ER 641, can be stated as follows:

1. The first task of the court is to establish on the evidence before it what rights, if any, the father had under Dutch law in relation to his children at the time of their removal.

2. The next stage is to resolve, as a matter of English law, that being the law of the forum where the Convention has been invoked, whether those rights amount to 'rights of custody' within Article 5.

3. Finally, the question is whether or not the removal of the children was in breach of those rights. The final answer determines whether or not the removal is wrongful within the meaning of Article 3 of the Convention. It is necessary to expand upon the second point. It is equally well established by Re F (above) that we must give a purposive construction to the convention. It is essential to have regard to the central purpose to be served because, as Lord Browne-Wilkinson observed in Re H (minors)(abduction: acquiescence) [1998] AC 72, [1997] 2 All ER 225, at 87F of the former report:

"An international convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The convention must have the same meaning and effect under the laws of all contracting States. I would therefore reject any construction of Article 13 which reflects purely English law rules as to the meaning of the word acquiescence'. I would also deplore attempts to introduce special rules of law applicable in England alone . . . which are not to be found in the Convention itself or in the general law of all developed nations."

This accords with the second conclusion of the Report of the second Special Commission meeting to review the operation of the Convention in January 1993:

"The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression 'rights of custody', for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention."

This approach gives effect to the explanatory report by Elisa Perez-Vera who said:

". . . a classic rule of treaty law requires that a treaty's terms be interpreted in their context and by taking into account the objective and end sought by the treaty."

She referred to the Vienna Convention of 23 May 1969. Article 31(1) requires that:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose."

Making abundantly clear that a consensus view is desirable, Article 31(3)(b) requires that account be taken of:

"any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation."

What then is the purpose of the Convention? Various views have been expressed and inevitably the opinions take their colour from the particular facts of the case and the issue to which attention is directed. Lord Browne-Wilkinson expressed it in Re H at page 81 D-B as follows:

"The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their

wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing a procedure to ensure the prompt return of the child to the state of his habitual residence."

Butler-Sloss LJ in Re F said at page 229F of the former report:

"It is repugnant to the philosophy of the Convention for one parent unilaterally, secretly and with full knowledge that it against the wishes of the other parent who possesses 'rights of custody', to remove the child from the jurisdiction of the child's habitual residence."

In the same case Millett LJ said at page 236G:

"The Convention is an International Convention and it is to be hoped that its terms receive a similar interpretation in all the contracting States. It is to be construed broadly and in accordance with its purpose without attributing to any of its terms a specialist meaning which it may have acquired under domestic law: see Re B (A Minor)(Abduction) [1994] 2 FLR 249, 257, per Waite LJ. I take that purpose to include the summary return of a child who has been removed from the country of his habitual residence by the unilateral act of one parent where the other has an equal right under the law of that country to decide where the child shall live and does not agree to his removal."

In Re B (A Minor)(Abduction) [1994] 2 FLR 249, [1995] 2 FCR 505 Waite LJ expressed the purpose in wide terms. He said at page 260 of the former report:

"The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of the breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore need to considered in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible."

There is, of course, a difficulty in applying these various expressions of the Convention's purpose to the task of identifying the meaning and scope of 'rights of custody'. It is that they all assume that the removal is wrongful or 'arbitrary', which comes to the same thing, and the danger, therefore, is that one may beg the question when using them to define the essence of the assumed wrongfulness, viz, the breach of rights of custody.

One needs, therefore, to look wider. One goes to the preamble which expresses the desire of the States signing the Convention:

"to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of habitual residence, as well as to secure protection for rights of access."

One sees at once a sharp distinction drawn between rights of custody and rights of access. The distinction was exposed in the trenchant judgments of Hale J in S v H (Abduction: Access Rights) [1998] Fam 49, [1997] 3 WLR 1086 and Re W; Re B (Child Abduction: Unmarried Father) [1998] 2 FLR 146, with which I agree. In the latter she said at page 157F:

"Thus a deliberate distinction is drawn between rights of custody and rights of access . . . Rights of custody are protected under Article 12 by the remedy of speedy return to the

country where the children were habitually resident before they were removed. Rights of access are protected under Article 21 by remedies to organise and secure their effective exercise in the country where the children are now living."

