

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 172 JR]

BETWEEN

MARY CALLAN BRADY

APPLICANT

AND

**THE BOARD OF MANAGEMENT OF CASTLEBLAYNEY INFANT NATIONAL SCHOOL, AND THE MOST REVEREND LIAM MCDAID
BISHOP OF CLOGHER**

RESPONDENTS

AND

VERONICA TREHY

NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on the 20th day of August, 2015

1. The applicant has thirty-six years of service as a teacher in Castleblayney Infant National School and is the Deputy Principal since 2010. The notice party was appointed as principal of the school on the 8th February, 2015, following a decision of the first named respondent (the Board). The second named respondent (the Patron) indicated his consent to the appointment on the 9th February, 2015.

2. The applicant is a failed candidate in the competition for appointment as principal and sought and was granted leave to challenge the notice party's appointment (Eagar J.) on the grounds set out in paragraph E of the original statement of grounds dated the 27th March, 2015. This included liberty to amend the grounds relied upon as set out in a short amended statement of grounds. The proposed amendment related to the manner in which marks were awarded by the Chairperson of the Board for the applicant's Irish language proficiency in the selection process. An injunction was granted restraining the taking of any further steps in the appointment of the notice party or exercising her role as principal, with the exception of payment of her salary.

3. The school is a coeducational school catering for pupils from junior infants to first class under the patronage of the second respondent the Roman Catholic Bishop of Clogher. There are one hundred and eighty-three pupils and twelve teachers at the school. Affidavits were filed on behalf of the applicant from a number of board members expressing dissatisfaction with the procedures followed by the Board, and the Selection Board which had been appointed by the Board to interview the various candidates and conduct the selection process leading to the appointment. This dissatisfaction extends to the role of the Chairperson of the Board at various stages of the competition, the selection process and the consideration of the appointment of the notice party. The initial application was grounded upon the affidavits of the applicant and the former principal of the school dated 25th March, 2015. An amended statement of grounds was filed on the 31st March, 2015 pursuant to the order granting leave. A notice of motion on behalf of the notice party issued on the 31st March, 2015 seeking an earlier return date than 12th May, 2015 which had originally been set. A further motion seeking liberty to amend the grounds to include a challenge to the decision based upon alleged objective bias issued on the 18th May, 2015 which was adjourned to the hearing of the action. A further application was made in the course of the hearing seeking liberty to issue and serve a notice of motion to amend the grounds based upon inter alia a claim that the decision to recommend the Notice Party for appointment as principal was unreasonable and irrational. This was refused in an extempore judgment delivered on the 8th June 2015. On the same date the court refused two other applications to cross-examine Mr. Peter McMahon and discovery brought by the applicant.

4. The notice party was due to take up her position as principal on the 8th April, 2015. She was informed that her application was successful on the 8th February by the Chairman of the Board, Mr. McMahon, and this was followed by a formal letter of offer on 10th February which she accepted in writing. She then gave notice of termination of her contract to her employers, Scoil Mhuire na mBuachaillí where she was employed on a fixed term contract until August 2015.

5. On the 2nd April, 2015 a consent order was made (Stewart J) which noted that the notice party's appointment as principal remained in place and that she would be paid her salary and allowances pending the determination of the proceedings. The injunction was extended by consent and it was agreed that another teacher would be appointed as the acting principal in the meantime. A commencement date for the hearing of the action was set for the 20th May, 2015. On the 2nd April, three further affidavits were sworn, one from the applicant, (a second affidavit), one from the notice party (her second) and one from Ms. Ann Lynn solicitor, concerning aspects of service and correspondence.

6. The matter for listed for mention on the 13th May. A statement of opposition was filed on the 12th May grounded on the affidavit of the Chairman of the Board, Mr. McMahon sworn on the 8th May together with a short affidavit of the patron.

7. The case was at that time defined by the pleadings and affidavits which had been filed including the first amended statement of grounds. The applicant sought to quash the board's decision approving the appointment of the notice party as principal and the patron's decision approving the Boards decision and an order remitting the matter of the selection of a principal to the Board for the purpose of choosing a new selection panel pursuant to the relevant statutory rules. A number of declarations were also sought; these are ancillary to the main relief claimed which is an order of certiorari.

The Principal Retires

8. The school is managed by the board which comprises eight members. They were at the time the former principal Ms. Sheila

Donnelly, Ms. Mary Duffy, a teacher at the school, Mr. Thomas Hanratty, retired publican and Ms. Demelza McKee, parents' nominees and Ms. Regina MacCormack (the treasurer), who have sworn affidavits in the proceedings on behalf of the applicant. Mr. Peter McMahon, a businessman was appointed by the patron and is chairman of the board. Mr. Jonnie Redmond and Ms. Helen Moore are both community nominees to the board.

9. In January, 2015, the chairman Mr. McMahon was advised by Ms. Donnelly that she intended to retire as principal in April. It became necessary to advertise and conduct a selection process for the appointment of a new principal. On the 8th January, the post was advertised nationally on "educationposts.ie". Applicants were required to submit a completed application form to the school by 22nd January, 2015. The commencement date for the new principal was stated to be 5th April. The standard application form for "Primary Principalship" was to be completed by candidates.

10. Ms. Donnelly deposes that the board requested the chairman to seek a suitable candidate for the position who was (a) a suitably qualified teacher with relevant experience at junior level because of the nature of the school, (b) a candidate with experience of working with children with special education needs to cater for the mild to moderate class in the school and (c) a candidate with management experience. Though these points were said to have been highlighted as a matter of importance by the board to the chairman no issue was taken with the short form of advertisement placed on the 8th January which does not refer to these criteria. A note of what is said to have transpired at the board meeting of the 7th January, 2015 signed by Ms. MacCormack (the treasurer) but dated 14th March, 2015 was submitted to the Court as "the minute" of that meeting. On the same date, an attempt was made to convene a board meeting concerning the appointment. The chairman attended the meeting but declined to recognise it as a valid board meeting on the basis of legal advice given. By that stage serious disagreements had emerged between board members, the chairman, the applicant and the patron as to the process employed in the appointment of Ms. Trehy as the new principal.

The Selection Process

11. The board is duly established under section 14 of the Education Act 1998. Section 8(1) provides for the appointment of the patron of a primary school. Section 15(1) provides that:-

"(1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that board has responsibility.

(2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall -

(a) do so in accordance with the policies determined by the Minister from time to time ..."

12. Section 24(11) of the 1998 Act as inserted by section 6 of the Education (Amendment) Act 2012 provides *inter alia* as follows:-

"(11) A board of a recognised school may, in accordance with procedures determined from time to time by the Minister following consultation with bodies representative of patrons, recognised school management organisations and with recognised trade unions and staff associations representing teachers or other staff as appropriate, appoint, suspend or dismiss any or all of the Principal, teachers and other staff of a school, who are remunerated out of monies provided by the Oireachtas."

13. Every member of the board was obliged to sign a declaration undertaking that he/she would adhere to the rules pertaining to his/her duties as per the "Constitution of Boards and Rules of Procedure 2011" and all other relevant rules, regulations and legislation together with departmental circulars relating to the membership and operation of boards. The procedure for board meetings is governed by the rules. Where a matter is put to a vote it must be determined by a majority of votes of the members present and voting and where there is an equal division of votes the chairperson of the meeting may exercise a second and casting vote. The numbers of those voting for and against a motion should be recorded. Minutes of the proceedings of the board must be recorded in an appropriate form and signed by the chairperson of the meeting of which they are a record or by the chairperson of the next meeting.

14. Under the heading "disclosure of interest/integrity of board proceedings" paragraph 15(a) of the 2011 Rules states that:

"A member of the board who stands in a relationship to a person who is a candidate for appointment by the board as teacher or other member of staff of the school, including the Principal, shall immediately disclose to the Board the fact of the relationship and the nature thereof and shall take no part in any deliberation or decision of the Board concerning the appointment and the disclosure and the decision shall be recorded in the minutes of the Board.

In this context board members are required to make a disclosure not only in the case of a family relationship but in respect of any relationship which could be regarded as prejudicial to ensuring absolute impartiality in the selection process. A professional relationship in itself does not necessarily mean there is a conflict of interest."

15. Paragraph 15(d) provides that where the patron is satisfied after due investigation and following receipt of a recommendation from the board that any member of the board failed at a material time to disclose a relationship, he should remove that person from membership of the board in accordance with section 16 of the Education Act 1998 and shall not subsequently appoint him/her as a member of any board of management.

16. Paragraph 16(e) provides that no member of the board shall make or cause to be made representations to the Minister or the department or any other party concerning the business of the board without having discussed the matter at a meeting of the board and having been authorised by the board to make representations on its behalf. The chairperson must act as correspondent for the board "with the department and all others".

17. Paragraph 20 provides that the procedures for the appointment of teachers are set out at Appendix D. Appendix D also applies to the appointment of principals. The procedures are designed to provide a fair and impartial process for appointment and the board of management is bound to apply them. Appendix D recites that the procedures have been authorised by statute and agreed by and between the parties identified under the Education Act 1998 i.e. the patron/trustees, the management authorities, teacher representatives, parent representatives and the Department of Education and Skills. Appendix D recites the role of the board of management under section 24(1) to (4) of the Education Act 1998 and rule 1.3 provides that:-

"All appointment of teachers in the school shall be made by the Board of Management in accordance with the Rules for National Schools, current Departmental Circulars and are subject to the prior approval of the Patron."

