Subjectivity, Citizenship and Belonging in Law

Identities and Intersections

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Chapter 7

Best interests of the child in family reunification – a citizenship test disguised?

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Introduction: Citizenship and intersectionality[1]

Ever since *The Origins of Totalitarianism*, it has been commonplace to note that rights are dependent on the existence of a political community, a nation state, and that belonging to such a community may be identified with possession of citizenship.[2] *Jacqueline Bhabha*, a distinguished human rights scholar and children's rights advocate, coined the term 'Arendt's children' to describe and draw attention to the situation shared by a large number of children in today's world who are or risk being separated from their parents or carers and whose ties to any state are so weak that they do not, in practice, have 'a country to call their own'.[3] This chapter turns to one specific issue relating to 'Arendt's children', that of their transnational family ties and rights to family life.[4] More precisely, the issue under scrutiny is the assessment of the best interests of the child in the particular context of EU citizenship and immigrant family reunification.

The idea I wish to discuss in this chapter is that citizenship, even in its purely legal dimension as the 'right to have rights', is better conceived as a matter of extent than a fixed or static status. Its formal dimensions are intertwined with informal ones, which is why it makes sense to discuss citizenship

1 I want to thank Saara Pellander and Linda Hart for their invaluable support and critical comments on the ideas and analysis presented in this chapter. Any remaining errors are of course my own.

2 Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1951).

3 Jacqueline Bhabha 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?' *Human Rights Quarterly* 31:2 (2009), 413.

4 For the past 20 years, family related migration has been the dominant legal mode of entry to Europe. For instance in 2014, 2.3 million first residence permits were issued in the European Union (EU) to non-EU citizens. Almost a third (29.5%) of first residence permits were issued in the EU for family reasons. See Eurostat publication 20 October 2015: *EU Member States issued 2.3 million first residence permits in 2014*, available at http://ec.europa.eu/eurostat/documents/2995521/7038745/3-20102015-BP-EN.pdf/70063124-c3f2-4dfa-96d5-aa5044b927a6 (accessed 4 July 2016).

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as a gradual and shifting relationship of belonging. This is because citizenship is located in a web of relations and is comprised of hierarchically organised and mutually enforcing identity markers that signal belonging. By the same token, the chapter addresses some of the complex issues relating to second generation childhood and the disadvantageous position of migrants in receiving societies.

These themes are here discussed through a close reading of one case. This case was decided by the Finnish Supreme Administrative Court in 2013 and it concerned the attempt of a transnational family[5] to enjoy family life together, despite the members of the family having both informal and legally recognised ties to two countries, Finland and Algeria.[6] Even though the selected case is merely one local example of how the citizenship position of a second generation child[7] might materialise, the argumentation present in the case is representative of immigration policies of most European countries.[8] Furthermore, the case involved an additional strand of EU law; it resulted in a preliminary ruling of the Court of Justice of the European Union (CJEU) in the case of *the Finnish Immigration Office v L.* (C-357).[9] Since EU citizenship rights are a matter of primary EU law, the case is relevant also to those Member States of the European Union that do not follow EU-wide rules on immigration. While the legal dispute in this case concerned the right of residency of *M.*, an Algerian national and a husband, father and a step father in the family, the decisive aspect of the case had to do with the rights of children and the scope of genuine enjoyment of rights granted to EU citizens by the virtue of possessing EU citizenship.

5 By transnational families I mean families that actively maintain a sense of familyhood and invest in their transnational family networks through shared resources, communication and caring practices, despite being located in different countries. About the concept, see for instance Harry Gouldbourne *et al.*, *Transnational Families: Ethnicities, Identities and Social Capital* (London: Routledge, 2009).

6 KHO:2013:97, 22 May 2013, Supreme Administrative Court of Finland.

7 The term 'second generation child' refers to a child who was born in a country and whose parents are immigrants.

8 See the discussion in Karina Horsti and Saara Pellander, 'Conditions of Cultural Citizenship: Intersections of Gender, Race and Age in Public Debates on Family Migration,' *Citizenship Studies* 19:6–7 (2015), 753.

9 The joined cases of *O. and S. v Maahanmuuttovirasto* (C-356/11) and *Maahanmuuttovirasto v L.* (C-357/11), 6 December 2012. The preliminary ruling of the CJEU is part of the judgment in KHO:2013:97. In both of these cases the family in question was a reconstituted family, with the EU citizen member of the family members being the child born from the mother's earlier marriage. During the proceedings at the Finnish Supreme Administrative Court, S., the sponsor in the first case acquired Finnish nationality. Since the requirement of secure means of subsistence does not concern the family members of a Finnish national, her case was remitted back to the Finnish Migration Office as the first instance. Accordingly, her case is left outside the scope of scrutiny here and the focus will be on L.'s case.

In looking at this case, my interest lies in the ways in which the decision of the court is underpinned by various narratives of belonging and integration. In addition to a legal doctrinal reading of the case, the chapter utilises the analytical framework of feminist intersectional theory for the purpose of understanding the dynamics of the case. As such, intersectionality is a broad term that covers a variety of approaches, but here it is taken to mean a form of analysis that focuses on the interplay of social structures and hierarchically organised categories, such as those created by the legal practice.[10] On the one hand, intersectional inquiries approach identities as relational subject positions that, instead of being reducible to independent categories, create specific hierarchies where inequality becomes reproduced in novel ways.[11] Due to the dialogical nature of their operations, categories of social difference produce unique forms of advantage and disadvantage. [12] On the other hand, intersectional approaches seek to address the anti-essentialist critique that for any form of social life to meet a category means that this order of categories is first imposed on social agents.[13] In this process, the experiences of people who are situated at the intersections of various hierarchies are excluded and rendered invisible. The identity categories result from 'dynamic interaction between the individual and institutional factors',[14] and are variously situated in different legal fields, in this case family law, children's rights and migration law.[15] Legal practice constructs its subjects according to the identities that are embedded in these fields, and the individual circumstances of a case are made to match these pre-existing 'disciplinary identity constructions'.[16]

10 Johanna Kantola and Kevät Nousiainen, 'Institutionalising Intersectionality in Europe: Introducing the theme,' *International Feminist Journal of Politics* 11:4 (2009), 462.

