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The Rights and Status of Persons with Disabilities in Administrative Proceedings in the Czech Republic

The author deals with the position of persons with disabilities in proceedings before administrative authorities in the Czech Republic. The legislation here is fragmented, and the author examines the basic principles that govern this area. At the same time, attention is focused on the question of the use of public and private institutes to support persons with disabilities in administrative proceedings. Finally, a significant transition trend from the „substitute decision-making system” to the „Supported or Assisted decision-making” concept is analyzed.

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KEYWORDS: persons with disabilities, public administration, administrative proceedings, discrimination, legal capacity, assisted decision-making, guardian, assisting person, representation by a member of the household

1 | Introduction

Czech legislation dealing with the status, rights and protection of persons with disabilities is considerably fragmented. There is no codification; everything is regulated by partially separate laws, which are devoted to, for example, social security, employment, education, healthcare and other areas of society's life. That is why there is no uniform definition of „disability” in the Czech Republic or „persons with disabilities”. Disability is defined differently in Czech laws, depending on each legal regulation's specific focus and purpose. In particular, the medical model^[1] is used (e.g. when assessing the state of health within the social security system) in combination with the social model^[2] (e.g. the school law)^[3]. Therefore, the legal regulation in the Czech Republic for persons with disabilities is confusing and complicated.

The article identifies the fundamental principles of the Czech public administration concerning persons with disabilities. These principles must be derived in particular from international legal and constitutional documents, as well as from the goals of the state's policy in this area, including civil society activities related to the support of people with disabilities. These principles reflect not only legal documents but also moral and ethical standards in society. Specifically, the article is devoted to the status and protection of the rights of persons with disabilities within the framework of administrative proceedings. In particular, the author tries to answer whether the Czech legislation reflects the need to protect the status and rights of persons with disabilities and what institutes it contains. At the same time, attention is also paid to whether this protection is provided by public law institutes or, at the same time, by private law

¹ Lenka Krhutová, „Teorie a modely zdravotního postižení” *Sociální Práce*, No. 4 (2010): 49–59.

² Michigan Disability Rights Coalition, *Models of Disability*. http://www.baha-studies.net/neurelitism/library/models_of_disability.pdf. See also Lenka Krhutová, *Argumentační základna pro prosazování a realizaci antidiskriminačních opatření ve vztahu k lidem se zdravotním postižením* (Olomouc: Univerzita Palackého v Olomouci-Výzkumné centrum integrace zdravotně postižených, 2005), 32.

³ For different models of understanding disability – see Deborah Kaplan, „The Definition of Disability: Perspective of the Disability Community” *Journal of Health Care Law & Policy*, No. 2 (2000). <http://digitalcommons.law.umaryland.edu/jhclp/vol3/iss2/5>.

institutes. Following this, the means of protecting the rights of persons with disabilities are analyzed, possible shortcomings are identified, and, in the end, *de lege ferenda* solutions are proposed.

2 | Basic principles of protection and support of persons with disabilities within the Czech public administration

The basic principle promoted in the Czech Republic (not only) in public administration is the principle of „accessibility”. Accessibility is intertwined with almost all areas of life for people with disabilities. It can be defined as a degree of accessibility in which a device, service, product or environment is available to as many people as possible or to all people without any distinction. In the field of public administration, this principle is reflected in the promotion of so-called „governance accessibility”^[4]. It is a set of principles that must be followed in order for public services to be created as accessible and which must be taken into account at all levels of public administration (national, regional and local). The basic rule is not to exclude persons with disabilities but to integrate them. In the case of public administration services and activities, the correct procedure is therefore not to create special services for these clients but, in contrast, to adapt standard services so that they are usable and accessible to all persons. This also applies, without exception, to the conduct of administrative proceedings before the Czech administrative bodies.

The basic general legal principles, which are critical in relation to access to public administration and administrative proceedings, are primarily the prohibition of discrimination, the principle of equal treatment, the principle of equality before the law, and the principle of ensuring equal access to justice.