18. Under rule 2.4 a Selection Board must be appointed for the purpose of a competition for the post of principal. Under paragraph 2.4.1(c) it must comprise:-

"(the) Chairperson of the Board of Management and at least two assessors independent of the Board of Management, to be appointed by the Patron after consultation with the Chairperson."

19. Rule 2.5 deals with the "short listing of applications" as follows:-

"2.5.1 The Selection Board shall meet as soon as is practicable and any documents or notes created by it shall be retained by the school for a period of 18 months.

2.5.2 Prior to advertising a position, the Board of Management may set a minimum number of applications which must be received for the competition to proceed. ...

2.5.4 The Selection Board shall, in the first instance, establish agreed criteria for the assessment of the applications. In establishing a criteria, the following factors shall be taken into account, having regard to the requirements of the particular post and the Rules for National Schools, though not exclusively nor necessarily in this order:-

- professional qualifications
- registration with the Teaching Council
- teaching experience
- other relevant experience e.g. experience in Special Needs; multiclass teaching etc.

Boards are advised to refer to www.education.ie for the most up to date qualification and registration requirements for appointment to teaching and principal posts.

The criteria selected must reflect the needs of the school and a copy of the criteria will be sent to all candidates who are called for interview. ...

2.5.5 Any member of the Selection Board, including the Chairperson, who

stands in a material relationship to a person who is a candidate for employment in the school, shall disclose this relationship to the Board of Management and, where necessary, withdraw from the Selection Board. The Patron shall nominate another Chairperson or member in their place. Such exclusion will stand for the entire process through to ratification at Board of Management level. The person so excluded shall not play any part in the deliberations or decision of the Board of Management on the matter but shall continue to participate as appropriate in all other business of the Board of Management.

(a) The disclosure and the decision shall be recorded in the minutes of the Board. In this context Board members are required to make a disclosure not only in the case of a family relationship but in respect of any relationship which could be regarded as prejudicial to ensuring absolute impartiality in the selection process.

(b) Knowing a person in a professional capacity (i.e. having taught or worked with them in the past) is not in and of itself a material relationship. A disclosure should be made and recorded as such by the selection board or the Board of Management as the case may be.

(c) Failure to disclose any material relationship to the selection may invalidate the process. ...

2.5.7 Selection of candidates for interview will be based on an initial assessment of applications against the criteria established under 2.5.4 above."

20. Rule 2.6 deals with the conduct of interviews. The following are relevant extracts from the Rule:

"2.6.4 All questions at interviews shall relate to the requirements of the particular post and of the Rules for National Schools. No question shall be asked nor information sought in any form from a candidate which might be construed as being discriminatory. ...

2.6.5 Each assessor is required to complete his or her own individual marking sheet and give it to the Chairperson of the Selection Board on completion of the interviews. Copies of these sheets will be made available to candidates on request.

2.6.6 The individual marks shall be added and the final mark for each candidate will be used to produce a ranking of candidates who are deemed suitable for appointment. The Chairperson shall furnish the final marks and the ranking to the Board of Management together with a written report, nominating the applicant(s) whom it considers suitable for appointment.

2.6.7 Confirmation of the receipt of suitable references of the highest ranked candidate(s) nominated for appointment must be included in the written report. References may be obtained in written or verbal format from the referees nominated by the candidate in their application form.

2.6.8 A copy of the agreed ranking list of candidates shall be retained by the Board of Management for use in the event of the post not being filled by the highest ranked nominee. References of candidates shall be checked prior to any offer of appointment being made.

2.6.9 The Board of Management shall appoint the highest ranked nominee to the post unless it has good and sufficient reason not to do so and such reason was not known to the Selection Board; in which instance the matter shall be referred to the Patron, whose decision in this matter shall be accepted by the Board.

2.6.10 The prospective employee should not be offered the appointment until the prior approval of the patron has been

obtained by the Chairperson of the Board of Management. ...”

21. In *Brown v. Rathfarnham Parish National School* [2008] 1 I.R. 70 Quirke J. considered the status of the Rules in the context of the Education Act 1998. The intention of the Rules is to provide a fair selection process for prospective and duly qualified candidates for appointment. In holding that an appointment was subject to judicial review he stated:-

“79. The rules relied upon by the applicant were rules with a statutory derivation which were intended, inter alia, to provide candidates for appointment as a principal teacher with specific, fair and impartial procedures.

80. The first respondent was, and remains, statutorily bound to perform its functions in the manner described in section 15 of the Act of 1998 and to apply the procedures required by section 23 of that Act.

81. The procedures required by section 23 of the Act in turn required the application of specific fair procedures in the appointment of principal teachers. It follows that, in applying those procedures, the first respondent was required to exercise its functions judicially.”

22. The learned judge considered whether the rules were mandatory or directory. In doing so he cited the preamble to the 1998 Act and concluded that section 23 gave effect to the “spirit of partnership between schools, patrons, students, parents, teachers and other school staff, the community served by the school and the State.” It provided for the appointment by the board of principal teachers “in accordance with procedures agreed” between the board and the various other interested parties. The statutory requirement imposed by section 23 of the Act required the application of these agreed procedures for the appointment of principal teachers. He found that the procedures had been breached in material respects. In particular he concluded:-

“94. The evidence adduced in these proceedings suggests that the first respondent was under the impression that the rules comprised rough guidelines which, at the discretion of the first respondent, could be applied in an ad hoc manner. That is not the case. The application of the procedures is not a matter which is within the discretion of the first respondent. Their application by it is mandatory.

95. Non-compliance with the minute detail of the agreed procedures will not invariably invalidate affected decisions. The procedures may be described as largely directory in nature. However, they may not be ignored. They must be applied by the first respondent in substance. That is clear, having regard to the principles identified earlier herein.

96. The provisions of rule 15 of the rules, in particular, are clear and unambiguous. In substance they may not be departed from by the first respondent.”

The Selection Board

23. In accordance with paragraph 2.4.1(c) of the 2011 Rules Mr. McMahon contacted the Patron to discuss the appointment of two independent assessors to sit with him on the Selection Board. The Patron maintained a panel of experienced persons deemed to be capable of acting as independent assessors and willing to assist in the selection process. Having discussed the matter with the Patron, Ms. Anna Mai Rooney and Ms. Majella Beggan were nominated and requested to act. Both had experience as National Primary School principals for in excess of fourteen years. The Patron confirmed in his affidavit that he appointed the two assessors to the Selection Board following this consultation.

24. I have considered the affidavits furnished in this case and I am satisfied to accept the evidence of Mr. McMahon, the two assessors and the Patron as to how the Selection Board was constituted and conducted its business. The applicant has not in anyway impugned the veracity of the independent assessors who each submitted affidavits on behalf of the Board.

25. The qualifications of the assessors are set out in their respective affidavits. In addition to her work as a school Principal Ms. Rooney is a Director of the Board of the Irish Primary Principals Network (IPPN) an independent body of school leaders consisting of principals and deputy principals in Ireland which represents 90% of schools in the State. She has been responsible for the preparation and contributed to the development of a training module on the recruitment process for schools and has assisted in its presentation to schools throughout the State. She is a local facilitator with the Professional Development of Services for Teachers delivering training to new and experienced principals. As a school principal she has been involved in at least twenty recruitments many of which concerned the appointment of a principal. She states that she is satisfied that the relevant procedures under Appendix D were complied with in the appointment of Ms. Trehy as principal in Castleblayney and that she and her colleagues on the Selection Board had the sole purpose of securing the best person for the post.

26. Ms. Beggan was approached to act as an assessor in January 2015 by Mr. McMahon. She agreed with the facts as set out in the affidavit of Ms. Rooney and considered that Ms. Trehy was the most suitable candidate to fill the post. She believed that the 2011 Rules were applied appropriately.

27. The first meeting of the Selection Board was held at St. Louis Senior Girls National School Monaghan after normal school hours on the 15th January, 2015. Ms. Rooney described a two hour meeting at which the profile of the Castleblayney school was discussed including the needs of the school, the desired credentials of the holder of the post of principal and the criteria which they ought to apply to determine the successful candidate. She states that Mr. McMahon made frequent reference to the characteristics recommended by the Board of Management which each of them agreed were suitable and acceptable. Full regard was had to paragraph 2.5.4 of the Rules which require the establishment of agreed criteria for assessing applications, the requirements of the particular post and the Rules for National Schools including the obligation to reflect in the criteria the needs of the particular school. It was agreed to meet again once the applications had been received and that all applications would be opened for the first time in the presence of the three members of the Selection Board.

28. Mr. McMahon described how on the 23rd January, 2015 he collected thirteen completed application forms from the school. A second meeting was convened with Ms. Rooney and Ms. Beggan on the 26th January. At this meeting, which continued for approximately five hours there was a further lengthy discussion concerning the background of the school, its needs and requirements and the rules to be applied in accordance with Appendix D. The Board also considered the type of principal who would be suitable for the school and the wishes of the Board of Management.

29. Mr. McMahon in his affidavit states that the Selection Board agreed to explore which each of the candidates the following criteria:

- (a) leadership qualities;
- (b) professional development and leadership;
- (c) culture and vision;
- (d) school self evaluation;
- (e) planning and administration;
- (f) special education;
- (g) catholic ethos;
- (h) líofacht sa ghaeilge;
- (i) discipline and anti-bullying;
- (j) teamwork and partnership.

It was agreed that the successful candidate would need to demonstrate suitable and satisfactory professional qualifications and relevant experience including experience of working with children with special needs and experience of working with young children at infant and first class level.