11 Intersectional theory originates in feminist theory and political thought and the term was first coined by Kimberlé Crenshaw in 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,' *The University of Chicago Legal Forum* (1989) 139–67. See also Emily Grabham *et al.*, 'Introduction,' in *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009).

12 Heidi Safia Mirza, '"A second skin": Embodied Intersectionality, Transnationalism and Narratives of Identity and Belonging among Muslim Women in Britain,' *Women's Studies International Forum*, 36:5 (2013), 5–15.

13 Leslie McCall, 'The Complexity of Intersectionality,' in *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009), 53.

14 Kantola and Nousiainen, 'Institutionalising Intersectionality in Europe,' 469.

15 Ibid. 468.

16 Grabham uses the term to discuss the disciplining aspects of intersectionality discourse, which risks becoming the 'product of the regime in which it operates and which it was conceived to contest'. Emily Grabham, 'Intersectionality: Traumatic impressions,' in *Intersectionality and Beyond: Law Power and the Politics of Location* (New York: Routledge-Cavendish, 2009), 199.

One response to the need to recognise these disadvantageous and intersectionalised identities as well as the variability of human experience has been the creation of more open and situation-sensitive norms.[17] I suggest that the right of the child to have her best interests considered as a primary concern in all legal decision-making is an example of a legal instrument aimed at incorporating knowledge of the intersectionalised subject into the legal decision-making. In practice, however, the 'intersectionality construct' of the best interests of the child meets the 'disciplinary identity construction' inherent in immigration law, with the result that the former is made to serve the latter.[18] The analysis presented here does not apply intersectionality as a method but uses its theoretical framework to interrogate this interplay between the disciplinary identity construction and the knowledge produced about the intersectional subject, the child at the centre of the case.[19]

The argument unfolds as follows. The next section discusses three interrelated issues. First the focus is on the complexities recognised and identified in previous research on migrants' and children's citizenship. Second, the idea of the rights of the child as a remedy to those complexities is discussed and the child's right to have her best interests considered is introduced as a legal tool to recognise the intersectional identity and vulnerability of the child. Third, a point is made about the function and problems of the best interests of the child in the specific context of immigration law; the chapter confirms what several studies have previously indicated – that courts have difficulties in applying children's rights in practice. The two following sections, which discuss the case, show, however, that the rights of the child and the case-by-case approach of the best interests doctrine remain insufficient in safeguarding an equal citizenship for children. In the first one of these two sections, the scope of EU citizenship is discussed through an

17 For example, Williams discusses the intersectionality construct in Canadian sentencing law, which aims to address over-representation of Aboriginal people in Canadian prisons. Williams notes that with law's gaze intently fixed on family and community, broader dimensions of discrimination become invisible. Toni Williams, 'Intersectionality analysis in the Sentencing of Aboriginal Women in Canada,' in *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge-Cavendish, 2009), 95. Intersectional approach to legal research is frequently utilised in discrimination research, see for example Kantola and Nousiainen, 'Institutionalising Intersectionality in Europe'.

18 The analysis provided in this chapter is indebted to the work done by *Samuli Hurri* in *Birth of the European Individual: Law, Security, Economy* (Abingdon: Routledge, 2014), especially regarding his analysis on the role of knowledge on the individual in producing the particular kind of subject in immigration law.

19 Intersectional methodology has been successfully applied for example to analyse how privilege is constructed by courts in contact cases. See Linnéa Bruno, 'Contact and Evaluations of Violence: An Intersectional Analysis of Swedish Court Orders,' *International Journal of Law, Policy and the Family* 29:2 (2015).

examination of its underlying premises regarding family relationships and interdependencies within a family. The second one focuses on the proportionality assessment, with the evaluation of the best interests of the child at its core.

Citizenship, childhood, and the best interests doctrine

To begin with, particular forms of belonging come to underpin our conceptions of citizenship in specific legal contexts not because of their naturalness or inevitability but as a result of political processes. According to sociologist *Nira Yuval-Davis*, belonging is better conceived of as a dynamic process than a reified fixity, although it often appears as a naturalised construction of a particular hegemonic form of power relations.[20] Already in 1950, in his essay on citizenship and social class, sociologist *T.H. Marshall* discussed the shifts between the system of status and the system of contract and noted that while the modern contract is essentially a contract between men who are free and equal in status, status was never eliminated from the social system. Rather, 'differential status, associated with class, function and family, was replaced by the single uniform status of citizenship, which provided the foundation of equality on which the structure of inequality could be built'.[21]

Marshall specifically excluded children from the definition of citizen and viewed citizenship as membership of the nation state.[22] In addition, he distinguished between two meanings of social class as a system of stratification; social class could either be based on a hierarchy of status, as was the case in feudal society, or the hierarchy of positions produced by other institutions. When the hierarchy of status was eliminated through the creation of citizenship based on the principle of equality of men, the legitimate distinctions had to be grounded in other categories. This explains some of the difficulties that 'Arendt's children' face. The position of the second generation children as holders of citizenship status is challenged both by the fact that their capacity as children seems to undermine the status of citizen and by the fact that citizen by definition refers to the political community of the nation state. In line with this observation, a considerable number of

20 Nira Yuval-Davis, *The Politics of Belonging: Intersectional Contestations* (London: Sage Publications, 2011), 12.

21 T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950), 34.

22 Ibid. 12 and 25. Marshall did argue for the importance of educating children as a genuine social right of citizenship. For him, the right to education was essentially about the right of the adult citizen that the child will become.

studies testify to the problems concerning children's citizenship,[23] as well as to the fact that migrants' access to rights is narrowed or blocked by exclusionary powers of citizenship.[24] On top of this, however, second generation children are also subject to the hierarchies produced by the subtler ways of differentiation and various 'politics of belonging'.[25]

