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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION BY TOM HARTLEY
FOR JUDICIAL REVIEW**

CARSWELL LCJ

Introduction

This is an appeal by the Law Society of Northern Ireland against an order of Kerr J made on 18 January 2000, whereby on the application of the respondent Tom Hartley he quashed a decision of the Society's Legal Aid Committee refusing him legal aid for an application for judicial review in respect of the nomination of councillors by Belfast City Council to committees and public bodies. The application raised important questions concerning the interpretation and application of the legislation governing the administration of legal aid. The substantive application concerning the nomination of councillors has now been determined, but because the parties wished to have a ruling from the court on the issues involved in the appeal for guidance in future cases we agreed to hear and determine the appeal.

The Factual Background

The respondent, a member of Sinn Fein, was at all material times a member of Belfast City Council, having been elected as a councillor for the Lower Falls electoral area in the local government election held in May 1997. In January 1998 he proposed to issue proceedings in the High Court seeking judicial review of decisions of the Council concerning nominations to committee posts and membership of various public bodies. He claimed in the affidavit sworn

by him grounding the proceedings that Sinn Fein had been –
"systematically and deliberately excluded from

- (1) all chair and vice chairpersonships on the sixteen Belfast City Council Committees.
- (2) nominations to statutory bodies (eg Belfast Education and Library Board) of which there are thirteen.
- (3) non-statutory bodies (other than partnerships); there are twenty-nine such non-statutory bodies including partnerships."

In the application, which was brought in due course by the respondent, he claimed declarations and an injunction against the exclusion of Sinn Fein councillors from these posts. The respondent's solicitors applied on his behalf on 27 January 1998 to the Legal Aid Department of the Law Society for an emergency certificate of legal aid to pursue the application for judicial review. In support of the application they submitted a draft statement under Order 53 and grounding affidavit, together with an undated opinion of counsel. That opinion focuses, as did the draft statement and affidavit and a report prepared by the respondent exhibited to the affidavit, upon the complaint advanced by Sinn Fein of systematic exclusion from posts in general rather than upon the respondent's own complaint of exclusion from the particular post of Harbour Commissioner. The same concentration on the grievance expressed by Sinn Fein councillors as a whole may be seen from the correspondence exhibited.

By a letter dated 29 January 1998 the Legal Aid Department notified the respondent's solicitors that it had refused the application for legal aid. The letter, written in the Department's standard form, gave the following reasons:

"You have not shown that you have reasonable grounds for taking steps to assert or dispute the claim, or for taking, defending, or being party to the proceedings.

It appears unreasonable that you should receive legal aid in the particular circumstances of the case."

The respondent's solicitors appealed on 13 February 1998 against the refusal of legal aid. The appeal was heard on 6 March 1998 by the Legal Aid Committee (the Committee), chaired

by Miss Ruth Collins. The members of the Committee had been supplied in advance of the meeting with the necessary grounding documents. Miss Angela Ritchie, a member of the firm of solicitors acting for the respondent, appeared at the hearing and gave information to the Committee in answer to a number of questions posed by the members. Miss Collins set out in paragraphs 4 and 5 of her affidavit sworn in these proceedings the course of the Committee's consideration of the matter:

"4. As is normal practice Miss Ritchie was invited to make any further points or arguments and the members then further considered the appeal in her absence.

The Committee was concerned as to whether it was reasonable in the circumstances to grant Legal Aid to the Applicant as it appeared that the Applicant was a person who was concerned in the proceedings in a representative capacity as member of the group of Sinn Fein Councillors in Belfast City Council. This was the issue that troubled the Committee.

The Committee considered the correspondence of the Applicant's solicitors which referred to that firm as acting for the Sinn Fein Councillors on Belfast City Council in the initial complaint to Belfast City Council. The Applicant's affidavit sworn on 27th April 1998 referred to Sinn Fein being systematically and deliberately excluded from involvement in certain activities of Belfast City Council. The Applicant expressed the view, in his affidavit, that Belfast City Council was continuing to discriminate against and marginalise Nationalists as a group. The correspondence from the Applicant to Lord Dubs exhibited at 'TH3' described apparent concerns as to the unfair discriminatory treatment resulting in disadvantage of the Sinn Fein Councillors on Belfast City Council. It appeared to the Committee from the reading of the papers in their entirety that the Applicant was pursuing the judicial review in a representative capacity.