30. The thirteen application forms were then opened. By reference to the agreed criteria five candidates were excluded. The Selection Board decided to invite the remaining eight applicants to attend for interview. Letters were sent on the 26th January, 2015 informing each of the applicants of the time and date of interview. The letter stated:-

"The interview will include a five minute oral presentation of your vision for the school into the future. This presentation is limited strictly to five minutes and is not to be ICT assisted."

It was accompanied by a separate sheet which indicated the interviewing criteria for the position of principal as set out at (a) to (j) inclusive above.

The Interviews

31. In advance of the interview sample sets of questions were prepared by Ms. Rooney and Ms. Beggan. This work commenced after the first meeting of the Selection Board on the 15th January and a draft marking sheet to match each set of questions was also prepared in advance of the second meeting on the 26th January, 2015. At that meeting a set of questions encompassing all aspects of the criteria was finally agreed by all three members of the Board taking into account each member's suggested amendments. Mr. McMahon states that he insisted that the criteria originally put forward by the Board of Management in advance of the process should be reflected in the questions. A final marking system to match the questions was also prepared at that meeting.

32. The interviews were held on 7th February, 2015. The Selection Board convened at 8.30am and had some further discussions as to what they were looking for from the successful candidate. Ms. Rooney states in her affidavit that in light of the criteria for the post the Board settled on a number of questions which would serve to draw out the qualities of the candidates in light of the criteria and that these questions were posed to each candidate in turn.

33. An issue arose as to how proficiency in Irish would be assessed and marked. Mr. McMahon advised the other two assessors that he had practically no knowledge of the Irish language and would not have a sufficient basis upon which to award marks on that topic. He considered it to be important that the successful candidate as the holder of the post of school principal should have a knowledge of Irish. It was decided that Mr. McMahon would mark the candidates on the issue of the Irish language taking the average of the two marks awarded by the other two assessors. It was agreed that at the commencement of each interview the candidates would be told of this arrangement. Ms. Rooney stated that "none objected". Mr. McMahon agrees that each candidate was informed of this approach in advance of the interview, including the applicant and did not object. The applicant does not accept this.

34. The procedure followed during the interviews is outlined in the assessors' affidavits. Mr. McMahon states that prior to the interviews on the 7th February, all the application forms for the candidates were provided to each member of the Selection Board. They were referred to during the course of the interviews. He states that for certain topics on the marking sheet such as experience and qualifications reference was made to the application forms to determine the level of experience and relevant qualifications of each candidate directly in advance of each interview. Ms. Rooney confirms that the application forms of the candidates about to be interviewed were re-examined. She states (and Ms. Beggan agrees) that it is entirely incorrect to suggest that the documentation provided to the Selection Board and the application forms provided by the applicants were ignored. Ms. Rooney states that they fed into all aspects of the interview process and were fully considered and taken into account. They were re-examined in detail prior to the commencement of each interview. The same procedure was followed in respect of each candidate appearing before the Selection Board.

35. Ms. Rooney describes how, at each interview, following introductions at the commencement, each candidate was in turn asked to give a short presentation regarding his/her vision for the school. This was in accordance with the request contained in the letter of invitation of 26th January. A time limit of five minutes was stipulated and the use of I.T. was prohibited. In the course of making presentations five of the eight candidates provided documentation and presentation aids setting out the framework of their presentation and highlighting issues which they deemed to be important. Ms. Rooney states that the applicant was one of the candidates who provided such documentation which was fully considered by the Selection Board. She states that the applicant's presentation and documentation were helpful to the Board as was documentation provided by other candidates in the same way.

36. The Selection Board members depose that at the conclusion of each interview each candidate was marked separately by the three members of the Selection Board. The marks were then collated. Ms. Rooney states that each of the three members of the Selection Board was clear as to who the leading candidate was. Ms. Trehy was out in front "by a considerable number of marks". The other two assessors agreed with this conclusion. A letter was prepared for the Board of Management setting out the result which was then signed and dated. Individual marking sheets were also signed and dated.

Ground E(x) and (xiv) sub-paragraphs (i),(ii),(iii),(vi) and (vii)

37. In ground E(x) and E(xiv) (i),(ii),(iii),(vi) and (vii) of the original Statement of Grounds the procedures and conclusions of the Selection Board are challenged as fundamentally flawed because of a failure to consider relevant information. Ground E(x) states:

"The chairperson of the Board informed the applicant and the Board of Management that he conducted the selection on the basis of an interview only. He said that he believed that he was not permitted to consider the application form in a selection of a Principal. That application form was only relied on to select candidates for interview, he said. Contrary to subsequent suggestions on his behalf that there was "a substantial compliance" with Appendix D, there is in fact no evidence that the Respondents selection panel gave consideration to the written application forms of any of the candidates. The chairperson informed the applicant that he believed that he was precluded from doing so. He said that he was not qualified to select the principal and that he ought not to have been asked to do so."

38. This complaint arises from what the chairman of the Board and the Selection Board, Mr. McMahon, is said to have told the Board when it convened on Sunday 8th February, 2015 to consider the result of the interviews held the previous day. Ms. Donnelly deposes that there was dismay from some Board Members during the meeting that the applicant had not been deemed to be the best candidate. She states that when asked how the Deputy Principal's experience and qualifications were valued by the Selection Board, the Chairman replied that no marks were awarded for those qualities as "there was no box to tick" for them. Ms. Donnelly states that the Chairperson insisted that the panel had gauged the candidates on interview only and given marks for length of service capped at ten years. She states that it was wrong that the applicant should be marked only on the basis of an interview based on a narrow selection of questions formulated by the Board. The notes of this meeting dated 23rd March, 2015 signed by Ms. MacCormack state:

"The chairperson outlined the interview process. As a result of this the Board was informed that the Deputy Principal was not recommended for the post.

There was dismay from some Board Members. When questioned re the Dep. Principal's experience and qualification and the value of these, the Board was informed that no marks were awarded for same as there was no box to tick for these experiences. The marks were awarded for length of service. ... The appointment was based solely on the interview."

39. On the 8th February, the chairperson telephoned the applicant to inform her that her application had failed. The applicant in her affidavit states that the Chairperson when asked whether her leadership experience counted for anything, replied that it counted for nothing. She states that she asked if as Chairperson of the Board he had not tried to ensure that her experience and position in the school with the backing of the whole staff would make her the front runner. He replied that there were no boxes to tick for that and he said that he was only one voice out of three. The applicant states that on 10th March, 2015 when she met Mr. McMahon, he informed her that he felt very unqualified for the job of Chairman of the Selection Board and that he should not have been asked to select a principal when he had no experience. She said that he repeated the fact that her experience in the school and as a leader counted for nothing. She also claims that he informed her that the application form only got her an interview and was not considered thereafter. She informed him that she felt unappreciated "when an outsider with no leadership experience could walk in and get the job going under interview only".

40. On this evidence, it is submitted that the Selection Board failed to give any consideration to the written application forms of any of the candidates and that the document setting out the eight main points of the applicant's presentation which she presented were not referenced on the marking forms. Furthermore, the applicant claims that she was not told that her extensive application form would not be considered or that answers to any points raised by her in the course of the interview which were not part of the selected questions would not be awarded any marks. This submission was based on the proposition that the Chairman had informed the applicant that there were "no boxes to tick" for her particular skill set.

41. Mr. McMahon in his replying affidavit denies that he stated that no marks were awarded to candidates for experience and qualifications. He contends that the marking sheets clearly demonstrate what marks were awarded. In particular he states that the issue of experience was considered as evident from the marking sheets in which candidates with in excess of ten years experience, including the applicant, were awarded top marks (20) in that category. This was a significantly higher mark for the category than that achieved by the notice party. He also rejected the assertion made by the applicant that he informed her that her experience in the school counted for nothing. He states that he said "it counted for nothing extra". He denies that he said that the application form was only relied upon to determine who would be interviewed, as this was plainly not the case, as evidenced by the marking sheets. He also notes that the minutes of the meetings presented as part of exhibit SD3 in the affidavit of Ms. Donnelly are not in accordance with paragraph 13(c)(ix) of the 2011 Rules which provides that the minutes of the Board shall be recorded in an appropriate form and signed by the Chairperson of the meeting of which they are a record or by the Chairperson of the next meeting. These minutes are clearly not so signed.

42. It was sought to cross-examine Mr. McMahon in relation to this aspect of his evidence because of the conflict which arose in respect of what has alleged to have been said at the meeting and to the applicant. However, the Court declined to permit this cross-examination as it had evidence which was uncontroverted and unchallenged from the two assessors which set out in detail, and corroborated the evidence of Mr. McMahon, as to how in fact the interviews proceeded and what was considered by the Selection Board in the course of the selection process. The Court specifically inquired as to whether the veracity or reliability of the two assessors as witnesses was the subject of challenge and in what respect: none was advanced. No application was made to cross-examine either of them. The burden of proof lies on the applicant in these proceedings. I am entirely satisfied that the application forms and presentations of each of the candidates were considered in the course of the selection process as deposed to by the two assessors and Mr. McMahon. I am therefore satisfied that there is no substance to Ground E(x) or the similar related matters referred to in Ground E (xiv) sub-paragraphs (i), (ii), (iii), (vi) and (vii).