Indeed, the construction of citizenship is in many respects notoriously racialised, gendered and in general dependent on identity factors; it excludes or disadvantages individuals and groups who do not meet the standards of normalcy underpinning the concept of citizenship.[26] Furthermore, studies have noted how the belonging of second generation children becomes contested on various sites of social life. In the Finnish context,[27] for instance, sociologist *Anna Rastas* has studied second generation youth and the ways in which racialising categorisation occurs in young people's everyday life and reproduces racialised social relations.[28] She notes how difference becomes communicated in the everyday interaction, as these young people are perceived as belonging to somewhere else and their relation to Finland and Finnishness becomes contested.[29] From a different perspective, studying how debates on family migration in Finland construct and condition citizenship and belonging, political theorists *Karina Horsti* and *Saara Pellander* note that national identity, which conditions how belonging is perceived, is heavily impacted by understandings of a culturally acceptable family. According to the authors, cultural citizenship in a Nordic welfare state is an exclusive construction based on some being considered 'culturally and morally incapable of citizenship . . . while others are included as

23 See, by way of example, the collection edited by Antonella Invernezzi and Jane Williams: *Children and Citizenship* (Los Angeles: Sage Publications, 2008).

24 Marie-Benedicte Dembour and Tobias Kelly (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Abingdon: Routledge, 2011); Jorge A. Bustamante, 'Immigrants' Vulnerability as Subjects of Human Rights,' *International Migration Review* 36:2 (2002), 333–54; Eleanor Drywood, 'Challenging Concepts of the 'Child' in Asylum and Immigration Law: the example of EU,' *Journal of Social Welfare and Family Law* 32:3 (2010), 309–23.

25 Yuval-Davis, *Politics of Belonging*.

26 The point stressed by a plethora of studies. For discussion, see for example: Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (Basingstoke and New York: Palgrave, 2000); Ruth Lister, *Citizenship: Feminist Perspectives* (Basingstoke: Palgrave Macmillan, 2003); Margaret Franz, 'Will to Love, Will to Fear: The Emotional Politics of Illegality and Citizenship in the Campaign against Birthright Citizenship in the US,' *Social Identities* 21:2 (2015), 184–98.

27 Finland still has a low number of immigrants, approximately 5% of the total population of 5.5 million.

28 Anna Rastas, 'Racializing Categorization among Young People in Finland,' *Young* 13:2 (2005).

29 Ibid. 152.

worthy of belonging'.[30] They point out that migrant children are framed in public discussions in ways that support these constructions.

The legal response to the problems associated with children's citizenship has been to strengthen the position of children as rights-holders.[31] The 1989 UN Convention on the Rights of the Child was generally hailed as a solution to the problems of children's limited citizenship and access to rights. Today, the doctrine of the best interests of the child and the 'due process' approach occupy a central place in the interpretation and realisation of the rights of the child, and thus form an essential backbone for the jurisprudence of the rights of the child. The transformative idea behind the right of the child to have her best interests considered as a primary concern in all actions affecting children (Article 3 of the 1989 Convention) is to ensure that the circumstances of the individual child are paid due respect in decision-making. Hence, the norm is an example of an 'intersectionality construct' *par excellence*; it aims to make use of intersectional knowledge on a case-by-case basis in order to change how law affects marginalised groups, in this case children.[32] The idea is that the judges may balance the prevailing social injustice brought about by the vulnerability of children by using the best interests test, as far as it is possible within the parameters of the law. However, this means that the legal context in which the assessment is conducted is decisive to how this 'intersectionality construct' plays out.

The Committee on the Rights of the Child has provided detailed guidelines on how the best interests norm should be applied. According to General Comment No 14 (2013),[33] the concept of the best interests is a tripartite notion.[34] It is, first, a substantive right of the child to have her best interests assessed and taken as a primary consideration when different interests are being evaluated. Second, it is a fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. And third, it is a rule of procedure. Whenever a decision is to be made that will affect a specific child, an identified group of children

30 Horsti and Pellander, 'Conditions of Cultural Citizenship,' 752.

31 The historical background of the children's rights movement has been traced to the changing image of childhood in Western societies as well as to the triumph of the human rights project. See the discussion in Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights,' *The International Journal of Children's Rights* 20:1 (2012), 155–68.

32 For a similar discussion in a very different context, see Williams, 'Intersectionality Analysis in the Sentencing of Aboriginal Women in Canada,' 81.

33 Committee on the Rights of the Children General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). Available at www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 15 April 2016). Paragraphs 52–79.

34 General Comment No. 14 (2013), para. 6.

or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. The best-interests assessment should consist of 'evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children' and it requires that the child's right to participate in decision-making be respected.[35]

In principle, the guidelines concerning the best interests evaluation apply also in immigrant family reunification. Courts, however, seem to have difficulties in balancing between the national norms and international obligations. First, the normative guidelines, on which they draw in interpreting rights of the child in the context of immigration control, tend to be peculiarly selected, which perhaps indicates a missing awareness regarding for example the work done by the Committee on the Rights of the Child.[36] Second, and this is a far harder issue to solve, the internal structure of immigration law often distorts the best interests of the child test. In these cases, rather than being about defining what would be in the best interests of the child, the best interests assessment becomes a tool for identifying the threshold to which the State may freely interfere with the rights and well-being of the child by means of immigration control.

As a condition of aliens' entry, the Member States of the European Union are entitled to require the sponsor to have secure means to maintain the family, so that granting a residence permit to the alien family member would not become a financial burden for the state. As these standards are usually set unattainably high, the questions of children's family rights and

35 General Comment No 14 provides a detailed description of the formal process of determining the best interests, including strict procedural safeguards The elements of the evaluation include the child's view; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education. Moreover, preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification. These ties include the extended family, friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places. The purpose of the detailed guidelines is to guarantee that the best interests evaluation is carried out properly, so that all relevant information concerning the circumstances of the child are taken into account in decision-making. General Comment No. 14 (2013), para. 47.