⁴ National Plan for the Promotion of Equal Opportunities for Persons with Disabilities for the period 2021–2025, approved by the Government of the Czech Republic on July 20, 2020. https://www.vlada.cz/assets/ppov/vvozp/dokumenty/National-Plan-for-the-Promotion-of-Equal-Opportunities-for-Persons-with-Disabilities-2021_2025.pdf. See also Rada Michal, *Governance Accessibility je nový směr pro Evropu i pro nás*. Office of the Government of the Czech Republic. <https://www.helpnet.cz/sites/default/files/soubory/Rada.pdf>.

The right to equal treatment is enshrined directly in Article 1 of the Charter of Fundamental Rights and Freedoms, which is part of the constitutional order of the Czech Republic. The article states: „All people are free and equal in their dignity and rights. Their fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrevocable”. Therefore, society cannot limit the rights of some people based on gender, skin colour, language, religion, political or other opinion, national or social origin, belonging to a national minority or even „health disability” (Article 3 of the Charter). The right to equal treatment and the prohibition of discrimination (direct and indirect) are regulated in the Anti-discrimination Act, where disability is mentioned as one of the reasons for both types of discrimination^[5]. At the same time, it should be added that equal treatment does not mean only the same approach and behaviour towards persons with disabilities but also enabling and providing an equivalent background, using the „universal design”, the aim of which is to make objects, technologies, buildings and the environment accessible to all people without restrictions^[6].

Equality before the law imposes the obligation to recognize persons with disabilities as subjects of law and their legal capacity in all areas of life on an equal basis with others. Therefore, when imposing measures related to the legal capacity, it is necessary to respect the rights, will and preferences of persons with disabilities. The positive change in this area was the adoption of the new Civil Code^[7], which enshrined fundamental changes regarding the legal capacity of a person and revised the rules for possible restrictions. It is no longer possible to completely deprive a person of a legal capacity, but only to limit it. At the same time, the law is based on „the concept of supported or assisted decision-making”^[8], meaning that each person can make their own decisions but may need a greater or lesser degree of support^[9]. Therefore, the legal system regulates the use of

⁵ Pavla Boučková et al, *Antidiskriminační zákon. Komentář* (Praha: C. H. Beck, 2016), 172–180, 218–230.

⁶ Sheryl Burgstahler, *Universal Design: Process, Principles, and Applications* (USA: University of Washington, 2009). <https://files.eric.ed.gov/fulltext/ED506550.pdf>.

⁷ Act No. 89/2012 Coll., Civil Code.

⁸ Rosie Harding, Ezgi Taşcıoğlu, „Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity” *Societies*, No. 2 (2018): 25. <https://doi.org/10.3390/soc8020025>.

⁹ This is a change compared to the previously applied concept of so-called substitute decision-making (when a guardian made decisions for a person with a disability and as a result the person was often excluded from life in society).

so-called „support measures” (the representation by a guardian, by a member of the household or by an „assisting person”) instead of restrictions of a legal capacity.

Although the principle of ensuring equal access to justice is primarily related to the judiciary, I think it is also fully applicable to public administration decision-making. After all, in this respect, the Charter provides in Article 36 that everyone can claim their right in an independent and impartial court and, in certain cases, in another body (by which we mean mainly the administrative bodies). In this regard, the procedural legal regulations, therefore, try to ensure equal access for all persons in terms of their administrative procedures, the realization of procedural rights, and technical measures (barrier-free offices and buildings of administrative authorities^[10]).

It is also important for persons with disabilities that public services provided and regulated by public administration are accessible and usable equally with others. The electronization of public administration (eGovernment) or the standardization of the performance of administrative agendas and activities contributes to this. An Easy-to-read methodology^[11] was prepared to create easy-to-read and comprehensible texts, which should ensure that public administration documents are understandable and accessible to people with impaired comprehension. The significant step was also adopting the Act on the Accessibility of Websites and Mobile Applications. This Act incorporates Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of websites and mobile applications of public sector entities. It is intended to ensure the accessibility of websites and mobile applications of state bodies and public institutions to all their users, especially persons with disabilities^[12]. To ensure accessibility of public administration services, the importance of continuous education of public administration

¹⁰ Act No. 183/2006 Coll., Building Act. Decree of the Ministry of Regional Development of the Czech Republic No. 398/2009 Coll., on general technical requirements ensuring barrier-free use of buildings.