The Irish Language Marks: Ground E(xiv) sub-paragraph(xii)

43. The applicant complains pursuant to Ground E(xiv) subparagraph (xii) of the amended statement of grounds dated 31st March, 2015 that the respondent failed to engage with the applicant and the individual members of the board who made up the majority of the board concerning, and failed to consider:

"the manner in which the marks were awarded by the Chairperson for the applicants Irish language proficiency".

44. The applicant submits that the selection procedure was flawed because the Chairperson of the Selection Board was not qualified to consider the candidates' proficiency in Irish. She complains that the procedure adopted at the interview by the assessors precluded an assessment by the three assessors: in effect there was only an assessment by two of them on this topic. Furthermore, the applicant states that though it was agreed that an average of the marks awarded by the two external assessors would be awarded by the Chairperson, in fact the average mark was not taken but the lower mark of the two marks awarded by the other two assessors. This, it was submitted, suggested a level of sharing of marks in advance of a final tally preceded by some discussion

between the assessors as to the mark appropriate to each candidate in respect of his/her proficiency in Irish. She also claims that she was not informed of this. It is pointed out that had Mr. McMahon selected the higher mark of the marks awarded by the external assessors – she would have received an additional mark which may have been important.

45. I am satisfied on the evidence adduced that the applicant was duly informed of the procedures to be followed by the Selection Board in respect of the Irish language assessment and raised no objection about it. No challenge is made to the veracity or reliability of the evidence of the two external assessors on this matter and leave to cross-examine either on this issue was not sought. Ms. Trehy in her affidavit states that she was informed of the difficulty and how it was proposed to proceed at her interview. She agreed to that procedure. Her evidence on this matter is not challenged nor was it sought to cross-examine her in relation to it.

46. As appears from the marking sheets, the marks awarded to the applicant in "Líofacht sa Ghaeilge" at item 8 indicate that Ms. Beggan awarded her seven marks and Ms. Rooney awarded her eight. Mr. McMahon awarded her seven. It is said that he awarded the lower mark of the two and not the average. However, it appears that the average of the two marks was rounded down rather than up. The marks awarded to Ms. Trehy indicate that Ms. Beggan awarded her six while Ms. Rooney awarded her five and that Mr. McMahon awarded her five also. A similar approach is clear from four other cases. The remaining candidates were awarded the same marks for proficiency in Irish by each of the external assessors and Mr. McMahon gave the same mark in those instances. The approach adopted was uniform. The external assessors never differed by more than one mark in respect of each candidate on this issue and no candidate suffered any prejudice as a result. It is clear that it had no appreciable effect on the end result or on the ranking of any of the applicants. Ms. Trehy's final score was 392. The applicant's final score was 365 but one other candidate was ahead of her on 373 marks.

47. I am satisfied that the marking system adopted in respect of Irish language proficiency was not in any way unfair or prejudicial to the applicant or other candidates nor could it be regarded in any sense as a substantive departure from fairness of procedures either under Appendix D or otherwise. Furthermore, the applicant had an opportunity to object to the procedures adopted and did not do so. There is no basis established by the applicant upon which to grant relief on this ground.

Grounds E(xiv) sub-paragraphs(v) and(vii)

48. Under this heading it is claimed that in awarding marks by reference to the questions set out in the marking sheets "only" rather than criteria set out in Appendix D the Selection Board was in error. It is claimed that the failure therefore to consider the eight point submission and the document made by the applicant was also in error as was the failure to record the applicant's responses to question 9(a) on the marking sheet. Question 9(a) asks "is there anything you would like to add that we have not discussed with you or given you an opportunity to say during the interview". It is followed by question 9(b) which asks "have you any questions you would like to ask us?" No marks are recorded in the appropriate boxes allocated for that purpose in the right-hand column of the questionnaire. This is common to each of the candidates.

49. Mr. McMahon deposes that all candidates were awarded a single mark for question 9 which was referable to the first part of the question and preceded 9(a) and 9(b) and which asked "how would you deal with a challenging member of staff who is resistant to change and continue to promote teamwork in the school?". He stated that the marks which appear in boxes 10 and 11 of each questionnaire which relate to "general presentation for interview" and "communication skills" in respect of which all candidates were awarded marks, encompassed the contributions made by each candidate in respect of questions 9(a) and (b). It is clear that the responses to the questions at 9(a) and (b) were recorded by the assessors to the extent they thought relevant. Mr. McMahon explained that no specific points were awarded in this section because some candidates may choose not to add anything further while some candidates may ask many questions, particularly those candidates who are not local or internal. Instead their manner of communication and presentation generally in the interview were marked separately encompassing the two questions.

50. I am satisfied that the explanation furnished by Mr. McMahon for the absence of marks for all candidates in respect of questions 9(a) and 9(b) is reasonable having regard to the very full information that was available to the assessors in the application forms, the presentations made, the further documentation submitted and the focused, detailed and relevant answers given in the course of the interviews. There is no evidence of any prejudice accruing to any candidate arising out of the approach adopted to the marking of questions 9(a) or (b). There is a degree of flexibility and margin of appreciation to be afforded to the Selection Board in the manner in which it conducted the interviews within the procedures set out in Appendix D. Therefore, I am not satisfied that there was a breach of fair procedures as alleged under Ground E(xiv) subparagraphs (v) and (vii) in not informing the applicant that the answers noted to questions 9(a) and (b) would not attract specific marks but would be considered under separate but related headings. I am satisfied that this material together with all other information furnished by the candidates was considered appropriately and fairly by each member of the Selection Board and that the approach adopted by the Selection Board was uniform in respect of each candidate. I am satisfied that the ground relied upon at E (xiv) subparagraphs (v) and (vii) are not established.

Ground E(xiv) sub-paragraph(v)

51. It is claimed that the marking sheet compiled for use in the interviews contravened Appendix D. It is claimed that the Selection Board did not grade the applicants in relation to the job specification provided to the Chairperson by the Board on the 7th January, 2015. The relevant criteria set by the Board to be applied required that a qualified teacher with relevant experience at junior level be appointed. It is claimed that the Board requested that the approved candidate should have experience of working with children with special education needs to cater for the mild to moderate class in the school. The need for management experience was emphasised. As previously noted Mr. McMahon states that he conveyed these criteria to the Selection Board members and that the questions formulated for the marking sheets were informed by these criteria and those set out in Appendix D. The assessors have deposed to the fact that it was agreed that the successful candidate would need to demonstrate suitable and satisfactory professional qualifications and relevant experience, including experience of working with children with special needs and experience with working with young children at infant and first class levels. I am satisfied on the basis of the evidence and in particular, that of the two external assessors, that these matters were discussed at great length at the meetings prior to the holding of the interviews. Questions were set in order to draw out the qualities of the candidates in light of these criteria and were posed to each candidate in turn. I am therefore satisfied that the Selection Board was not in error and did not fail to apply the criteria indicated by the Board in the choosing of a successful candidate. I am satisfied that the Selection Board compiled the interview questions with care and a marking system which corresponded to the "requirements of the particular post" and/or the "needs of the school" in accordance with paragraph 2.5.4 and the provisions of Appendix D.

Irrationality and unreasonableness : Ground(xix)

52. Ground(xix) claims that in the absence of an adequate explanation the decision to select the notice party over the applicant as the preferred candidate "appears to be irrational and unreasonable as relates to the task set for the Chairperson by the Board of Management in January 2015 and the manner in which that recruitment was to be undertaken pursuant to Appendix D." No particulars were furnished of the nature and extent of the alleged unreasonableness or irrationality. This ground was the subject of an application on the final day of the hearing for leave to issue a notice of motion to further amend the statement of grounds extending or

elaborating upon the particulars in respect of that ground. That application was refused on the 8th June. It was based on the suggested emergence in the further exchanges of affidavits during the course of the hearing of additional facts which gave rise to more extensive evidence supporting the contention that the decision of the Selection Board was irrational and unreasonable. Since the general ground had already been pleaded and to some degree addressed in the notice of opposition and submissions, I was satisfied to permit further argument on the basis of the material set out in these additional affidavits and to regard some of the proposed amended grounds at A to L as submissions on the unreasonableness or irrationality arguments. A number of the points raised were arguments relevant to other grounds; others were simply irrelevant to the issues in the case. For example the fact that the notice party was the first interviewed candidate is irrelevant. The fact that the notice party is claimed by the applicant to be the least qualified and experienced candidate but succeeded in her application thereby defeating a number of other candidates, including a number of principals, and well as the applicant is an assertion and of itself adds nothing to the case.

53. The court has no jurisdiction on judicial review to determine the merits of the decision: this application is not an appeal from the decision-maker. The court under this heading must consider whether the impugned decision "plainly and unambiguously flies in the face of fundamental reason and common sense" (per *Henchy J., in The State (Keegan) -v- Stardust Compensation Tribunal* [1986] I.R. 642 at p. 658: see also *O'Keeffe -v- An Bord Pleanala* [1993] 1 I.R. 39 and *Meadows -v- Minister for Justice* [2010] 2 I.R. 701). The occasions upon which the court will be justified in intervening to quash a decision on this basis are limited and rare. There is a heavy burden on an applicant in such a case. It is not sufficient to demonstrate that this court might have reached a different decision or that a different result might, on a review of the materials, have been reached.