I do not seek to set out exhaustively the contents of all the papers presented by the Applicant's solicitors however in my experience Committee members carefully consider the documents submitted in their entirety.

5. Whilst the complaint made in the application for judicial review affected the Applicant personally, it appeared to the Committee that the same complaints affected the public representatives of Sinn Fein on Belfast City Council in a similar manner. The Committee took the view that members of Sinn Fein who were Councillors had a common interest in the outcome of the proceedings of the Applicant. The Committee

concluded that the Applicant had an interest common to other Sinn Fein Councillors rather than a particular individual interest in applying for judicial review. In the circumstances of the Applicant acting as a representative of Sinn Fein Councillors it is reasonable and proper to expect the political organisation concerned to support the Applicant's judicial review.

The Committee was concerned that by granting Legal Aid and making public funds available for an application which was of interest and benefit to members, supporters and a group of public representatives of a political party that the same could be regarded as advancing the interests of that party thereby setting an inappropriate precedent for future applications."

The committee decided unanimously to refuse the appeal. Miss Collins noted on the case summary "Refused. 7g", a reference to Regulation 7(g) of the Legal Aid (General) Regulations (Northern Ireland) 1965, as amended. The Legal Aid Department informed the respondent's solicitors of the result of the appeal by a letter dated 11 March 1998, in the following terms:

"I refer to the appeal to the Legal Aid Committee against the refusal to grant legal aid in this case and wish to inform you that the appeal was considered by the Legal Aid Committee on 6 instant and was refused on the grounds that it appeared unreasonable, in the particular circumstances of the case, that you should receive legal aid.

I should inform you that there is no appeal against the refusal of the Legal Aid Committee."

The solicitors pressed the Department in several letters to provide fuller reasons for the refusal, and by letter dated 31 March 1998 the Department replied as follows:

"Further to your letters of 18 inst and 10 inst I note the contents thereof and apologise for the delay in replying.

This appeal was considered by the Legal Aid Committee on Friday 6 inst and was refused on the grounds that it appeared unreasonable in the particular circumstances of the case that you should receive legal aid.

I can confirm that the Legal Aid Committee had before it all relevant papers submitted by you in respect of the above applicant and indeed your personal representation before it. The Committee fully considered these papers and your submissions and responses to the various queries raised by the Committee

members and decided that the applicant had not disclosed that it was reasonable in the particular circumstances of this case that you should receive legal aid for taking the proposed proceedings.

You will be aware that each application for legal aid is considered on its own merits and on the particular details and information supplied by the applicant's solicitor in the application for legal aid, and in this case including personal representation before the Committee.

You will be aware that there is no appeal against the decision of the Legal Aid Committee."

The respondent applied for leave to bring the present application by lodging a statement dated 27 April 1998 and leave was given by Kerr J on 29 April. The application was heard on 23 October 1998 and the judge gave a written judgment on 18 January 2000, in which he set out his reasons for quashing the Legal Aid Committee's decision refusing the respondent's appeal. The Law Society appealed by notice dated 7 February 2000 and the matter came before us for hearing on 22 May 2000.

The Statutory Provisions

The grant or refusal of legal aid is governed by the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. The material provision for present purposes is Article 10, which defines the scope and general conditions of legal aid. Paragraphs (4) and (5) of Article 10 provide:

"(4) A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto.

(5) A person may be refused legal aid if, in the particular circumstances of the case, it appears -

- (a) unreasonable that he should receive it; or
- (b) more appropriate that he should receive assistance by way of representation;

and regulations may prescribe the criteria for determining any question arising under sub-paragraph (b)."

Regulations were made under the predecessor legislation the Legal Aid and Advice Act

(Northern Ireland) 1965, and these regulations, the Legal Aid (General) Regulations (Northern Ireland) 1965 (the 1965 Regulations), which have been frequently amended, are still in operation although that Act was repealed and replaced by the 1981 Order. Regulation 2(1) is the starting point: it provides that –

"Legal aid shall be available to any person to whom a certificate has been issued in accordance with these regulations."