¹¹ Government of the Czech Republic: „Easy to read” methodology. <https://www.vlada.cz/cz/ppov/vvozp/dokumenty/metodika-easy-to-read-174932/>.

¹² Kristiina Nurmela, Antti Pirhonen, Airi Salminen, „Accessibility of Public Web Services: A Distant Dream?”, [in:] *Human-Computer Interaction - INTERACT 2013. INTERACT 2013. Lecture Notes in Computer Science*, vol. 8117, ed. Paula Kotzé, Gary Marsden, Gitte Lindgaard; Janet Wesson; Marco Winkler (Berlin-Heidelberg: Springer, 2013). https://doi.org/10.1007/978-3-642-40483-2_40; https://link.springer.com/content/pdf/10.1007/978-3-642-40483-2_40.pdf?pdf=inline%20link.

officials on disability topics and the development of knowledge and skills related to the appropriate way of communicating with persons with certain types of disabilities cannot be overlooked.

3 | Status and rights of persons with disabilities in proceedings conducted by public administration bodies

The essential procedural regulation for decision-making procedures of administrative bodies is the Code of Administrative Procedure. The Code contains the „basic principles of activities of administrative bodies” (from Section 2 to Section 8). These principles represent a set of basic assumptions and conditions for the proper performance of public administration in every democratic legal state. On the basis of these principles, the administrative authorities must create conditions that allow all persons concerned to exercise their procedural rights effectively. This also applies to persons with disabilities. Section 7 of the Code states, „the persons concerned have an equal position in applying their procedural rights. Where the equality of the persons concerned could be prejudiced, the administrative authority will take the necessary measures to ensure it”. This imperative is especially aimed at the position of persons with disabilities within the procedures and activities of the public administrative authorities.

From the point of view of the specific institutes protecting the rights of persons with disabilities in administrative proceedings, it is necessary first to explain their procedural position and acting within the administrative proceedings. Section 29 of the Code states, „everyone is competent to act independently in administrative proceedings to the extent that the law grants them the legal capacity”^[13]. According to the Civil Code, the legal capacity is the capacity to acquire rights and assume duties for oneself by making juridical acts. Legal capacity may only be limited in the interests of the individual concerned after he has been seen by a court and with full recognition of his rights and his uniqueness. In so doing, the extent and

¹³ „Considerable prudence is always in order when assessing the relationship between self-determination and legal capacity” – Judgment of the Supreme Administrative Court of the Czech Republic, 26 July 2018, 8 As 147/2017.

degree of the individual's inability to care for his matters must be carefully considered. An individual's legal capacity can only be limited if threatened with serious harm unless milder and less restrictive measures suffice to protect his interests. An individual's legal capacity may only be limited by a court. In its decision to limit the legal capacity of an individual, „a court shall appoint a guardian for the individual”. When choosing a guardian (often a relative or other close person), the court shall consider the wishes, his needs, and the suggestions of close persons of the ward.

Therefore, if the court limits the legal capacity of a person with a disability, „this person must be represented in administrative proceedings by a guardian appointed by the court to the extent specified”. This ensures the protection and full realisation of all procedural rights of a person who cannot act independently to the full extent due to disability. If the court cannot find any suitable person to perform the function of a guardian, it will appoint a so-called „public guardian”. This is the municipality (city) where the ward is located. In such a case, the person with limited legal capacity is represented in the administrative proceedings by the public guardian (by the municipality).

However, the Czech legal regulation of administrative proceedings also remembers situations when, for certain reasons, a person with limited legal capacity does not have a guardian or cannot be represented by this guardian at the given moment. In such a case, the administrative authority must appoint „a procedural guardian” for this person. Another situation in which the administrative body is obliged to appoint a procedural guardian is a situation where it is a person who has full legal capacity but who is suddenly affected by a temporary mental disorder, which prevents the person from acting independently in the proceedings. Until the procedural guardian is appointed, it is advisable for the administrative body to suspend the proceedings.

The appointment of a guardian is therefore intended to ensure maximum support and protection of participants with disabilities^[14]. As the Municipal Court in Prague aptly states, „It is about achieving the constitutional maximum of equality between the parties to the proceedings”^[15]. The guardian thus protects the position and rights of a person with a disability who would otherwise be disadvantaged in the proceedings (compared to

¹⁴ Jan Vedral, *Správní řád. Komentář* (Praha: Bova Polygon, 2012), 366–367.