36 For example, in its landmark cases KHO:2014:50 and KHO:2014:51, 19 March 2014, the Finnish Supreme Administrative Court makes no reference to General Comment No 14, although the document was adopted nearly a year prior to the decisions. In the case law of the European Court of Human Rights, the document makes its first appearance in May 2015 in the case of *S.L. and J.L. v Croatia*, app. No. 13712/11 (7 May 2015), which concerned the property rights and the supervision of the children's interests in the selling of the children's property. In the specific context of family reunification, however, General Comment No 14 is yet to appear in the argumentation of the ECtHR.

whether their rights require exemptions to maintenance requirements are becoming more and more frequent. This presses courts to balance between the goals of immigration law and international human rights. For instance in Finland, the scope of the best interests of the child assessment in relation to family reunification and maintenance requirement has been set quite narrow; only severe individual reasons, such as a life-threatening medical condition, may result in an exemption to the maintenance requirement.[37]

Restricting the scope of the best interests assessment this radically, in fact, amounts to an infringement on the rights of the child. For instance, in the light of the case law of the European Court of Human Rights (ECtHR), the approach adopted by the Finnish court seems questionable. In *Jeunesse v The Netherlands (2014)*,[38] the ECtHR stressed that 'national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it'.[39] Our analysis now turns to the question of whether a due best interests evaluation would be able to protect the rights of the child in the immigration context. In order to examine this, the next sections to follow will dwell on the argumentation of the CJEU and the Finnish Supreme Administrative Court in KHO:2013:97.

Transnational families and borders of belonging: the concept of family and the question of dependency

The core issue in KHO:2013:97 was whether the family had any realistic chances to live together and in which country, Finland or Algeria, their

37 In the two landmark cases, KHO:2014:50 and KHO:2014:51, 19 March 2014, the Finnish Supreme Administrative Court emphasised that in situations where the spouses have founded a family knowing that their residence status is uncertain, granting an exception to the maintenance requirement solely on the basis of the best interests of the child would lead to an unacceptable outcome, as the main rule of sufficient subsistence would *de facto* become overruled. The court thus stated that the possibility of disturbing the family life between the child and the alien parent is not a sufficient reason to make an exemption from the maintenance requirement. This approach to the best interests of the child in the context of immigration control is adopted by several countries, see for example Bhabha, 'Arendt's Children,' 447; Johanna Schiratzki, 'The Best Interests of the Child in the Swedish Aliens Act,' *International Journal of Law, Policy and the Family* 14:3 (2006); and Anna Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights,' *Journal of Human Rights Practice* 3:1 (2011).

38 *Jeunesse v The Netherlands [GC]*, app. no. 12738/10, 60 EHRR 789 (3 October 2014).

39 ECtHR, *Jeunesse (2014)*, para. 120. In this case the ECtHR specifically refers to the relevant articles of the Convention on the Rights of the Child. However, instead of General Comment No 14, the ECtHR refers to the Committee's statements regarding the best interests of the child as expressed in General Comment No. 7 (2005). Paragraph 74.

family life was to take place. The mother *L.*, the sponsor, was an Algerian national who had arrived in Finland in 2003 and obtained a permanent residence permit on the grounds of marriage to a Finnish citizen. Her first child was born in this marriage in early 2004. The child obtained Finnish nationality and, consequently, the citizenship of the EU, which is a legal status enjoyed by all EU citizens simply by the virtue of being nationals of some Member State of the European Union.[40] Initially introduced in the Maastricht Treaty in 1992 and now provided for in Article 20 of the Treaty on the Functioning of the European Union, EU citizenship has been subject to debate,[41] but is nevertheless rather firmly established in the case law of the CJEU.[42] It is constituted by citizenship rights, especially the four fundamental freedoms, one of which is the right to move and reside freely within the EU.[43]

Soon after the birth of the first child, *L.*'s marriage broke down, and as of 2005 she was the sole guardian of the child. In October 2006, *L.* married *M.*, an Algerian who at the time was seeking asylum in Finland. *M.*'s asylum application was rejected and he was ordered to return to Algeria. After his return, in early 2007, *L.* gave birth to the couple's child, who acquired Algerian nationality. *L.* and *M.* then applied for family reunification, but their application was rejected, as the family failed to present evidence of secure

40 For a discussion in the context of family law, see Katharina Kaesling, 'Family Life and EU Citizenship: The Discovery of the Substance of the EU Citizen's Rights and its Genuine Enjoyment,' in *Family Law and Culture in Europe: Developments, Challenges and Opportunities*, ed. Katharina Boele-Woelki, Nina Dethloff and Werner Gephart (Cambridge: Intersentia, 2014), 293–304.

41 The case law of the CJEU is copiously commented on in the specific context of EU citizenship law, see for example Dimitry Kochenov, 'The Essence of European Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' *International and Comparative Law Quarterly* 62:1 2013, 97; Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change,' *Modern Law Review*, 68:2 (2005), 233. In the context of family reunification rules the issue of reverse discrimination has attracted more scholarly attention. See for instance Anne Staver, 'Free Movement and the Fragmentation of Family Reunification Rights,' *European Journal of Migration and Law* 15:1 (2013), 69–89; Chiara Berneri, 'Protection of Families Composed by EU Citizens and Third-Country Nationals: Some Suggestions to Tackle Reverse Discrimination,' *European Journal of Migration and Law* 16:2 (2014), 249–76.

42 It was announced by the CJEU for the first time in Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193 (20 September 2001). For a thorough analysis of EU citizenship and the right to move and reside freely, see Suvi Sankari, *Legal Reasoning in Context: The Court of Justice on Articles 17 and 18EC (20 and 21 TFEU) 2000–2008*, Helsinki: Helsinki University Printing House, 2011. For versatile analyses on European citizenship, see the work of Jo Shaw and the European Union Democracy Observatory on Citizenship.