Speedy return of the children wrongfully removed is required to give effect to that purpose of the Convention best expressed in paragraph 19 of the Explanatory Report by Professor Perez-Vera as follows:

"The Convention rests implicitly upon the principal that any debate on the merits of the question, ie of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal . . ."

It seems to me, therefore, that the proper approach to the consideration of whether or not the father's rights amount to rights of custody is to view the expression broadly, endeavouring to give it a universal meaning but one which preserves the essential distinction between, on the one hand, the rights of custody which should only be varied by the courts of the child's habitual residence for the purpose of which consideration the child should be speedily returned, and, on the other, the rights of access, the protection of which do not require so Draconian a remedy and which can be safeguarded in the country to which children will have been lawfully and not wrongfully removed.

What are the father's rights according to Dutch law?

It is common ground that at the time the divorce was granted, the rule was that the court made orders for sole custody/authority - though it had a judge - made power exceptionally to order joint custody. We need not be concerned with, though it is interesting to note, the change in the law on 1 January 1998 under which joint custody became the usual order and sole custody had to be separately applied for and justified. For present purposes, therefore, the mother had sole custody of these children and custody is defined by Article 245 of the Civil Code as that which:

"relates to the person of the minor, the administration of his/her property and his/her representation in civil actions both legal and non-legal."

By virtue of Article 377b.1 the parent granted custody is under a duty to 'inform' the other parent of "important matters regarding the person and property of the child"(the mother's translation reading 'important aspects of the care and upbringing of the child') and to 'consult' on any decisions that then have to be taken in that connection.

The judge accepted the father's lawyer's opinion that the effect of that provision was:

"Though (the mother), being the parent with custody/authority, did not need (the father's) nor the court's permission beforehand (before leaving the country), she did have to inform and consult (the father). This obligation is based on the covenant, and also on Article 377b Civil Code.

If she informed/and or consulted (the father), and he had objected, she would still not have needed any court's permission before leaving the country, only:

if the (father) had known the children were going to be removed permanently from the Netherlands, he could have taken action through the courts, and the court would have weighed if leaving the country permanently was to be in the best interests of the children."

The judge summarised the expert evidence as follows:

"When the two reports were considered, it was apparent that they were in agreement on one important point. Under Dutch law the mother could lawfully leave the jurisdiction of the Netherlands with the children without seeking the court's permission, and whether she had or had not informed or consulted the father beforehand. This applied even if he had objected to her actions.

There was an initial dispute about the extent of the obligation on the mother in relation to the children and the father. The mother now accepts as the result of a further report from (her expert) that she was under an obligation to inform the father about leaving the jurisdiction for more than a month and to consult him."

The mother's expert was a member of the Dutch Central Authority and, writing as such, expressed this opinion:

"In conclusion the Central Authority is of the opinion that by taking the children from the Netherlands to Wales, the mother has not, according to Dutch law, broken the custody rights to the children . . ."

She also observed with reference to Article 377 that:

"The starting point of the legislation, as set out in the Parliamentary documents in which the subject of the law is explained by the Secretary of State for Justice, is that it is considered to be of eminent importance that the parent who has not been granted custody remains involved in the care of his/her children. . ."

The consultation obligation above all is new, and previously hardly ever occurred in practice. With regard to this, the memorandum in reply stated: 'The consultation obligation is one step further than the information right. (. . .). It is based on the parent granted custody involving the other parent in important decisions which have to be taken in relation to the person of the child and his/her property. This should speak for itself. It is also a matter of the bond between the parent not granted custody and the child (not) being unnecessarily more seriously affected by divorce than is all too often the case' . . ."

Are these 'rights of custody' within the meaning of Article 5?

It is, thus, not disputed that the mother has sole custody as a matter of Dutch law. All the father has is this right to be consulted as defined and explained above. The question is: is that enough to constitute a Convention right of custody?

As a matter of English law - or certainly under the law before the Children Act 1989 - a parent could have the right to be consulted without his or her having custody of the child: see Dipper v Dipper [1981] Fam 31, [1980] 2 All ER 722, at page 48 of the former report, where Cumming-Bruce LJ said:

"As Ormrod LJ has explained, the judge was there falling into error, it being a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference be resolved by the court."