¹⁵ The judgment of the Municipal Court in Prague, 7 November 2018, 10 A 102/2015.

other participants). The guardian must actively represent this person in administrative proceedings, perform procedural actions on his behalf and properly defend his interests in the proceedings. Thus, the procedural guardian cannot act only as a formal representative of a party to the proceedings. It is, therefore, crucial to appoint a „suitable” person to act as a guardian^[16]. The concept of appropriateness was emphasised, for example, in the Constitutional Court decision dated 8 November 2011, no. IV. ús 1433/11: „When choosing a guardian, the Constitutional Court emphasizes the guardian being a person who can truly represent the interests of the participant”^[17]. The problem with the current Czech regulation is that the Code does not require the guardian’s consent to be appointed to this position. The administrative body can, therefore, appoint a certain person as a procedural guardian without obtaining their consent in advance. This can, of course, endanger the quality of the performance of this function and the representation of a person with a disability in administrative proceedings^[18].

The guardian appointed by the court or the procedural guardian appointed by the administrative authority acts in administrative proceedings on behalf of the represented person with disabilities. The guardian’s acts give rise to rights and obligations directly to the person represented. Also, except for cases where the representative has to personally perform something in the proceedings, all documents are delivered only to the representative (the guardian).

¹⁶ Zdeněk Fiala, Kateřina Frumarová et al., *Správní řád. Praktický komentář* (Praha: Wolters Kluwer, 2020), 129–130; Luboš Jemelka, Klára Pondělíčková, David Bohadlo, *Správní řád. Komentář* (Praha: C.H. Beck, 2016), 182–183.

¹⁷ In the judgment of the Supreme Administrative Court of the Czech Republic (23 August 2012, 9 As 109/2011) states that: „[...] when selecting [...] a person to be appointed as a guardian [...] the administrative authority should take care above all that the appointed person has the prerequisites to properly defend the interests of the ward”.

¹⁸ Martin Škurek, „Osoba procesního opatrovníka ve správním řízení”, [in:] *Naděje právní vědy 2020: Právní věda v praxi: sborník příspěvků ze stejnojmenné mezinárodní konference pořádané Fakultou právnickou Západočeské univerzity v Plzni on-line dne 27. listopadu 2020*, ed. Vilém Knoll, Jakub Hablovič, Vladislav Vnenk (Plzeň: Západočeská univerzita v Plzni, 2022), 668–678.

4 | The concept of „Supported or Assisted decision-making” and administrative proceedings

However, in recent years, Czech law has tried to be based more on the concept of „supported or assisted decision-making”, which is based on the fact that „each person is capable of making their own decisions, but may need a greater or lesser degree of support to do so”. The task of legislation is to ensure that a disabled person has a sufficient degree of ability to act freely according to his will and abilities. Until 2014, the legal regulation was based exclusively on the „substitute decision-making system”, where the guardian decides about the person instead of him. The current Civil Code is based on the concept of supported decision-making. According to this concept, in certain cases, the assistance of another person (in a function formalized to a certain extent) will suffice. This person will participate in the legal proceedings of the supported person without the need to interfere with his legal capacity.^[19] Since 2014, the „the assisting person” institute has been used in the Czech Republic.

Unlike a guardian, „the assisting person does not act instead of a person with a disability but acts with this person”. This regulation of decision-making support is mainly based on Article 12 of the Convention, according to which the States Parties shall take appropriate measures to provide access for persons with disabilities to the support they may require in exercising their legal capacity. The legal solution to support decision-making was adjusted after 1990 in the Canadian provinces, then also in Europe in Norway, Denmark, and Sweden, in Great Britain and France (during the reform of the guardianship system in 2007). Article 12 of the Convention requires, among other things, to adopt adequate and effective measures to prevent assistance abuse. In the Czech Republic, therefore, a contract for the provision of support (assistance) is concluded between the two parties,