43 On discussion on what rights actually constitute the status, see Dimitry Kochenov, 'The Right to Have What Rights? EU Citizenship in Need of Clarification,' *European Law Journal*, Vol 19, 2013, 502–16.

means of subsistence. The refusal of *M.'s* entry would mean that the family would either remain separated or that *L.* and the children would move to Algeria. Hence, this decision might have the impact of forcing *L.* and the children, including the EU citizen child, to leave the territory of the European Union in order to be able to live as a family. This potential outcome of refusal of entry, then, raised the question of whether such an outcome would breach the rights of the EU citizen child, especially in the light of the principles laid down in the landmark case of *Ruiz Zambrano*,[44] and prompted the Finnish court to refer the case to the CJEU for a preliminary ruling.

The assessment of the case thus begun with what is known as the 'genuine enjoyment test'. The purpose of this legal test is to determine the scope of EU citizenship rights, in this case whether the situation and rights of the children required that an exemption be made to the maintenance requirement. The highest rank of rights, in this respect, are those attached to the status of EU citizenship. The competence to authoritative interpretation of EU primary law is located beyond the level of national courts, in the CJEU. In its preliminary ruling, the CJEU found that in the circumstances present in this case, the refusal of a residence permit of a third country national does not, *per se*, necessarily mean a denial of genuine enjoyment of substance of the rights of the EU citizen child. Thus, Article 20 TFEU does not categorically preclude a state from refusing to grant a third country national a residence permit in a situation similar to this one at hand. Importantly, though, the CJEU stated that it was for the national court to evaluate whether the particular circumstances of the case would amount to a breach of citizenship rights.[45]

As to which factors are relevant for the genuine enjoyment of citizenship rights, the first task of the national court is to consider whether there is a *direct obligation* to leave the EU territory. Since *L.* as the mother of the EU citizen child held a permanent residence permit, there was no direct

44 Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] ECR I-1177 (8 March 2011) concerned the right of two Colombian nationals to reside in Belgium on account of the EU citizenship of their minor children. This landmark ruling extended the scope of EU legal rules to apply in certain situations to 'static EU citizens', which means that a cross-border situation is no longer an absolute necessity in order for the EU law to actualise in a case. See also Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315 (15 November 2011).

45 Operative part of the judgment, first paragraph: 'Article 20 TFEU must be interpreted as not precluding a Member State from refusing to grant a third country national a residence permit on the basis of family reunification where that national seeks to reside with his spouse, who is also a third country national and resides lawfully in that Member State and is the mother of a child from a previous marriage who is a Union citizen, and with the child of their own marriage, who is also a third country national, *provided that such a refusal does not entail, for the Union citizen concerned, the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union, that being for the referring court to ascertain.*' (Italics SM). For similar phrasing, see Case C-256/11, *Dereci* [2011], para. 74.

obligation for her and children in her custody to leave EU territory. Second, the custody of the EU citizen child as well as the fact that the child was part of a reconstituted family were relevant.[46] The EU citizen child was not *M.*'s biological child nor in his custody. While the absence of the blood relationship between the *M.* and the EU citizen child was not decisive, it was, nevertheless, significant that the child was not legally, financially or emotionally dependent on him. But how are we to evaluate how the individual relationships of dependency are organised within a family?

According to the CJEU, a primary cause and effect relationship needs to be identified between the acts of the state and consequence of those acts. In this case the primary cause and effect relationship is the *relationship of dependency* between the Union citizen who is a minor and the third country national who is being refused a right of residence. To count for an interference with the rights of the EU citizen, the consequence of leaving the territory must be a direct result of the refusal to grant a residence permit to the third country national.[47] Following the benchmarks set by the CJEU, the Finnish Supreme Administrative Court concluded that refusing *M.*'s entry did not directly influence the possibilities of the child to enjoy her rights as an EU citizen.

Refusing the entry of *M.* placed *L.* in a situation where she had to choose which one of her children would have the possibility to stay in close contact with her biological father. This outcome, however, was not considered a denial of genuine enjoyment of the EU citizen's rights. While the ruling of the CJEU may be sound in that it seems to recognise the variability within families regarding the extent to which different family relations foster dependency, the formal requirement that a relationship of direct cause and effect be identified seems artificial in that the child becomes conceptualised as a 'liberal individual' – that is, isolated from the network of relations and interdependencies that in reality constitute her position as an agent.[48] Furthermore, to assume that relationships of dependency should be stable and follow a prescribed pattern and thus be easily identifiable is an example of how a 'truth' is constructed in legal reasoning by standardised assumptions.[49]

The requirement of direct dependence between the child and the third country resident parent may be criticised for reflecting a rigid and

46 Case C-357/11, paras 50 and 51.

47 Case C-357/11, para. 52.

48 See discussion in Fiona Kelly, 'Conceptualizing the Child through an "Ethic of Care": Lessons for Family Law,' *International Journal of Law in Context* 1:4 (2005), 375–96.

49 For an interesting discussion on how different conceptions of dependency may play out in the context of family reunification, see Saara Pellander, 'Traces of Dependency: Manifestations of Elderly Family Migration across Policy Arenas'. Paper presented at The Problematisation of Family Migration – workshop, 4–5 June 2015, University of Amsterdam, Netherlands.

atomistic understanding of family relations. While welfare dependency is being rejected through the sufficient means of subsistence requirement, the notion of dependency within a family seems to be underpinned by a view that dependency operates isolated from other relationships and independent from the totality of relations within a family. It could well be argued that family relationships, kinship formations and relations of care, affect and dependency are too manifold and fluctuating to be captured in legal prerequisites. For instance, configurational approaches to family research emphasise that individuals and relationships belonging to configurations are profoundly influenced by the configuration as a whole, which impacts the ways in which interdependencies within families organise.[50] Moreover, as political theorists *Nancy Fraser* and *Lisa Gordon* note, the use of the term 'dependency' conceals ideologies that constitute specific kinds of moral subjects.[51] Perceiving dependency as something that is inevitably part of some relationships within a family but not others actually comes close to treating social relations of dependency as personality traits, as something that exists as pre-fixed and similar in all children.