Regulation 3(1) directs that applications for certificates in respect of proceedings in the House of Lords, Privy Council or Court of Appeal are to be made to the Legal Aid Committee, and applications in respect of any other proceedings are by Regulation 3(2) to go to a certifying committee. In Regulation 1(2) the term "appropriate committee" is defined as meaning the Legal Aid Committee or a certifying committee to whom an application for a certificate has been made.

Regulation 5(1) specifies the matters to which the secretary to the certifying committee is to have regard when considering the issue of a certificate:

"An application for a certificate in respect of a claim shall be considered by the secretary to the certifying committee and if, after consideration by him of the general circumstances in which it was made, including questions of fact or law arising out of the claim, and after determination by him of the disposable income and disposable capital of the applicant and the maximum contribution payable by the applicant, it appears to the secretary -

- (a) that the applicant has reasonable grounds for taking steps to assert or dispute a claim; and
- (b) that it is reasonable in the circumstances that he should receive legal aid; and
- (c) that the total cost of asserting or disputing the claim would not be likely to exceed one hundred pounds; and
- (d) that the question of taking, defending or being a party to proceedings before a court or tribunal does not arise or has not yet arisen;

he shall (subject to Section 5 of the Act (xvii)) approve the application on behalf of the committee."

It may be noted that this provision refers only to a certifying committee and does not extend to

the Legal Aid Committee, whereas many of the other provisions of the Regulations are applicable to the "appropriate committee". One such provision is Regulation 5(11), much canvassed in this litigation, which reads:

"(11) Where an application is made by or on behalf of a person in connection with a cause or matter in which numerous persons have the same interest and, in accordance with rules of court, one or more persons may sue or be sued, or may be authorised by a court to defend any such cause or matter on behalf of or for the benefit of all persons so interested, the appropriate committee shall refuse the application if they are satisfied -

- (a) that such refusal would not seriously prejudice the right of the applicant, or
- (b) that it would be reasonable and proper for the other persons having the same interest in the matter as the applicant to defray so much of the costs as would be payable from the fund in respect of the proceedings if a certificate were issued."

Regulation 7 deals with the refusal of certificates, the material part being paragraph (g):

"7. If the appropriate committee refuse an application for a certificate, they shall notify the applicant, stating that the application has been refused on one or more of the following grounds:

...

- (g) that it appears unreasonable that he should receive legal aid in the particular circumstances of the case (whether as a result of any discretion given to the appropriate committee under any provision of these regulations or otherwise)."

It is to be noted that this provision is merely administrative, specifying the grounds of refusal to be set out in a notice of refusal. For the grounds on which the appropriate committee is to base its decision to grant or refuse legal aid one has to go back to Article 10 of the 1981 Order, supplemented by the mandatory requirement of refusal contained in Regulation 5(11). Appeals against the refusal of a certificate by a certifying committee are governed by Regulation 10, of which the material parts are paragraphs (1), (2) and (5) (as amended):

"10(1) Where a certifying committee refuse an application for or for the amendment of a certificate in respect of proceedings other

than authorised summary proceedings or an applicant feels aggrieved by the terms upon which the certifying committee would be prepared to issue or amend it, the applicant may appeal to the Legal Aid Committee:

Provided that no appeal shall lie to the Legal Aid Committee from -

- (a) any determination of an officer appointed by the Department of Health and Social Services; or
 - (b) any decision by a certifying committee as to the amount of any contribution or the method by which it shall be paid.
- (2) Such appeal shall be by way of review of the general circumstances in which the application for a certificate was made.

...

- (5) The Legal Aid Committee shall determine the appeal in such a manner as seems to them to be just and, without prejudice to the generality of the foregoing, may -
- (a) dismiss the appeal; or
 - (b) direct the certifying committee to issue or to amend a certificate subject to such terms and conditions as the Legal Aid Committee think fit; or
 - (c) instead of themselves settling such terms and conditions, direct the certifying committee to do so; or
 - (d) refer the matter or any part of it back to the certifying committee for their determination or report."

Again it is to be observed that Regulation 10(5) does not purport to specify the grounds on which the Legal Aid Committee should determine whether to allow or dismiss an appeal, which are governed by Article 10 of the 1981 Order. The learned judge correctly stated at page 12 of his judgment that this provision –

"is not concerned with the basis on which an appeal may be refused but rather with the range of options available to the Committee in dealing with an appeal before it."