¹⁹ Glen Kristin Booth, „Supported decision-making and the human right of legal capacity” *Inclusion*, No. 1 (2015): 2-16. <https://supporteddecisionmaking.com.au/wp-content/uploads/sites/4/2021/10/AAIDD-article-Glen-SDM-Human-Right-Legal-Capacity.pdf>. See also Gerard Quinn, „Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD”, [in:] *Proceedings of the HPOD Conference* (Harvard Law School, Cambridge, Mass., 20 February 2010). http://www.fedvol.ie/_fileupload/Research/NDE%20Reading%20Lists/Harvard%20Legal%20Capacity%20ogq%20draft%202%20Gerard%20Quinn%20Feb%202010.pdf.

which must be approved by the court, which will, of course, review all the circumstances of the concluded contract and its content.

Therefore, even if the assisting person is essentially a private law institute, a person with a disability can also use it in public administration and as part of their participation in administrative proceedings. Section 36 of the Code explicitly stipulates that „the participant has the right to consult with the assisting person when dealing with the administrative body”; if there are more such persons, the participant chooses one of them. Furthermore, the Code „allows the assisting person to inspect the file together with the participant and to participate in closed hearings before the administrative body”.

The institute of the assisting person can undoubtedly be welcomed; however, it is also necessary to draw attention to some relatively fundamental „shortcomings” of its current legal regulation. The assisting person is not, *de lege lata*, a party to the administrative proceedings, nor is he the legal representative (i.e. guardian) or an agent based on a power of attorney. This conclusion was also confirmed in the opinion of the Advisory Board of the Minister of the Interior of the Czech Republic when it stated that the assisting person „is not a representative of a participant in the proceedings and in the proceedings he has rights only to the extent defined by the Code of Administrative Procedure. The supported participant in the proceedings acts independently, with the help of his chosen assisting person”^[20]. Therefore, the assisting person is not responsible for the support provided in the administrative proceedings. That’s the first problem. Only on the application of the person receiving assistance or the assisting person can a court remove the assisting person; the court shall also remove him, even of its motion, if the assisting person commits a substantial breach of his duties. The second problem is the relatively narrow range of competencies of the assisting person (only consultation, inspection of the file in the presence of the participant and participation in closed hearings). I think it will be necessary to strengthen and extend the competence of the assisting person. Undoubtedly, it would be appropriate for the administrative body to have, for example, the obligation to deliver all relevant documents to the assisting person and to inform the assisting person of all procedural acts in the proceedings.

²⁰ Conclusion No. 131of the Advisory Board of the Minister of the Interior on the Administrative Code of 14 February 2014. <https://docplayer.cz/24901124-Zaver-c-131-ze-zasedani-poradniho-sboru-ministra-vnitra-ke-spravnimu-radu-ze-dne-napomoc-pri-rozhodovani-a-zastupovani-clenem-domacnosti.html>.

In addition to the possibility of having an assisting person, the Civil Code also regulates the possibility of „a person being represented by a member of the household”. Suppose a mental disorder prevents an adult with no other representative from doing juridical acts. In that case, he may be represented by his descendant, ancestor, sibling, spouse or partner, or someone who had lived with the person in a common household before the creation of representation for at least three years. The representative shall inform the person represented that he will represent him and clearly explain the nature and consequences of the representation. If the person to be represented refuses that, the representation is not created. A court must approve the creation of representation. Before making any decision, the court shall make the necessary effort to obtain the opinion of the person represented, also using the way of communication chosen by the person represented. With this institute, the Czech legislation fulfils, among other things, the requirement of Article 19 of the Convention and the recommendation of the Committee of Ministers of the Council of Europe No. R (99) 4 regarding the principles of legally protecting incompetent adults. It can be considered that „in relation to administrative proceedings, this form of assistance to persons with disabilities is subsidiary and only of limited use, for the following reasons”.

The institute of the representation by a household member „was not reflected in the Code in any way” (unlike the assisting person). A household member can only represent a natural person in the usual matters related to everyday life. It is a substantive legal institute regulated in the Civil Code, and the procedural representation cannot be automatically derived from it. The representation of a household member cannot be considered representation within the meaning of Section 31 of the Code. This institute is not a kind of full legal representation, nor is it an agent or a guardian. From the point of view of the Code, it is rather a special type of acting regulated by a special law for the benefit of the participant. The list of cases where a household member represents a party to the proceedings „must be determined by a special law” (since the Code, as a general procedural regulation, is silent in this regard). Thus, a participant in administrative proceedings with a disability can be represented by a member of the household only in such administrative proceedings in which a special law permits the representation of the participant by a member of the household.