The formal categories and forms of atomistic reasoning, however, are not the only aspects open to criticism in the genuine enjoyment test. Rather, the more fundamental issues have to do with how the different categories are mobilised within the argumentation of the court in ways that reproduce the hegemonic forms of belonging, without materially investigating them. For instance, the gendered practices of parenting may be seen to intersect with class position as well as the family's deviance from the nuclear family norm. On the one hand, *L.* who had two children but no partner to help her care and provide for the family had no realistic opportunities to meet the stringent income requirement, as the threshold of 'sufficient mean of subsistence' is set unattainably high.[52] On the other hand, in the situation where the fathers of *L.*'s two children lived in different countries, it was seen as unproblematic that the children would follow *L.* whatever she should decide, which seems to reflect a gendered norm of parenting where children are seen to belong to their mother more than they belong

50 See for instance Eric D. Widmer *et al.*, 'Introduction', in *Beyond the Nuclear Family: Families in a Configurational Perspective*, ed. Eric D. Widmer and Riitta Jallinoja (Bern: Lang, 2008), 2.

51 Nancy Fraser and Lisa Gordon, 'A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State,' *Signs* 19:2 (Winter, 1994), 323.

52 For discussion on the maintenance requirement in the context of family reunification in Finland see Saara Pellander, 'Collective Threats and Individual Rights: Political Debates on Marriage Migration to Finland,' in *Race, Ethnicity and Welfare States. An American Dilemma?* ed. Pauli Kettunen, Sonya Michel and Claus Petersen (Cheltenham: Edward Elgar Publishing, 2015), 107–27. The government is currently planning to tighten the conditions of family reunification by extending the maintenance requirement to cover family members of sponsors who obtained residence permits on the grounds of subsidiary or humanitarian protection. See government proposal 43/2016.

to their father. Furthermore, the norm of respectability, which in family studies refers to the normative ideal of what families should be like,[53] may be seen as eroding the notion of belonging of the family together. While the applicant was *L.*'s husband and the father of the younger child, the family was nevertheless a reconstituted family, in which the family bonds are seen as weaker than those in an ideal type of family.

After solving the question of the applicability of primary EU law, the second step of the evaluation was the interpretation of secondary EU law, in this case the Family Reunification Directive EC/2003/86. The CJEU pointed out that since authorisation of family reunification is the general rule, any maintenance requirement must be interpreted restrictively and in compliance with the Charter of Fundamental Rights of the European Union, with regard to the best interests of the children involved and with a view of promoting family life. Again, the CJEU stated that it is for the national authorities, when implementing the Directive and examining applications for family reunification, to make a balanced and reasonable assessment of all the interests at play, accounting particularly for the interests of the children concerned.[54]

Best interests of the child and politics of belonging

The point of departure for assessments of proportionality in family reunification cases is founded on the legitimate interest of the State to control immigration. Referring explicitly to the principles established by the European Court of Human Rights (ECtHR) in *Rodrigues da Silva and Hoogkamer v The Netherlands*; *Konstantinov v The Netherlands* and *Darren Omoregia and Others v Norway*, the Finnish Supreme Administrative Court emphasised that states are not obliged to respect immigrants' choice of the country where they wish their family life to take place.[55] This starting point is significant, as it means that interests of the family members are considered from the perspective of whether they amount to *obstacles to enjoying family life elsewhere.* In order to define whether the interests of the children required granting

53 The term respectability was coined by Beverley Skeggs and has recently been used in family and migration studies (see for example, Marja Peltola, *Kunnollisia perheitä: Maahanmuutto, sukupolvet ja yhteiskunnallinen asema*, in English: Respectable families – Immigration, generations and social position). The idea behind 'respectability' is that respectability is one attribute of good and ideal family, which materially usually links to a middle class way of life, and is an important element of the social positioning. See Beverley Skeggs. *Formations of Class and Gender: Becoming Respectable* (London: Sage Publishing, 1997).

54 Operative part of the judgment, second paragraph.

55 The case of *Rodrigues da Silva and Hoogkamer v The Netherlands*, 31 January 2006, Application No 50435/99; The case of *Konstantinov v The Netherlands*, 26 April 2007, Application No 16351/03; *Darren Omoregia and Others v Norway*, 31 July 2008, Application No. 265/07.

the residence permit to *M.*, the court focused on three issues: 1) the relationship rights of the eldest child; 2) the children's possibility to adapt to Algerian society; and 3) the stage of their integration into Finnish society.

In closer scrutiny, each of the three elements of the best interests evaluation emerges as underpinned by influential understandings of belonging and identity of the children. The power of these understandings lies in their presumed naturalness and legitimacy. For even if we might argue differently than the court at certain points of the decision, we must admit some legitimacy for many of the questions the court posed. In fact, these factors are listed in General Comment No. 14, and they feature also in the case law of the ECtHR.[56] The mechanisms giving birth to disadvantage operate in a subtler manner. Yet, cultural and symbolic factors present in the case are highly political, and deeply embedded in the struggles over belonging.

The first one of the issues considered by the court, the relationship rights of the eldest child, was scarcely addressed in the decision. While according to the mother, *L.*, the father of the child had objected to his child moving to Algeria, the court recognised no interference with the rights of the eldest child to have contact with her father nor with the parental rights of the father. Instead, the court pointed out that the mother was the sole holder of the custody of the child, which implies that the court viewed *L.*'s competence to make the decision about the habitual residence of the child alone as proving that she could move the child to Algeria, regardless of the objections of the other parent. Such a view would contradict several well-established principles of child law.[57] Accepting this line of reasoning would also create potentially harmful incentives to arrange the custody and care of the child with the sole purpose of meeting the requirements of the immigration process. This would effectively render empty some focal principles of child law, such as that decisions on custody and contact issues should be grounded in the best interests of the child.