As already stated, it is neither English nor Dutch domestic law which determines the question at issue but our notion of whether such rights as the father has fall within the

Convention. The meaning of the Convention rights was considered by Lord Donaldson of Lymington MR in Re C. (A Minor) (Abduction) [1989] 1 FLR 403, 413B-C:

"'Custody', as a matter non-technical English means 'safekeeping, protection, charge, care, guardianship' (I take that from the Shorter Oxford Dictionary, 3rd ed, rev. (1973)); but 'rights of custody' as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is 'the right to determine the child's place of residence'. This right may be in the court, the mother, the father, some care-taking institution . . . or it may, as in this case, be a divided right, so far as the child is to reside in Australia, the right being that of the mother; but, insofar as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention."

This case establishes that a right of veto can amount to a right of custody but Mr Levy QC seizes upon the words he emboldens in that last sentence to support his submission that a failure to consult constitutes a wrongful removal. That submission ignores the condition upon which consultation is predicated, which are the words I underline, namely provided the parent has a right to object. Here the father has no right to object: he has a bare right to be consulted.

Mr Levy then draws our attention to paragraph 19 of the report of 3 Special Commission meeting to review the operation of the Convention in March 1997 where it is stated:

"At the time the Convention was drafted, 'rights of custody' under Article 5 were deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child's place of residence."

Once again, it seems to me that Mr Levy is taking the sentence out of its context. The paragraph was dealing not with rights of custody which had been the subject of discussion in paragraphs 13 and 14, but with a different topic - 'Actually exercised'. In its context the full passage reads:

"There have been a number of cases where the return of the child to a parent with custody rights was denied because that parent had not actually been living with the child for a certain period of time. However, some parents might understand their custody rights as mainly allowing them to object to a future change of residence of the child. Under the aforementioned case law such parents would be precluded from requesting the return of the child at the time they intended to exercise their rights of custody."

(Then the passage Mr Levy cites):

"At the time the Convention was drafted, 'rights of custody' under Article 5 were deemed to cover cases where a parent had rights of access and the right to be consulted before a change of the child's place of residence. The requirement of actual exercise of custody rights under Article 3b of the Convention in effect demands that the parent has maintained some contacts with the child."

I have added the emphasis to point out that here again the right to be consulted is being referred to in the context of an associated right to object.

Far from providing support to his submissions, it may be that these paragraphs draw attention to a greater difficulty for him. Matters of rights of consultation and veto were

appropriately made subjects for discussion under a heading of 'actually exercised' which is a reference to a defence contained in Article 13. An argument can be raised that, contrary to the view taken by the English court in Re C and Re F, even a right of veto should not be treated as a right of custody because it is likely to fall foul of the requirement for the rights actually to be exercised at the time of removal. Article 13 provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

"(a.) The person institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal . . ."

If the only right of custody is the right to object to the removal, then can it be argued that right was not actually being exercised at the time of removal if the mother clandestinely fled the country before he could object? It is, fortunately, not necessary for us to answer that question.

What the Third Special Commission were considering was the number of cases in several jurisdictions where return had been denied on this ground. Hale J dealt carefully with this problem in her judgment in Re W; Re B, where, having cited the passage from Lord Donaldson MR's judgment in Re C above she said at page 152H-153D:

"Hence in this country, convention rights of custody have long been held to include the right to veto the removal of the child from his country of habitual residence. This is so even if that person has no right to the care of the person of the child, so that the right of veto is in support of a right of access rather than a right of custody. There is some awkwardness in fitting this approach into the scheme of the Convention as a whole: for example under Article 13, the authorities in the requested State are not bound to order the return of the child if 'the person, institution or other body having the care of the person of the child . . . had consented to or subsequently acquiesced in the removal or retention'. The words emphasised are not obviously apt to describe the consent or acquiescence of a person with a bare right to veto. I note that the Supreme Court of Canada has twice expressed doubts as to whether, once a final custody order has been made, a right of veto which merely protects another person's rights of access would amount to 'rights of custody' (see Thomson v Thomson (1994) 119 DLR (4th) 253, DS v VW & JS & Rodrigue Blais [1996] 2 SCR 108).

Nevertheless, Mr Nicholls (from the office of the Official Solicitor where the Central Authority for England and Wales under the Convention is situated) whose researches and arguments as amicus curiae have been most illuminating, recalls that at the third conference to discuss the operation of the Convention, the Re C approach was commonly held among Contacting States."