Last but not least, attention must be paid to „persons with sensory disabilities and their position in proceedings before administrative authorities”. In this regard, the Code regulates the right to

- a. appointment of a Czech sign language interpreter for deaf users of Czech sign language,
- b. appointment of a mediator for deaf-blind persons,
- c. appointment of a guardian for particularly severely disabled persons who cannot be communicated with even through an interpreter or mediator and
- d. ensuring access to the contents of the file for persons with visual impairments.

The regulation of these procedural rights of persons with sensory disabilities can be found mainly in the Code and *the Act on Communication Systems of Deaf and Deaf-Blind Persons*. The basic principle is that deaf and deaf-blind people have „the right to freely choose from the communication systems mentioned in this Act the one that meets their needs”. Their choice must be respected to the maximum extent possible. The basic communication system of deaf people is the Czech sign language. Other communication systems are signed Czech, finger alphabet, visualization of spoken Czech, written record of spoken speech, Lorma’s alphabet, typing, Braille, tactile reading and the Tadoma vibration method.

The Code respects the right to free choice of communication of these persons and stipulates that the administrative body appoints a Czech sign language interpreter for deaf users. A deaf person who prefers the Czech language, as well as a deaf-blind person, will then be assigned a mediator who can communicate with them using one of the communication mentioned above systems. Suppose a particularly severely disabled person appears in the proceedings, with whom the administrative body cannot act through an interpreter or a med. In that case, it must appoint a procedural guardian for such a person (see above for more details). Also, concerning blind persons, the Code strives for maximum protection of their rights. About this type of sensory disability, their protection is mainly reflected in the modification of access to the file. The Code stipulates that the content of the administrative file will be read to blind persons. On a request, the administrative authority will allow a blind person to make an audio recording. The administrative authority shall also allow the blind person to consult the file with his guide.

5 | Conclusion

It can be stated that the Czech legal regulation of administrative proceedings reflects the requirements for the protection of the rights of persons with disabilities which arise from the international legal obligations of the Czech Republic, as well as from modern global trends in access to persons with disabilities. Instead of a „substitute decision-making system”, the „Supported or Assisted decision-making” concept is increasingly being promoted. This concept means that each person can make their own decisions but may need a greater or lesser degree of support. Therefore, the Czech legal system regulates the various „support measures” instead of restrictions of a legal capacity.

The very interesting fact is that in the Czech Republic, public and private institutes protect the status and rights of persons with disabilities in administrative proceedings. They consider this trend of linking public and private law to be desirable because both private and public law instruments serve essentially the same purpose: to support the independent action of a person with a disability as much as possible and, at the same time, to protect their position and rights in legal proceedings (administrative and judicial) but also within the framework of private law acting.

The traditional institutes of a guardian appointed by a court or by an administrative body were supplemented by modern institutes of „assisting person” and the possibility of representation by a household member. In particular, „assisting person” appears to be a very suitable form of assistance for persons with disabilities, including administrative proceedings. Unlike a guardian, the assisting person does not act instead as a person with a disability, but acts with this person. The only problem is the relatively narrow range of competencies of the assisting person (only consultation, inspection of the file in the presence of the participant and participation in closed hearings). I think it will be necessary to strengthen and extend the competence of the assisting person. Undoubtedly, it would be appropriate for the administrative body to have, for example, the obligation to deliver all relevant documents to the assisting person and to inform the assisting person of all procedural acts in the proceedings.

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Quinn Gerard, „Personhood & legal capacity: Perspectives on the paradigm shift of article 12 CRPD”, [in:] *Proceedings of the HPOD Conference*. Harvard Law School, Cambridge, Mass., 20 February 2010. http://www.fedvol.ie/_fileupload/Research/NDE%20Reading%20Lists/Harvard%20Legal%20Capacity%20ogq%20draft%202%20Gerard%20Quinn%20Feb%202010.pdf.

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