In evaluating the second set of issues, namely the implications that moving to Algeria would have for the children, the court took into account, first, that both of the children had Arabic registered as their mother tongue. Their practical language skills, however, were not evaluated.[58] The

56 See for example, ECtHR, *Jeunesse (2014)*, paras 117, 120, and 121.

57 Were the child in joint custody of the parents, the decision to take the child abroad against the wishes of the other parent would amount to child abduction. In any case, custodial arrangements are not meant to restrict the rights of the non-custodian parent and the child to enjoy family life, which in the case of parents and children is a strongly protected right, extending even to potential family life. Parents may arrange the custody of the child in many ways and for a variety of reasons.

58 In fact, it is common in Finland for children to be bilingual, as there are two main official languages (Finnish and Swedish) in the country. The registration of one of the child's languages as mother tongue entitles the child to receive education in that language.

court considered, further, that were the children to move to Algeria, they would not experience the local culture and language as strange, despite having lived their lives thus far in Finland. In the event of moving to Algeria, they could rely on the support of their mother as well as the father of the younger child. Aged 6 and 9, the children were, according to the court, at an adaptive age and at such a stage of their schooling that moving would not endanger their education. All in all, the court concluded that even though moving to Algeria would mean a substantial change in the children's life, several facts indicated that together with their mother they were able to adapt to such a change. Consequently, their interests did not require granting an exemption regarding the requirement of secure means of subsistence. Interestingly, the case features no discussion of the grounds of *M.*'s previous asylum application. Even though *M.* had not been granted asylum, one might think that some attention to the reasons behind his asylum application would be required as part of the best interests assessment.

The third point the court considered concerned the stage of the integration of the children into Finnish society. While questioning the integration of someone who was born and has lived their entire life in a country seems somewhat peculiar, the court explicitly stated that *no such facts relating to circumstances outside home and the family had arisen that would indicate that integration to Finland was so advanced* that the children could not be required to move away from Finland with their mother, should she so choose.[59] The actual home and every-day environment of the children was bypassed by a brief remark that it was not shown that factors outside home would indicate the integration of the children was advanced. This brings to the fore yet another, albeit important, point of criticism, namely the question of which instance would be responsible for acquiring sufficient information on the circumstances of the child in family reunification cases. Since the national procedural norms enable the court to obtain further clarification and even expert opinions if necessary for solving the case, it seems problematic that the court apparently interprets the lack of evidence to amount to a certain outcome.[60] Again, the question of knowledge – who is

59 Original in Finnish, translation and italics SM: '*Asiassa ei ole ilmennyt myöskään muita kodin ulkopuolisia seikkoja, jotka osoittaisivat niin pitkälle edennyttä integraatiota Suomeen*, että lapsien ei voitaisi edellyttää muuttavan yhdessä äitinsä kanssa pois Suomesta, mikäli tämä niin valitsee.'

60 According to the procedural code applied in administrative courts (Hallintolainkäyttölaki, 33 §), the court may request further clarification and even expert opinions necessary for solving the case. According to research conducted in 2012 by *Virve-Maria de Godzinsky*, the courts use this possibility only occasionally (*Taking a Child into Care: Research of decision making in administrative courts*, National Research Institute of Legal Policy, Research Report No. 260, Helsinki 2012. The report, which includes an English summary, is available at www.optula.om.fi/material/attachments/optula/julkaisut/tutkimuksia-sarja/4xBiUQPOp/260_de_Godzinsky_2012.pdf (accessed 15 April 2016))

responsible for obtaining it as well as what kinds of knowledge is excluded – proves decisive.[61]

I suggested above that the best interests test as developed in General Comment No. 14 is an example of a legal instrument meant to foster the visibility of the intersectional identity of the child. The best interests test is supposed to operate as a mechanism that subsumes the knowledge of the individual child into the legal decision-making process. But this intersectionally situated, flesh-and-blood child is not a person that immigration law can deal with, and so the lived identity of the child is really not at the centre of the best interests assessment here. Rather, the child subject to the best interests evaluation and whose identity is investigated has to match the needs of the inquiry. This disciplinary constructed identity, the Alien who does not belong to the society that the nation state represents, is embedded in the legal practice of family reunification as the target of immigration control. The one who belongs, the-non alien, is a mere side effect of a futile inquiry into suspected 'alienness', the exception to the rule. So, the knowledge concerning the child is collected with this in mind, the main goal being the upholding of the legitimacy of the distinction between the alien and the citizen. The knowledge of the identity of the particular child is knowledge of a child who, by affiliation with a transnational family which by nature is prone to 'not-belong', is a potential alien, regardless of her formal citizenship status.[62]

The fact that the law primarily aims to detect a match for the pre-existing 'disciplinary identity' of the non-belonging foreign child, I suggest, explains many of the awkward moments in the decision. At these awkward moments the structural biases, which function to maintain the rigid order of privilege on which the citizenship system is founded, become annoyingly visible. The ethnic origin of the children and their ties to Algeria, familiarity with Algerian culture and Arabic mother tongue are considered relevant for the decision, whereas the opposite holds for their ties to Finland and cultural identity factors emphasising belonging to Finland (presumably good skills in Finnish, identification with Finnish culture), social environment, school records or other circumstances of the children. The integration into Finnish society of these children who were born and raised in Finland is challenged on the basis of their identities marked by

61 In the Finnish context, studies have documented how expert knowledge on the best interests and well-being of the child has utterly different weight in family reunification in the context of child welfare and out-of-home placement of a child than in family reunification in the context of immigration law. Reija Knuutila and Heta Heiskanen, 'Lapsen etu viranomaistoiminnassa: katsaus eräisiin Maahanmuuttoviraston viimeaikaisiin kielteisiin päätöksiin,' *Oikeus* 43:3 (2014), 314–21. This is the example of how the 'truth' is a product of politics and power.

62 Bahbha, 'Arendt's Children,' 448.

ethnicity, language and position as a second generation migrant, but this integration is never evaluated in material terms, for instance by hearing from the children about their circumstances[63] or other people significant to the children, e.g. staff of their schools or nurseries. Couplings of belonging and identity through the vague use of the term 'integration' assume a relevant difference, thus necessarily involving processes of erecting boundaries, constructing hierarchies and reifying identities. Such dynamics highlight the urgency of asking 'who exactly is the figure that needs to be integrated'[64] – and, moreover, what exactly is meant by integration of second generation children, who by definition were born in the country and often have lived there their whole life?