54. It was contended that marks awarded by the Selection Board for Catholic Ethos and CPD were irrational and/or unreasonable and did not relate to the information provided at interview or in the application forms of either applicant or notice party. In that regard it was submitted that the applicant's Catholic religious training and involvement was "superior" to that of the notice party who had taught in a "non-denomination school for most of her career" and had made no additional claims to any religious expertise, training or involvement and referred to Catholic ethos as being "the way you treat people". The marks awarded in respect of Catholic ethos were 8, 8 and 7 to the applicant and 10, 8 and 8 to the notice party and appear to be the two highest marks awarded under that heading when compared with the other candidates. This gave each a total of 23 and 26 marks respectively for this topic. The difference in marks would not have bridged the difference between the two candidates or the gap between the applicant and the second ranked candidate. The submission advanced in relation to "Catholic ethos" was somewhat vague and subjective and falls well short of the threshold set for irrationality or unreasonableness.

55. The complaint that a disproportionate number of marks were allowed for "leadership qualities, promotion of the school, presentation and communication skills" when, it is said, they were not included in the Selection Board's criteria sent to the applicant prior to interview is untenable. The interviewing criteria clearly set out leadership qualities, professional development and leadership, culture and vision, planning and administration, teamwork and partnership as topics relevant to the interview. It is difficult to understand how a selection board having regard to these interview criteria could not assign a significant number of marks under the headings about which complaint is now made.

56. The claim that the chairperson awarded the first candidate interviewed (the notice party) top marks or almost full marks for all questions in which he was not impeded from doing so by prior agreement with the Selection Board was also advanced as an indication that the decision was irrational or unreasonable. There is no evidence to support the assertion that the awarding of high marks was of itself irrational or unreasonable. I view the attempt to make this argument as an effort by the applicant to introduce an allegation of actual bias in favour of the notice party and against the applicant on the part of Mr. McMahon. That allegation was specifically withdrawn and not pursued in the course of the hearings and it was not a ground upon which leave was granted. I will return to this matter in respect of the further notice to amend grounds later in this judgment.

Criticism of Ms. Trehy's Qualifications and Experience

57. Ms. Trehy qualified as a primary school teacher in 2007 and was awarded a post graduate diploma with first class honours at St. Patrick's College, Drumcondra. She had been previously awarded a degree of Bachelor of Commerce from University College Dublin in 2004. Prior to commencing a teaching career she worked as an industrial relations officer with the IBOA from 2000-2005, a branch official with SIPTU from 1998-2000 and a business development consultant with REA Mortgage Services from 1997-1998. Following her qualification as a teacher she was offered a permanent position in Mullingar Educate Together where she assisted with the development and growth of the school. Prior to her qualification from 2005-2006 she acted as a learning support and resource teacher at St. Josephs, Fairview, Dublin. While teaching at Mullingar Educate Together between 2007 and 2014 she was a mainstream teacher for second and third class. She taught pupils at all levels from junior infants to sixth class in her capacity as learning support/resource teacher in addition to teaching children with English as an additional language.

58. Between 2008 and 2014 she held a special duty B post with Mullingar Educate Together which involved responsibility for the entire school's literacy planning and support, pastoral responsibility including mentoring, peer teaching and the organisation of resources for language teaching. She gained experience in the area of literacy, numeracy, staff development and special education. She was elected as the teacher nominee to the Board of Management of Mullingar Educate Together and gained considerable experience and knowledge in the process and operation of running a school including school governance. She was involved in the growth of Mullingar Educate Together from a small school to the largest school in Mullingar and participated in decisions as to the future direction of the school. Prior to taking up the teaching profession she worked for four years as a learning support/resource teacher and as an EAL teacher. She worked with children with varying needs such as autistic spectrum disorder, language disorders and children with emotional behavioural and social difficulties. The school had four special education needs units that catered for children across the autism spectrum with which she had daily interaction. The school was a Deis Band 2 (delivering equality of opportunity in schools) which was the Department of Education and Skills policy instrument to assist educational disadvantage. Castleblayney Infant National School is also a Deis Band 2 school. She moved from Mullingar for family reasons and obtained the position of teacher on a fixed-term basis at Castleblayney Boys National School in August 2014. She rejects the applicant's and Ms. Donnelly's description of her as a temporary teacher with limited or no experience. Prior to her appointment as principal by the Board she was informed that her fixed term contract position was available on a longer term basis but she resigned her position on appointment as principal of Castleblayney Infant National School.

59. The applicant claimed that the Selection Board was not entitled to interview Ms. Trehy because she was only awarded two points for her qualifications which rendered her "inadequate" according to the standard set by the Selection Board itself and because she had not taught below second class. It was claimed that she should not have been awarded twelve marks for experience since she had only qualified in 2007 and there was no evidence that she worked in 2013 to 2014. It is claimed by the applicant that the appointment of Ms. Trehy to the position of principal in a junior school is "a considerable leap in the dark for the school given the alternatives. She has limited management experience having held a B post in the past and is reliant on "life experiences" and a willingness to learn".

60. I am satisfied that the qualifications and experience of the respective candidates was a matter to be determined by the Selection

Board. The extent of the experience which she displayed along with other candidates for the post was the subject of scrutiny by a Selection Board which consisted of two highly experienced assessors who were specifically chosen for that reason. Marks were awarded appropriate to what the Board believed to be the level of qualification and experience demonstrated by each candidate. The suggestion that her qualification of B Ed., which qualified her for two points from a maximum potential of ten renders her "inadequate" derives from the marking range set by the Board in relation to candidates. Undoubtedly, on this score she was at the lowest level. A person with a Masters degree was reckoned to have a weak performance (3 to 4). At least one other candidate scored the same level of points in respect of qualifications as the notice party but was also interviewed. The fact that one could score at a lower level on one or more topics did not preclude a candidate from doing well under other topics and eventually achieving a high score overall having regard to the criteria applied by the Board. This does not render the overall determination of the Selection Board unreasonable or irrational. The Courts function is not to decide on the merits of any applicant's candidature and the burden is on the applicant to establish that there was no material or evidence upon which the Selection Board could rationally or reasonably have reached its decision in respect of Ms. Trehy. In fact, the Selection Board accurately applied the appropriate mark which it had set for the level of qualification which Ms. Trehy demonstrated which then became part of her overall score. I am not satisfied that the applicant has established that the decision was fundamentally flawed on these grounds.

The Board Meeting

61. When the interviews were concluded the assessors collated the marks awarded to each applicant. Mr. McMahon deposes that the Notice Party was the candidate with the highest marks and the assessors in their affidavits, agreed that this was in accordance with their respective views. The Selection Board considered her to be the best and most appropriate candidate for the position. A letter was then prepared for the Board of Management setting out the result which was then signed and dated by each of the assessors. The individual marking sheets were also signed and dated and later made available on request to the candidates. The letter states:-

"Following interview for the post of Principal in convent school, Castleblayney, which took place on 7.2.2015, we recommend the appointment of Ms. Veronica Trehy to the vacant position".

62. A meeting of the Board took place on the 8th February, 2015 commencing at 6pm and continued for approximately 1 hour 45 minutes. The letter was presented to the Board identifying Ms. Trehy as the recommended candidate for appointment. This letter was the only document submitted. It constituted "the written report" which the chairperson of the Selection Board is obliged to submit to the Board pursuant to Rule 2.6.6 of the 2011 Rules. The rule requires that the individual marks of each candidate must be counted and the final mark must then be relied upon to produce a ranking of candidates. The chairperson is obliged to furnish three elements of information to the Board; firstly "the final marks and the ranking" of candidates; secondly, a written report nominating the applicant whom it considers suitable for appointment. A copy of the agreed list of rankings must be retained by the Board in the event that the post is not filled by the highest ranked nominee under Rule 2.6.8. Thirdly, under Rule 2.6.7, a confirmation must be included in the report of the receipt of suitable references of the highest ranking candidate nominated for appointment. The references may be obtained orally or in writing from the persons nominated in the application form.

63. It is an unusual feature of this case that the meeting of the Board which voted to approve the appointment of Ms. Trehy is the subject of considerable controversy and that a majority of its members have submitted affidavits to the Court concerning the conduct of this meeting and in support of the applicant's challenge. Affidavits have been received from Ms. Sheila Donnelly, Ms. Regina MacCormack, Mr. Thomas Hanratty, Ms. Demelza McKee, and Ms. Mary Duffy.

64. The Board of Management must appoint the highest marked candidate to the post "unless it has good and sufficient reason not to do so and such reason was not known to the Selection Board" under Rule 2.6.9. If that is the case, the matter must be referred to the Patron "whose decision in the matter shall be accepted by the Board".

65. It is common case that the final marks and ranking of the candidates were not submitted to the Board nor was a confirmation forthcoming or available to the Selection Board on the 7th February concerning the references of the successful candidate. Consequently, this confirmation was not included in the written report submitted to the Board. It is submitted on behalf of the applicant that these two omissions render the appointment process fundamentally flawed because it does not comply with Rules 2.6.6 and 2.6.7. though the latter matter is not a ground upon which leave was granted.

66. The board meeting was attended by Ms. Sheila Donnelly. She states that she and other members of the Board were "frankly astounded" at the recommendation of the Selection Board. The note of the meeting compiled by Ms. Regina MacCormack on the 23rd March, 2015 records that a number of members expressed "their dismay". The focus of this dismay was the failure to appoint the Deputy Principal who was deemed by those present to be more qualified and experienced than the successful candidate. A question was raised at the meeting as to the marks available for experience and qualification and the "no box to tick" controversy ensued. She states that the chairperson referred to the fact that the selection process was an interview only based assessment, a matter also included in the Draft Minute and to which I have already referred earlier in this judgment. Ms. Donnelly states:-

"13. ... The majority of Board Members, me included, were very concerned and the Chairperson was asked if the Board could refuse to ratify the appointment. He told us that the Patron would ratify it anyway because the process was correct. We asked him for the ranking of the candidates, but he refused to provide it. Presuming that the Chairperson was correct, we took him at his word and his appointment was reluctantly ratified. However, we were relying on our Chairperson for advice and he refused to let us reconvene. ...