If one takes at face value the wording of paragraph 2 of the second affidavit sworn by Miss

Collins, dated 9 October 1998, it would look as if the Legal Aid Committee regarded Regulation 10(5) as containing the criterion to be applied by it in deciding the appeal. She said in that passage:

"The Committee were aware that in considering this matter and acting as an Appellate Tribunal, that its considerations were governed by Regulation 10(5) of the Legal Aid and Advice General Regulations (NI) 1965. It is to this Regulation that the Committee directed its mind."

She went on to state in paragraph 4:

"Insofar as the Committee took into consideration Regulation 5(11) [so corrected from 5(1)] of the 1965 Regulations in determining the Applicant's case, the same was merely a guideline adopted in the overall approach to the matter as required by Regulation 10(5)."

The Judge's Decision

The learned trial judge held that it would not have been open to the Legal Aid Committee to apply Regulation 5(11), and that it was not entitled to use it as a guideline in discharging its function under Regulation 10(5). After considering the terms of Regulation 5(11) he stated at page 11 of his judgment:

"It appears to me, however, that the use of the words 'cause or matter in which ... one or more persons may sue or be sued' in Regulation 5(11) confines its application to civil claim in private law. Judicial review is a public law remedy. It is not a 'cause' on which one sues. Rather it is an application to the court for a pronouncement on a disputed point of public law. An applicant for judicial review must of course have *locus standi* ie he must show that he has sufficient interest in the matter under challenge to justify his making the application but the right which he seeks to have vindicated must be one rooted in public rather than private law. I consider, therefore, that it would not have been open to the Committee to apply Regulation 5(11) to this application for legal aid. I am of the opinion that the Committee was correct, therefore, in its conclusion that the power to refuse legal aid under this provision was not available to it in this case.

The Committee believed, however, that, in the exercise of its powers under Regulation 10(5), it could have regard to Regulation 5(11) as a guideline. Before turning to Regulation 10(5) one may observe as a preliminary comment that, if the powers under Regulation 5(11) were not available to the Committee, it would be somewhat anomalous that this regulation

could be used as a guideline in the exercise of other powers."

He went on at page 12:

"I have concluded, therefore, that the Committee was not entitled to have regard to Regulation 5(11) as a guideline in discharging its function under Regulation 10(5). In consequence the Committee's decision must be quashed."

He also considered the need for the Committee to give reasons and the adequacy of those given, but this issue was not the subject of any argument before us on appeal.

The Issues on the Appeal

The issues which were debated before us were the following:

1. Whether the Committee had regard to the correct principles or criteria in reaching its conclusions and whether it applied the correct provisions of the legislation or regulations in doing so.

2. Whether Regulation 5(11) applied to the present case.

3. Whether the Committee was entitled to have regard to Regulation 5(11) for guidance and apply the principles contained in that provision.

4. If the Committee had regard to the wrong criteria or applied incorrect provisions in reaching its conclusions, whether relief should be refused on the ground that it would not now avail the respondent.

The Criteria Applied

The positive and negative criteria for allowing or refusing legal aid are set out in paragraphs (4) and (5) of Article 10 of the 1981 Order. The Legal Aid Committee fairly clearly took the view that the respondent satisfied the positive criterion in paragraph (5) of having reasonable grounds for taking the proceedings. It focused on the issue whether it was unreasonable that he should receive legal aid. Its consideration was directed to the question whether the applicant was acting in effect in a representative capacity on behalf of the Sinn Fein members of Belfast City Council. As appears from Miss Collins' affidavit, the Committee took the view that he was so acting and that it was unreasonable in those circumstances that he should receive legal aid. The Committee expressed its conclusion in the terms that it "appeared

unreasonable, in the particular circumstances of the case," that the respondent should receive legal aid. This is the statutory criterion contained in Article 10(5) and it was in our view the correct criterion to apply. An argument was put forward on behalf of the respondent that the statement contained in paragraph 2 of Miss Collins' second affidavit shows that the Committee applied the wrong criterion and accordingly its decision was wrong in law. In so far as the committee "directed its mind" to Regulation 10(5) of the 1965 Regulations, however, that cannot be described as the application of a criterion for refusing legal aid. That provision merely describes the various steps which the Committee has power to take, not the test which it is to apply in considering whether to grant or refuse legal aid to an applicant. Whatever is meant by the wording of Miss Collins' averment, it is plain that the Committee applied the statutory test in reaching its conclusion that legal aid should be refused.