In conceptualising what she calls the politics of belonging, Yuval-Davis distinguishes between three analytically separate realms where belonging is constructed: the realm of social locations, such as race, ethnicity, age, gender, class and nation, which operate as 'hierarchically organised positions in grids of power relations'; the realm of identifications and emotional attachments to collectivities; and the realm of ethical and political value systems used for judging belonging.[65] These distinctions serve analytical purposes; in reality they refer to complex, overlapping, and at times contradictory social processes. This complexity, however, offers the site for contestation and resistance. For in each realm, the complex symbolic order is reproduced by an array of technologies and within a range of practices.[66] Simultaneously as these various technologies take part in producing class and subjectivity, they give rise also to specific projects of belonging. Viewed in this theoretical framework, then, the exercise of evaluating the best interests of the child may function as a site of normalisation – but of struggle and resistance too. For it is within the scope of this evaluation that identities and social locations become the 'individual circumstances' of the case.

63 This complete muteness of children in immigration cases seems to signal a profound perception of relevant knowledge. The child may be heard if it is to evaluate the reliability of the narratives of the family members but not in order to give her opinion weight.

64 Floya Anthias, 'Moving beyond the Janus Face of Integration and Diversity Discourses: Towards an Intersectional Framing,' *The Sociological Review* 61:2 (2013), 323–43.

65 Yuval-Davis, *Politics of Belonging*, 12.

66 For instance *Magdalena Kmak* examines the moral subject of mobility laws. According to her analysis, in the context of mobility, a moral subject may only be the active and economically robust EU citizen or the passive and victimised refugee. Others, specifically irregular immigrants, are considered immoral and suspectable. Kmak, 'Between Citizen and Bogus Asylum Seeker: Management of Migration in the EU through Technology of Morality,' *Social Identities* 21:4 (2015), 395–409. In an altogether different context, feminist scholars like *Beverley Skeggs* have pointed out that affect operates as the key technology of reproducing class hierarchies. For a comprehensive introduction to the 'turn to affect', see Margareta Wetherell, *Affect and Emotion: A New Social Science Understanding* (London: Sage Publishing, 2012).

The belongings of the second-generation child constructed in the realm of social locations through various mundane practices become mobilised in the ethico-political system of immigration law, where these belongings meet the 'disciplinary identities' embedded in the legal system. By the same token, it is here where these identities and social locations may contribute to the politics of belonging in a manner that either reproduces discrimination or offers means to resist it.

Conclusion: towards an intersectional analysis of the best interests of the child?

More than 65 years ago Marshall wrote that 'social rights in their modern form imply an invasion of contract by status, the subordination of market price to social justice, the replacement of the free bargain by the declaration of rights',[67] and suggested that these principles were entrenched with the contract system itself, making it dependent on a particular system of status. Since the two systems, the one rooted in status differentiation and the other in contract, bore with them a different sphere of rights and duties, Marshall argued that the shifts between these systems lead to the expansion of rights – that is, to situations where people may invoke both systems to claim rights while escaping the corresponding responsibilities. However, in the case of second generation children, the case may be reverse. These two systems may also be invoked in a manner that allocates risks and liabilities without any corresponding rights to some individuals or groups of people, as the identity narratives that make up the informal citizenship and define belonging feed back into the formal logics of citizenship.

The review provided in this chapter suggests that citizenship, specifically the citizenship of a child, is a discontinuous legal construction, determined not solely by citizenship as a formal status derived from nationality but by a plethora of identity factors marking the belonging of a person both in the family and in the jurisdiction of a nation state. In these accounts of belonging, weight is given both to considerations regarding family configurations and to individual characteristics associated with belonging to a nation state, such as language or ethnic origin. These identity narratives are conveyed into the legal reasoning as facts to be taken into account in those phases of the decision-making that require discretion and balancing by the merits of the particular case. This balancing, including the choice of which facts are to be taken into account, is ultimately always determined at the national level – in both stages of the ruling, the interpretation of citizenship rights and the interpretation of the Directive, the CJEU referred the decision back to the national court.

67 Marshall, *Citizenship and Social Class*, 68.

It remains an important and morally urgent call to resist the othering processes prevailing in immigration law and to promote the best interests of the child and to demand procedural guarantees for the realisation of these interests.[68] This, however, is not sufficient and may even end up derogating the inequalities embedded in immigration laws. For it might well be that the inherent limitations of immigration control – that is, the goal of keeping outsiders out – renders immigration law eventually a mismatch with the promise of contextual justice delivered by the rights of the child. This is the case simply because the legitimacy of the state's interest to control immigration allows the state to set the threshold so high that the best interests of the child would be relevant only in extremely exceptional cases. The purpose of the intersectional reading in this chapter has been to offer another perspective into what discursively happens in the decision – that through the best interests evaluation the court in fact participates in a vigorous construction of identities that undermine the belonging of second generation children in Finnish society.

This preliminary discussion on an intersectional approach to citizenship, belonging and legal constructions of identity points, in my view, towards a significant observation. The point it highlights is that what really is at stake in immigrant family reunification cases, is not (only) that in this field, argumentation of the courts falls short of the standard defined by international law regarding the right of the child to have her best interests evaluated properly and as a primary concern in all judicial proceedings concerning her, as recommended by the UN Committee on the Rights of the Child in its General Comment No. 14. Rather, what is at stake is that the logic of this field is exclusionary to such an extent that the impact of these stringent immigration policies cannot be fixed by a case-by-case approach offered by the rights of the child and the doctrine of the best interests. There are good reasons to suggest that very basic requirements of social justice stress the need to rethink the conditions of family reunification and social positioning of second generation children and their families in receiving societies.

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68 Bhabha, 'Arendt's Children,' 450.

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