14. Had we as a Board known then that we were entitled to the rankings and that the Selection Panel erred in the manner in which it conducted the selection process and that they may not have been provided with our specific requirements for selection or given marks for the qualities evident in the application forms (and had not told the candidates that those points would get no marks unless raised at the interview stage) and that they asked questions for which no marks were awarded, we would not have ratified the nomination. We were not provided with the information sought and we were not permitted time to consider the full situation or given the correct steer on Appendix D".

Ms. Donnelly also deposes that a number of Board Members sought to adjourn the meeting in order to obtain advice but "that request was refused by the Chairperson".

67. Ms. Regina MacCormack, also attended this meeting and states that she requested the individual marks of the top three candidates which were refused by Mr. McMahon who stated that he did not have to share this information with the Board of Management. She states that she asked for an adjournment of the meeting for one night so that they could consider the matter and perhaps seek further advice. She states that she was informed by the Chairman that this could not happen as a decision had to be

made there and then. She states that she also asked questions about the experience of the proposed nominee for appointment when compared to the other candidates. She accepts that the Board of Management duly ratified the appointment of the Notice Party. However, she states that this was done without full knowledge of Ms Trehy's alleged inexperience at infant level and because they were informed that the appointment would in any event be approved by the Patron. She claims that this ratification was conducted "under duress".

68. She also informed the Court that she had considerable experience over a number of years of sitting on interview panels in her working capacity and in her voluntary roles and had been on selection panels for various positions in the Convent Junior School. She is the treasurer of the Board.

69. Mr. Thomas Hanratty, a retired publican had been a member of the Board for three years and also attended the meeting. He confirms that Ms. MacCormack requested the individual marks of the top three candidates and this was refused by Mr. McMahon who stated that "he did not have to share this information with the Board of Management". He states that Ms. MacCormack also raised concern about the haste with which the appointment was to be made and that they were being asked to ratify a candidate about whom they knew very little, especially her experience. He complained to Mr. McMahon that the Board would have little function if they were not allowed to ask the questions posed. Mr. Hanratty accepts at paragraph 15 of his affidavit that the Board "duly ratified" the appointment of the Notice Party but that it ought to be set aside because it was done under duress. This allegation is made in exactly the same terms as that set out in Ms. MacCormack's affidavit.

70. Ms. Demelza McKee, who also attended the Board Meeting informed Mr. McMahon and the rest of the Board that she had completed a Master's Degree in Human Resource Management in which one of her subjects was recruitment. She considered the process to be flawed and informed Mr. McMahon and the rest of the Board of her view. She agreed with the contents of Mr. Hanratty's affidavit. She voted in favour of the appointment.

71. Ms. Mary Duffy is a teacher, qualified since 1981. She joined the staff of the school in September 1998 and was the Teacher Representative on the Board of Management since November 2011. She is also the INTO Staff Representative at the school. She states that the majority of the Board was "aghast" at what happened. She claims that the Chairperson was attempting to force the Board to make an appointment without knowing all of the information requested. She said other Board Members were very surprised at the recommended appointment.

"They were at a loss to understand how the applicant's years of diligent work in and dedication to the Junior School had been topped by someone about whom they were being told nothing. They felt that the applicant's experience was being overlooked in this situation."

72. She states that the Board "reluctantly took a vote to ratify the appointment". Ms. Duffy abstained from the vote as she felt strongly that a highly qualified candidate had been wronged, namely Ms. Callan Brady. She and the Principal also informed the Chairperson that they expected that Ms. Callan Brady would appeal this result.

73. Ms. MacCormack's note of the meeting states that there was dismay from some Board Members when they discovered that the Deputy Principal had not been recommended for the post. The note states:

"The Chairperson was asked if the Board could refuse to ratify the appointment and the Board was informed that the Bishop would ratify the appointment, as the process was correct, despite the Board's refusal. The Chairperson was asked could the ranking from the interviews be disclosed and this was refused also. The appointment was based solely on the interview.

Veronica Trehy was recommended. The Board ratified the appointment with dissent of Mary Duffy and Sheila Donnelly noted, after questions re deferral were discussed.

The Board was also informed that decision would probably warrant an appeal and or legal action.

Veronica Trehy was offered the position at the end of the meeting by telephone call from the Chairperson.

She accepted the position."

74. Mr. McMahon in his affidavits acknowledges that the final marks of each candidate were not furnished to the Board. He stated that when an internal candidate has not been successful individual marks are not provided to the Board unless a particular issue arises. He stated that an opportunity did not present itself to provide the marks because it quickly became apparent that neither Ms. Donnelly nor Ms. Duffy were happy with the turn of events and repeatedly stated that the wrong candidate had been chosen. He states that other members of the Board did not raise an objection to the appointment of the notice party to the position of Principal. Indeed, it is clear from Ms. MacCormack's note that the appointment was ratified by the Board notwithstanding the reservations some Board Members may have had at the time. He states that he informed the Board Members that an extensive and considered process had been undertaken to arrive at the highest ranked nominee and had been conducted with two experienced and wholly independent Selection Board members. He accepts that a request was made to adjourn or suspend the meeting but maintains that though discussed it was decided that the adjournment or suspension of the meeting would serve no purpose. Once again, it appears that though the matter of an adjournment was canvassed, the Board did not make a decision, which it could have made, to adjourn the meeting for further consideration.

75. In an affidavit from Mr. Matt Melvin a School Principal on secondment to the Education Executive of the Catholic Primary School Management Association (CPSMA) the practice in relation to the furnishing of marks and rankings under Appendix D is discussed. He states that in his experience Selection Boards are required to produce a ranking of candidates who are deemed suitable for appointment though this ranking is frequently not furnished to the Board of Management. He states that this is because applicants for the post of principal often include internal and external candidates. A Board of Management did not necessarily know who on the teaching staff has applied for the position of principal and it would be invidious if the Board were to be informed of the identities of those who may have applied and how they fared in the process. The CPSMA advised concerning the appointment of teachers and principals that the Chairperson should report back to the Board of Management nominating the applicant whom the Selection Panel considers should be appointed. It also advises that the balance of the final marks or rankings need not be disclosed to the Board unless there is a particular reason to do so. This is because the rankings contain confidential information and personal data relating to third parties and because of sensitivity to the fact that internal applicants may not have been successful and external applicants may have applied without the knowledge of their own Principal or Board of Management. Although obliged to be confidential in respect of such matters, Mr. Melvin states that Boards of Management may be prone to the leaking of information by individuals. He adds that

Teachers Unions have never requested to his knowledge that the information be made available as a matter of course to a Board of Management. Mr. Mc Mahon sought advice from Mr. Melvin prior to and following the conclusion of the selection process. Ms Donnelly also sought his advice following the appointment of Ms Trehy.

76. Following the ratification of the appointment of the notice party Mr. McMahon states that Ms. Donnelly informed him that the next step in the procedure was that he should contact the notice party which he did. He telephoned Ms Trehy and each of the other candidates that evening to inform them of the result of the competition. On 9th February, 2015, the Chairperson visited the Patron and explained the entire process and outcome to him. This included the fact that the Board of Management had ratified the appointment of the notice party to the post of Principal. The Patron states in his affidavit that he was satisfied to consent to the appointment. He had no reason to cast doubt on the transparency, objectivity or probity of the recruitment process.

77. Ms. Trehy was telephoned by the Chairman on the 8th February and informed that her application had been successful. She was very pleased and immediately accepted the position. On the 10th February, 2015 she received a formal letter of offer from the Chairman of the Board of Management informing her that the Board was pleased to offer her the position of Principal Teacher. The offer was subject to a number of standard conditions including one at Item 10 referred to as "satisfactory references". By return of post Ms. Trehy accepted the offer. A complaint was made that the telephone call to Ms. Trehy on the 8th February indicating that she had been successful in her application following the Board Meeting constituted a premature offer of appointment which should only have been made following the ratification of the Board's decision by the Patron. This was also said to be a breach of the Rules. That is not so. I am satisfied that the letter of offer of appointment to Ms Trehy issued after the Patron's consent was obtained in accordance with the Rules.

78. The Court has already determined that the grounds challenging the procedure and decisions of the Selection Board have not been established as a matter of fact or law. In those circumstances Appendix D Rule 2.6.9 requires that the Board shall appoint the highest ranked nominee to the post "unless it has good and sufficient reason not to do so and such reason was not known to the Selection Board". No good and sufficient reason was advanced during the course of the Board meeting as to why the nominee should not be appointed. The court is satisfied that a fair, reasonable and transparent procedure was followed by the Selection Board resulting in its recommendation. Though it might be suggested that the Board was prevented from asserting whether there was a "good and sufficient reason" because of the failures or inadequacy of the Selection Board processes or decision making, I am satisfied, in the light of the conclusions reached earlier in this judgment which reject these claims, that there is no basis for this submission. Moreover, Rule 2.6.9 requires two conditions to be fulfilled if the Board of Management is not to appoint the highest ranked nominee. The second is that the reason deemed to be good and sufficient for not doing so must not have been known to the Selection Board at the time of its decision. There is nothing in the material advanced by the applicant that could possibly support that proposition. I am entirely satisfied that there was no basis upon which the Board of Management could have refused to ratify the appointment of the notice party under Rule 2.6.9. Even if there were such a reason, the matter must then be referred to the Patron whose decision on the matter must be accepted by the Board. This does not arise because no good and sufficient reason was ever canvassed or advanced at the Board meeting nor does any exist on the evidence.