The judge held that (a) Regulation 5(11) of the 1965 Regulations did not apply to judicial review proceedings (b) the Committee was not entitled to have regard to this provision even as a guideline in deciding whether to refuse legal aid. We are unable to agree with either proposition.

The judge held, in the passage which we have quoted, that the words in Regulation 5(11) "cause or matter in which ... one or more may sue or be sued" confine the application of that provision to civil claims in private law. He went on to say that judicial law is a public law remedy, not a "cause" on which one sues. The definitions of "cause" and "matter" in section 120 of the Judicature (Northern Ireland) Act 1978 are, however, very wide. "Cause" is defined as including "any action, suit or other original proceeding between a plaintiff and a defendant" and "matter" as including "every proceeding in court not a cause." Between them accordingly the words "cause or matter" must include judicial review proceedings. The words "sue or be sued" also appear to be capable of a much wider meaning than to be a party to a civil action. One of the meanings contained in the Concise Oxford Dictionary is "make entreaty or application to person or law court (for redress ...)". It would appear to make rather better sense to interpret the phrase in such a way as to include applications for judicial review and we see no compelling reason to restrict it to civil actions if it will bear that meaning.

Mr Lavery pointed to the words "in accordance with rules of court" and submitted that

the only rules contained in RSC (NI) 1980 on the point are to be found in Order 15 and that the reference to "plaintiffs" and "defendants" in rule 12 was an indication that the rules covered only civil actions. Those terms are, however, defined very broadly in section 120 of the Judicature (Northern Ireland) Act 1978 and appear to be quite capable of covering applicants or respondents in judicial review proceedings. By way of an alternative argument counsel submitted that Regulation 5(11) applies only to matters which come direct to the Legal Aid Committee, not to those which reach it by way of appeal from certifying committees. We see no reason why the provision should be interpreted in this manner and its wording appears to us quite clear. Mr Lavery also urged before us the consideration that groups of persons affected by decisions the subject of challenge in public law proceedings may be very diverse, not to say diffuse, and may not have available funds with which to support their case in a judicial review application. It seems to us, however, that the appropriate committee is entitled and bound to have regard to factors of that kind under paragraph (b) of Regulation 5(11) and that that is not a good ground for construing the provision so as to exclude public law proceedings.

We accordingly are of opinion that Regulation 5(11) does extend to applications for judicial review and covers cases which come before the Legal Aid Committee on appeal from certifying committees. It is mandatory in its terms and the Committee would have been obliged to refuse legal aid if it had been satisfied of either of the matters set out under (a) and (b) in that paragraph. It has not ruled on whether it was satisfied, although it appears clear from the terms of Miss Collins' first affidavit that it would have regarded condition (b) as having been fulfilled. It did not attempt to deal with the issue, no doubt because the members were aware of the observation made in this court in *Re McLaughlin's Application* (1990, unreported), in which Hutton LCJ stated at page 4 of his judgment that Regulation 5(11) related only to decisions of the certifying committee, not the Legal Aid Committee. It is clear, however, from the use of the words "appropriate committee" that Regulation 5(11) relates to both committees, and the court's contrary statement must be taken to have been made *per incuriam*.

Miss Collins states that the Committee adopted the provision as a guideline, but it is contended on behalf of the respondent that it was wrong to do so. We consider that this contention is incorrect, whether or not Regulation 5(11) extends to an appeal to the Committee

in respect of an application for legal aid to bring judicial review proceedings.

If Regulation 5(11) did so extend, then the Committee should have considered the matters set out in (a) and (b) of that regulation. It was submitted that as it did not do so it mistook its authority and failed to apply the correct provision, with the result that its decision must be set aside. It is clear from the terms of paragraph 5 of Miss Collins' first affidavit, however, that the Committee applied the same criteria as those contained in paragraph (b) of the regulation and came to the conclusion that the other Sinn Fein councillors had the same interest in the matter as the respondent and that it was reasonable and proper for their party to support his application for judicial review. If it had considered the matter by reference to Regulation 5(11) it would accordingly have concluded that it was obliged under its terms to refuse legal aid. Since it concluded by reference to the same criteria that legal aid should be refused, it applied the correct considerations, even if it did not appreciate that it was bound by the regulation to decide as it did. In those circumstances we do not consider that the decision should be set aside.