In time available to me I have only been able to gain access to the first of the Canadian cases, Thomson v Thomson in which La Forest J said at page 277:

"By providing that 'at the time of removal or retention those rights (of custody) were actually exercised, either jointly, or alone, or would have been so exercised but for the removal or retention', Article 3 would seem to imply that the rights breached must have belonged to someone other than the breaching parties. That reading is confirmed by the structure of the Convention as well as by the comments of those engaged in the drafting of the Convention, from which it appears that primary protection to custody rather than access was intended."

That judgment supports what is, in my judgment, the crucial distinction in the scheme of the Convention between the enforcement of the rights of custody and the rights of access. The remedy of immediate return is limited to breaches of the former rights. Whilst, therefore, the convention must receive its broad interpretation, that breadth must not erase the dividing line between custody and access.

Turning to the definition of 'rights of custody' in Article 5, Mr Levy adopted a view expressed in the course of argument that the definition should be read in a way which will "include rights relating to the care of the person of the child and, in particular (relating to) the right to determine the child's place of residence." If the emphasised words can be added then he has better prospects of establishing that the right of consultation at least relates to determining the child's place of residence if the words are given a broad construction. I reject that contention. Whilst warning myself not to fall into the error of applying English rules of statutory interpretation to an International Convention, I must say that a literal interpretation of the definition does not support Mr Levy's submissions. As I read the definition its natural meaning is that rights of custody include rights relating to the care of the person and include the particular right to determine the child's place of residence as one of the rights which relate to the care of the person. That view sits comfortably with the Explanatory Report by Professor Perez-Vera. She points out in paragraph 84:

"As regards custody rights, the Convention merely emphasises the fact that it includes in the term 'rights relating to the care of the person of the child', leaving aside the possible ways of protecting the child's property. It is therefore a more limited concept than that of 'protection of minors', despite attempts made during the Fourteenth Session to introduce the idea of 'protection' so as to include in particular those cases where children are entrusted to institutions or bodies. But since all effort to define custody rights in regard to those particular situations failed, one has to rest content with the general description given above. The Convention seeks to be more precise by emphasising, as an example of the 'care' referred, the right to determine the child's place of residence."

I must turn from the generality of construction to answering the precise questions raised in the appeal, namely, whether the orders and agreement made in the Netherlands constitute a right relating to the care of the person of the children or whether they amount to a right to determine the children's place of residence. The first point to observe is that Dutch law defines 'custody' as that which 'relates to the person of the minor'. That must be the same as the Convention rights relating to the care of the person of the minor. Though the choice of joint custody was available, the choice was not exercised and sole custody was awarded to the mother. If she has the sole right, the father has none.

Mr Levy then submits that one must look to the purpose to be served by giving the father the right to be consulted. He refers to the evidence of the mother's own experts who emphasised that "it is considered to be of eminent importance that the parent who has not been granted custody remains involved in the care of his/her children . . ." He points out that the mother is bound to notify the father of important decisions to be taken and that necessarily involves him the decision-making process.

I am quite satisfied that a right to be consulted does not amount to a right relating to the care of the person of the child. The father's response to the consultation cannot force any change to the pattern of the children's care. I do not wish to diminish the importance of consultation. The explanatory notes to Article 377b of the Dutch Code stress the need for consultation as a means of remaining involved in the children's lives. It may have considerable psychological importance but it has little legal effect. The most it gives the father is the right to seek a ruling from the court as to where the children are to live. The

right to be consulted is not a right of veto. The mother was not bound to take his objections into account nor even to explain why she would not do so. She was free to leave the Netherlands without the father's permission and without the court's permission. If she was free to decide where the children were to reside, and he could not object, then it seems to me he had no right to determine the children's place of residence. The attempt to elevate a right to consultation to a right of custody is to eradicate the crucial distinction between custody and access. The broad purpose of the Convention is to maintain that distinction. I therefore reject Mr Levy's submissions. It is a happy and comforting coincidence, pleasing to notions of comity, but not otherwise influential to my decision, that the Central Authority in the Netherlands take the same view. If they had been asked to seek the United Kingdom's assistance in recovering these children, they would, it seems, have refused to invoke the Convention and this application would never have been made.

If the father has no rights of custody, no question of breach arises.

Consequently I would dismiss the appeal.

MANTELL LJ: I agree.

BELDAM LJ: I also agree.

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