79. This Rule reflects the purpose and intention of the Education Act and the Scheme of Appointment of Teachers and Principals which endeavour to ensure equality of treatment for internal or external candidates. It preserves the integrity of the decision made by the largely separate and fully independent Selection Board by compelling the Board to ratify the highest ranking candidate once he/she is identified. It protects the independence of the selection process and decision from unwarranted interference based on favouritism or otherwise.

80. Rule 2.6.6 provides only that individual marks should be added and "the final mark for each candidate" be used to produce a ranking of candidates deemed suitable for appointment. It is the final mark and the ranking of the candidates to which the Board is entitled under the Rule. These were not supplied in this case which is a technical breach of the rule. However, it is inconsistent with the purpose and scheme of the Rules that a Board would be entitled to reasonably conclude that it had "good and sufficient reason" not to appoint the highest ranking candidate and that such a reason was "not known to the Selection Board" based simply on the final marks of the lower ranking candidates coupled with an assertion that they are too low in respect of one or other of them. The purpose of the agreed ranking list is that it may be used by the Board if the post is not filled by the highest ranking nominee.

81. The question arises as to whether this breach is so fundamental as to vitiate the decision of the Board. I am satisfied having considered all of the facts and circumstances of this case that this does not constitute a substantial non-compliance with the Rules. The Rules must be considered in the context of the limited decision-making role conferred on the Board pursuant to the 2011 Rules and Appendix D. The intention of the Rules is to circumscribe the power of the Board to interfere with the independent conclusions of the Selection Board save in the special circumstances set out in Rule 2.6.9. The main purpose of providing the final marks and rankings is to enable the Board to have a list of candidates available to it arising out of the same selection process by the same Selection Board from which it may choose the next highest ranking candidate should the successful candidate decline to accept the appointment. The furnishing of the list could not have assisted the Board in determining within its limited power whether to appoint the highest ranking candidate or not. It would be inconsistent with the purpose of the Rule if the placement of a candidate at a lower ranking on that list could be advanced as a justification for failing to appoint the highest ranking candidate. It would completely undermine the independence of the selection process and defeat the very purpose for which a Selection Board exists. It could not be regarded as a reason or a fact of which the Selection Board was unaware. Having regard to the findings of the Court on the challenge made to the Selection Board's decision which the Court is satisfied is in accordance with the 2011 Rules and fair procedures, I am not satisfied that the failure to comply with this Rule invalidates the Board decision in this case. The 2011 Rules have been complied with in substance and in accordance with their purpose and the principles on which they are based.

Objective Bias

82. By notice of motion dated 18th May, 2015 an application was made pursuant to Order 84 Rule 23 of the Rules of the Superior Courts to amend the Statement of Grounds (the second of three) and extending the time for leave to apply for Judicial Review on those grounds. It was claimed that the Chairperson failed to comply with paragraph 15(a) of the 2011 Rules and Rule 2.5.5 of Appendix D. Paragraph 15(a) provides that a member of a Board who stands "in a relationship with a person" who is a candidate for appointment by the Board shall immediately disclose to the Board the fact of the relationship and the nature thereof and take no part in any deliberation or decision concerning the appointment. The disclosure and the decision shall be recorded in the minutes of the Board. A disclosure is required not only in the case of a family relationship but in respect of "any relationship which could be regarded as prejudicial to ensuring absolute impartiality in the selection process. A professional relationship in itself does not necessarily mean there is a conflict of interest".

83. Rule 2.5.5 of Appendix D provides a similar rule in respect of members of a Selection Board who stand in "a material relationship to a person who is a candidate for employment in the school". The board member should disclose the relationship to the Board of Management and where necessary withdraw from the Selection Board. The Patron should then nominate a replacement. The exclusion

stands for the entire process through to ratification at Board of Management level. A person so excluded is not to play any part in the deliberations or decisions of the Board of Management but may continue to participate as appropriate in all other business of the Board.

84. Rule 2.5.5(a) also requires that a disclosure and the decision shall be recorded in the Minutes of the Board and that Board Members are required to make a disclosure not only in the case of a family relationship but in respect of any relationship which could be regarded as prejudicial to ensuring absolute impartiality in the selection process. However, knowing a person in a professional capacity i.e. having taught or worked with them in the past, is not in and of itself a material relationship. A disclosure must also be recorded by the Selection Board or Board of Management as the case may be. The Rule also provides that failure to disclose any material relationship to the Selection "may invalidate the process".

85. It is claimed that the Chairperson failed to comply with paragraph 15(a) and Rule 2.5.5 of Appendix D in that the notice party was at the time of the interview teaching the Chairperson's children as class teacher. It is also claimed that the notice party coached his children in Gaelic football. It is further claimed that the Chairperson was previously a Board Member of the school in which the notice party was at that time a teacher and therefore was very well acquainted with her nominated referee, the principal of her school with whom he was also very closely associated through the GAA. It is submitted that the Chairperson did not disclose any of this to the Board and failed to recuse himself from the Selection Board once the Notice Party's application was received on 20th January, 2015. Furthermore it is claimed that he did not disclose this relationship to the applicant or any applicant for the position and "on that basis alone the applicant has a reasonable apprehension of objective bias on the part of the Chairperson". The obligation under the Rule is to notify the Board and/or selection Board not the candidates.

86. An extension of time is sought to pursue the challenge on these grounds because it is said that it only became apparent when the opposition papers and replying affidavits were served and considered by other Board Members.

87. The principles governing the amendment of grounds once leave has been granted, are summarised in the judgment of Fennelly J., in *Keegan -v- Garda Síochána Ombudsman Commission* [2012] 2 I.R. 570 at paragraphs 30 to 38. Once an applicant has obtained an order granting leave to apply, he/she is confined to the grounds permitted and may not argue any other grounds without the leave of the court. If the application is made within the time permitted for leave to apply, the court will normally grant the amendment; if it is not the court may still grant the application provided there is no unfair prejudice to the other parties. The failure to apply within the time permitted will have to be explained to the court. The failure to include the proposed new ground in the original application must also be explained and the court should be reluctant to permit an amendment if it amounts to advancing an entirely new cause of action. However, if the proposed amendment does not give rise to any significant difference to the nature of the case and/or is based on a pure matter of law, the court may be more disposed to grant the amendment: the court may take a different view if the new ground is likely to give rise to a further exchange of affidavits.

88. In this case the new ground advanced is one of alleged objective bias. The parties have already addressed the facts in a further exchange of affidavits on the issue in respect of the motion to amend and no further exchange is necessary. The applicant is approximately 9 days out of time. The case is based on "objective" not "actual" or "subjective" bias. The applicant claims that she was unaware of the potential of this aspect of the case until the replying affidavits of Ms MacCormack and others were being compiled which were eventually sworn on the 19th May. There is evidence to indicate that this is not so from Ms Ramona Cronin. However, the applicant submits that she did not realise the significance of the information imparted by Ms Cronin on the 9th February which is set out below. I am also entitled to take account of whether the ground advanced is arguable.

89. The question to be determined is whether a reasonable person would, in the circumstances of this case have a reasonable fear that the applicant would not have the benefit of a fair and independent selection process by reason of the fact that Mr. Mc Mahon's children were taught by Ms Trehy. It is claimed that this gave rise to a reasonable apprehension of bias or suspicion that the decision-maker might have been biased even though there is no actual bias. This may not be inferred from the establishment of errors in the impugned decision or the process leading to it (as the applicant attempted in this case) because the allegation is made arising out of facts external to the decision-making process (see *Orange Communications Ltd -v- Director of Telecommunications Regulation (No.2)*[2000] 4 I.R.159) . In addition, it is necessary under the 2011 Rules and on the basis of constitutional fairness to examine closely the impugned relationship and assess its relevance to objective bias from the perspective of the "reasonable man". As noted by Fennelly J., in *Kenny -v- Trinity College Dublin*[2008] 2 I.R.40 the reasonable person is an independent observer who is not over-sensitive and has knowledge of the facts, including the facts that support the possible apprehension of risk of bias and the substance of the allegations made in the case.

90. On the 14th May, 2015 the solicitors for the applicant wrote to Hayes Solicitors, representing the notice party stating that they had been informed that the Chairperson knew Ms. Trehy prior to her application for the post of principal and that the Chairperson's twins were taught by her at the time he chaired the Selection Board. It was also stated that the Chairperson's children received private sports tutorials from the notice party. This matter was apparently brought to the attention of the applicant's solicitors by Board Members preparing replies to the respondents and notice party's affidavits "who were most surprised to see that neither Mr. McMahon or Ms. Trehy brought this to the Courts attention". They expressed themselves to be deeply disturbed that the Chairperson failed to refer to this "personal connection" in his sworn statement. This letter was sent in the course of the hearing of these proceedings before me. Affidavits were sworn by Ms. MacCormack, Ms. Callan Brady, Ms. Duffy, Mr. Hanratty and Ms. McKee and a further affidavit by Ms. Donnelly on the 19th May, 2015. The letter sought clarification and confirmation of "the nature of any connection or prior knowledge of or contact between the Notice Party (or a family member) and Mr. McMahon (or a family member/s) and confirmation as to whether the notice party was invited to apply for the post of principal and if so, when and by whom and how she became aware of a vacancy in the school.