If we are wrong in our construction of Regulation 5(11) and it did not extend to the appeal before the Committee, then it correctly did not attempt to apply that provision. It used its terms as a guideline in determining whether it was unreasonable that the respondent should receive legal aid. The respondent's counsel submitted that it was wrong in law to do so, but we are unable to accept that proposition. On this supposition Regulation 5(11) would not be an empowering provision, the source of the Committee's authority to act, and accordingly the Committee was not purporting to exercise the authority conferred by it. Its authority came from Article 10(5) of the 1981 Order, and it was looking to Regulation 5(11) only for assistance in deciding the basic issue, whether it was unreasonable that the respondent should receive legal aid. We see no reason why it should not have done so and placed such weight as it saw fit on the considerations set out in Regulation 5(11).

The Discretion of the Court

Counsel for the appellant advanced, with the leave of the court, a final argument which had not been argued in the court below. The substantive application for judicial review of the decisions of Belfast City Council relating to the nomination of councillors for membership of Council committees and public bodies was heard and determined before the present application

for judicial review of the Legal Aid Committee was heard in the court below. Mr Smith submitted that legal aid cannot be granted with retrospective effect but can apply only to work done after the issue of a certificate. Accordingly if, contrary to his submission, the judge was right to find in favour of the applicant, the remedy granted had no practical effect and he should in the exercise of his discretion have refused to make an order.

Regulation 1(2) of the 1965 Regulations defines an "assisted person" as a person in respect of whom a certificate is in force and a certificate as "a civil aid certificate issued in accordance with these regulations entitling a person to legal aid". Regulation 2(1) provides:

"Legal aid shall be available to any person to whom a certificate has been issued in accordance with these regulations."

In *Lacey v W Silk & Son Ltd* [1951] 2 All ER 128, decided on identically worded regulations in force in England, Slade J emphasised the past tense of the word "issued" and held that legal aid was not available to any person to whom a certificate had not been issued under the regulations. It was therefore not possible to issue a second legal aid certificate back-dated to an earlier date when it should have been issued. This decision was approved in *R & T Thew Ltd v Reeves* [1981] 2 All ER 964, in which the defendant's solicitors had failed to include the prosecution of a counterclaim in their application for legal aid. When they realised their mistake they applied to the legal aid authority for an amendment, which was made. When the judge came at trial to consider the amended certificate he held that the amendment was operative from the date of the original certificate, so in effect rectifying the mistake. The Court of Appeal by a majority reversed his decision. Dunn LJ stated at page 980 that the cornerstone of the legal aid scheme is the certificate, upon which everything depends. There was no power to antedate a certificate and the court was not entitled to rectify it.

Counsel for the respondent argued that these decisions did not deal with the situation where a certificate had been wrongly refused by the legal aid authority itself. They submitted that when that decision is set aside by the court as having been wrongly reached, a certificate could then be issued which would operate from the date of the incorrect decision. This would be putting into effect the ruling of the court and would leave intact the reasoning and result of the cases which had been cited.

Attractive as this argument is, we do not think that we can accede to it. In our opinion the intention of the provisions of the regulations to which we have referred is clear, and it is not possible to escape from the conclusion that a certificate can operate only from the date on which it is issued. We do not consider that there is room for exceptions, which might only lead to confusion and uncertainty, or that the court has power to alter this state of affairs. We accordingly conclude that the appellant's submission is correct and that if we were to decide that legal aid had been incorrectly refused to the respondent, and he were now to receive a certificate, it would not entitle him to legal aid in respect of the costs which he incurred in pursuing the substantive application. It follows that to set aside the Legal Aid Committee's decision would accomplish nothing of practical effect. On that ground we should, if it had been material, have declined in the exercise of our discretion to make an order setting it aside.

For the reasons which we have given we conclude that the appeal must be allowed and the learned judge's order reversed.

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JUDGMENT

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