91. By reply dated 18th May, 2015 Ms. Trehy's solicitors stated that, as was clear from her affidavits, she was employed at Scoil Mhuire na mBuachaillí in Castleblayney which was the school attended by Mr. McMahon's sons. She taught Mr. McMahon's sons for approximately seven months. At no time did she ever provide private sports tutoring to them as suggested. She had two short interactions with Mr. McMahon, one at an open night when she gave a presentation to parents concerning issues arising out of the curriculum and at an annual parent/teacher meeting. She had no "personal connection" with Mr. McMahon prior to her application contrary to the suggestion of the letter. She was not invited by any person to apply for the post of which she became aware through "educationposts.ie" the website on which it had been advertised. I accept her evidence on this issue.

92. The applicant states that this matter came to light after she applied for Judicial Review. She had not been aware that the notice party was a candidate for the position of principal. She says that she only became aware of the alleged breach of paragraph 15(a) when Ms. MacCormack was provided with the replying affidavits which were filed by the respondents and notice party. She claims that this gives rise to an apprehension of objective bias and the failure by any of the deponents for the respondents or the notice party to mention that prior relationship "causes me to feel very uncomfortable with the process".

93. Ms. MacCormack in her affidavit states that she is now aware that there was a "material relationship between the Chairperson ... and two of the applicants for the post of principal of the school." She notes that Peter McMahon's son and Mary Callan Brady's son were friends. In addition she was aware that Peter McMahon should have made it known that the notice party was currently teaching two of his sons. She claims that the failure to disclose these material relationships to the Board invalidated the selection process. He should have disclosed the relationships and withdrawn from the process.

94. It is clear from the affidavits that the applicant's son and the Chairperson's son were close friends. It was clearly known to Ms. Callan Brady. There was no suggestion at any stage of the process that this gave rise to a material relationship of the type which required him to excuse himself or that he should make known that "relationship" to the Board. This is not and could have not been part of any challenge to the ultimate decision made. Clearly, it could not be claimed that it resulted in favouritism on his part towards her as is clear from the extensive nature of the challenge to his involvement in the selection process and the result. I do not accept that there is any reality to Ms Mac Cormack's expression of concern in this regard.

95. This belated and somewhat overblown attempt to challenge the decision making process on the basis of objective bias arises where there is clear evidence that the applicant was aware of the alleged "material" connection from an early stage. Ms Ramona Cronin is employed as a home school liaison officer at Castleblayney National School. On 9th February, 2015 she was in the applicant's office when the appointment of the notice party was discussed. She was asked by those present, who included the applicant Ms. Donnelly and Ms. Duffy, a number of questions concerning the notice party with whom they knew she was friendly. She confirmed that she was asked about the qualifications and experience of the notice party and that she informed those present that she taught fourth class in the Boys' school and was a successful teacher there. She suggested that if those present wished to obtain more information about her they should speak to Mr. McMahon as his sons were taught by and getting on well with her. It would appear that both the applicant and Ms. Donnelly had knowledge that Ms Trehy taught the Chairperson's sons at least from the 9th February, 2015 but no attempt was made to include any aspect of what is now termed to be "a material relationship" in the original application or in the first application to amend grounds on the day of the application for leave. The applicant maintains that she was "wary of gossip" and was not aware of the significance of the fact or that it was not known to the Board. She said she did not mention it to her solicitors as she did not have any facts and in any event was not aware of it before the interviews.

96. In her affidavit of 21st May, 2015 the applicant states that she also saw a YouTube video made by the notice party which featured the Chairperson's children of which the Chairperson must have known and been proud as a result of which he "would have credited the notice party with involving his children".

97. Mr. McMahon states that the notice party taught his twin boys in fourth class for the year 2014-2015 until she resigned from her position upon her appointment as Principal to Castleblayney National School. He informed the two members of the Selection Board Ms. Rooney and Ms. Beggan of that fact. He did not accept that the fact that his children were attending Scoil Mhuire na mBuachaillí was unknown generally or indeed specifically to Ms. Donnelly with whom he had a long standing relationship. He stated that it was simply untrue that his children had private sports tutorials from the notice party or that she coached his children in Gaelic football. This was unsupported by any evidence whatsoever though it was suggested that the applicant "will aver" to this fact in her third affidavit which she did not.

98. Mr. McMahon also rejects the suggestion that he could not receive a reference from Mr. McEnaney because he was involved in the same local GAA club and was the principal in the notice party's school. I do not accept that the furnishing of a reference by the notice party's principal could be regarded in the circumstances as inappropriate. The absence of such a reference would have been surprising.

99. I am satisfied that the delay which resulted in the making of this application for leave a short time outside the three month period could result in a refusal to extend the time. However, the applicant offers an explanation for the delay which, given the nature of the events surrounding this case and the involvement of the Board members, suggests that her understanding of how she might deploy these facts did not crystallise until mid-May at the instigation of others. I am persuaded that the low threshold which requires the existence of an arguable case before granting leave has been established on the materials advanced on the motion. It does not appear to me that the case is substantially altered or that further affidavits will be required and indeed the court has the benefit of full submissions on the proposed ground from the each of the parties. I am satisfied therefore, in the exercise of my discretion to extend the time and to grant the application to amend the grounds upon which leave was granted to include the claim in respect of objective bias.

100. I have considered all of the evidence advanced on this issue and I am satisfied that there is no substance to the contention that there was any relationship or "material relationship" for the purpose of paragraph 15(a) between the notice party and the Chairperson. Ms. Trehy states in her affidavit that she did not provide private sports tutoring to Mr. McMahon's sons either during or after school hours. As far as she knew Mr. McMahon was not a member of the Board of Management of the school during her employment there. She set out in detail her duties in the school and the very limited contact she had with Mr. McMahon in teaching his two sons. Ms. Trehy states that she chose Mr. McEnaney as one of her referees as he was the principal of her school. The fact that there may have been a friendship between the Chairperson of the Board and one of her referees would not be uncommon particularly in a rural area. She presumed that Mr. McEnaney, as a professional, provided an objective reference. I am satisfied that it is correct to say that in a town like Castleblayney it is likely that there would be considerable interaction between members of the community.

101. I am satisfied that the Rules have to be interpreted and applied in a sensible and reasonable way and, on the evidence in this case, I am not satisfied that there is any substance in the suggestion of objective bias. I do not consider that the relationship outlined gives rise to a material relationship or that the contentions made by the applicant constitute anything more than assertions. In that regard, the nature and extent of the normal interaction that may occur as a matter of course is recognised within the Rules themselves. The Rules acknowledge that even knowing a person in a professional capacity, such as having taught or worked with him/her in the past, does not, in and of itself, amount to a material relationship. Furthermore, the Rules indicate that the failure to disclose such a relationship does not necessarily vitiate a decision but "may" result in its invalidity, which suggests that it is not to be applied inflexibly. I am satisfied that the minimal contact between Mr. McMahon and the notice party is not of the nature, level or extent contemplated by the Rules. Furthermore, the Rules assist in understanding how the reasonable man might be expected to view this evidence. I am satisfied that the applicant has not established the existence of a material relationship or one of such a proximate and continuous nature as might give rise to a reasonable apprehension of bias or that the requirement of absolute impartiality would be breached. It is clearly not a family relationship. It involved a very low level of contact on two occasions. They are not friends. The notice party did not train his sons.

102. I am not satisfied that the facts of this case are comparable to those in *Brown* which concerned a family relationship in which a candidate's brother-in-law became involved in a decision making process, which clearly constituted a material relationship, in a case in

which the court also found that there were many other breaches of the Rules and fair procedures amounting to substantial non-compliance. I am not satisfied that the applicant has established a sufficient basis upon which to have the decision quashed on this ground.

103. A number of other facts were relied upon by the applicant and the Board members in respect of the meeting of the 8th February and events which occurred after the decision made by the Board to appoint the notice party. It is submitted that the Chairperson unlawfully fettered the discretion of the Board by refusing to adjourn the meeting on the 8th February and by refusing to convene a meeting the following day or later when requested to do so by other Board members. It was repeatedly suggested that the Chairman put the Board members under "duress" on the 8th February. I am satisfied that there is nothing to support this very serious allegation which I am satisfied is an exaggeration of what happened at the meeting. The Board members raised the issue of an adjournment but did not propose one formally or vote on such a proposal. The Board members raised concerns focussed on the failure to recommend Ms. Callan Brady and the absence of marks but then voted to appoint the highest ranking candidate. There were two dissenting members. The reality is that Mr. McMahon is correct in his view that they were obliged to appoint the highest ranking candidate under the Rules. I am not satisfied that the charges and counter charges as to what occurred in the aftermath of the decision have any relevance to my consideration of the validity of the decision made by the Board on the 8th to appoint the notice party. The Board members were not inexperienced and some claim experience in making appointments in the past. They have a clear and enduring loyalty to the applicant. Board members are responsible and accountable for their actions. I have no doubt that they were dissatisfied with the selection of someone other than their preferred candidate and it is clear from their admitted reactions to the notice party's selection that they were expecting the applicant to succeed. Their subsequent support of this application in circumstances in which they had the power and authority to vote against the appointment if there was reason to do so under Rule 2.6.9 has not been satisfactorily explained. However, the court is satisfied that no good and sufficient reason was or could have been advanced not to appoint the notice party at that time nor has any ground been advanced on this application to quash that decision.

104. The application is therefore refused.