Neutral Citation Number: [2015] EWHC 1012 (Admin)

Case No: CO/4693/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2015

Before :

MR JUSTICE COBB

- -

Between :

The Queen **On the application of** **The Governing Body of the London Oratory School**	**Claimant**
- and -	
The Schools Adjudicator	**Defendant**
-and-	
(1) The British Humanist Association **(2) The Secretary of State for Education**	**Interested Parties**

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Mr. Charles Béar QC & Mr. Julian Milford (instructed by **Payne Hicks Beach**) for the **Claimants**
Mr. James Goudie QC & Ms Fiona Scolding (instructed by **Treasury Solicitor**) for the **Defendant**
The First Interested Party was not represented
Mr. Jonathan Moffett (instructed by **Treasury Solicitor**) for the **Second Interested Party**

Hearing dates: 24-26 March 2015

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Approved Judgment

The Honourable Mr Justice Cobb:

Introduction and Summary

1. By a Determination promulgated on 15 July 2014, School's Adjudicator, Dr. Bryan Slater ("the Adjudicator"), concluded that the London Oratory School ("the School") had been in breach of its statutory obligations in setting its admissions criteria for 2014 and 2015. By Claim dated 8 October 2014, the School challenges that Determination by way of judicial review; permission to pursue the Claim was granted on 10 November 2014.

2. This Claim, and indeed this judgment, is not about the quality of education available to pupils at the School; by all accounts, it is an outstanding and successful school with high standards of academic teaching. The School is, unsurprisingly in the circumstances, extraordinarily popular and is vastly oversubscribed year on year. Nor is this Claim, or this judgment, concerned with the principle of public-funding of education by schools with a 'religious character'; this is clearly provided for in statute. This Claim, and this judgment, is only concerned with the lawfulness of the Adjudicator's conclusions.

3. I explain below my reasons for granting the School in part the relief it seeks. In summary, the Claimants have succeeded in demonstrating that:

   i) The Adjudicator applied too stringent a test when concluding that the Governing Body of the School (as the relevant 'admission authority', per *section 88* of the *School Standards and Framework Act 1998* ('*SSFA 1998*')) had failed to 'have regard' to the published Guidance (2003) from the Archdiocese of Westminster (as it was required to do under the Department for Education's School Admissions Code (2012) ("the Admissions Code")) when setting its faith-based oversubscription criteria;

   ii) The Adjudicator's conclusion that the Governing Body of the School had operated an admissions system which was socially selective, discriminatory, and unfairly disadvantageous to children from "less well-off" families was flawed, and was reached by a process which was procedurally unfair to the School;

   iii) The Adjudicator's conclusion that the admissions forms published by the Governing Body of the School for 2015 were unclear in failing to identify what was meant by a 'parent' was *Wednesbury* unreasonable, failing to acknowledge (or even refer to) the relevant 'definition' section which appears prominently in the notes to support the admissions process;

   iv) That it was/would be permissible for the School to request parents' baptismal certificates as proof of their Catholic faith; such a request does not offend against the Admissions Code;

   v) That (subject to there being clear and proper reason for departing from the Diocesan Guidance to which the School was obliged to have regard) it was/would be permissible for the School to include an over-subscription criterion seeking evidence of previous Catholic education in the manner which

the School adopted in 2014, and in 2015 (for Year 3 candidates only); the Adjudicator acted unlawfully in concluding that the School had breached the Admissions Code in including this criterion;

vi) That, while I disagree with the School's interpretation of *Regulation 16* of the *School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements)(England) Regulations 2012* ("the *2012 Regulations*") in relation to consultation on its admissions processes, the Adjudicator was wrong to conclude that the School could show no evidence that it had as a matter of fact failed to make any meaningful attempt to bring the School's proposed arrangements to the attention of the required consultees.

In all other respects, I conclude that the Adjudicator reached conclusions which were lawful, or not otherwise susceptible to challenge.

4. I heard oral argument on the issues over three court days; many documents and legal authorities were subjected to intense, and repeated, examination. There was little common ground between the parties. I set out below, by way of index, the contents of this judgment.

The Oratory School

5. The School was founded in 1863, and is located in Fulham, London SW6. It offers education to boys aged 7 to 18, and girls between the ages of 16 and 18. It is part of the Catholic Church with a philosophy and liturgical tradition which dates back to 16th Century Rome, and specifically to the Patron Saint of the School, St Philip Neri. St Philip Neri, an Italian priest who devoted his energies to the teaching of young men, formed an influential movement in the Catholic Church called the Congregation of the Oratory. St Philip Neri also gave his name to the London Oratory Church; the School and Oratory Church maintain close links with one another, sharing strong liturgical traditions. When the School was founded, its mission was to offer Catholic education for the benefit of Catholic children from all over London; that continues to be one of its key objectives today. Indeed, the pupils are drawn from over 300 parishes and primary schools, and 40 local education authority areas in and around London; it is reported that fifty three languages are spoken in the School, and that over 70% of its pupils travel more than 5kms to attend the School.

6. Religious worship plays a substantial part in school life; the admissions process of the School has, thus far, ensured that its pupils are fully committed and practising members of the Catholic Church. In pursuing the objectives of Cardinal John Newman (who introduced the Oratorians to England in the nineteenth century), the strong religious ethos, in the Canonical tradition, is combined with academic strength. The School's Ofsted and other independent inspection reports describe the school as "outstanding".

7. The School espouses two distinct and fundamental objectives:

   i) To serve the Catholic community across the whole of the London area (referred to in the documents as its "pan-London mission"); and

   ii) To preserve and enhance strong Catholic religious and academic teaching in the spiritual and musical traditions of the oratories of St Philip Neri.

8. The School is, unsurprisingly, very popular; the places (usually approximately 160 places for admission in Year 7) are, each year, vastly over-subscribed (typically, there are more than 800 applicants). The School is concerned to minimise the extent of random selection of its pupils while promoting its strong Catholic ethos. The School has been subject to a relatively high number of challenges to its admissions procedures in the past, including a previous challenge from the British Humanist Association. Notable among previous challenges (albeit a largely unsuccessful one) is the decision of Jackson J (as he then was) in *Governing Body of the London Oratory School (& others) v School's Adjudicator* [2004] EWHC 3014 (Admin), [2005] ELR 162 – a case decided under a different statutory regime. I return to discuss this decision later.

The School's 'Academy' Status / Funding Agreement

9. The School began life as a charitable religious foundation. In its 150 year history it has enjoyed public funding support through various education models before, on 1 August 2011, becoming an Academy under *section 1A* of the *Academies Act 2010* ("*the 2010 Act*"). It is treated as being a school with a "religious character" (or 'faith

school') under *section 69(3)* of the *School Standards and Framework Act 1998* ("*SSFA 1998*"), and *section 6(8)* of the *2010 Act*. The funding arrangement for the School is contained within a Funding Agreement which was signed in 2011; the Funding Agreement specifically provides that:

> "the admissions policy and arrangements for the school will be in accordance with admissions law, and the DfE Codes of Practice, as they apply to maintained schools." (clause 10(c)).

The Governing Body is the relevant 'admission authority' (*section 88(1)(c)* of the *SSFA 1998*) for the School responsible for admissions arrangements and policy (*section 88(2)* ibid.).

10. The Funding Agreement further provides that the School is to be an all ability inclusive school (as an Academy it is required to provide education "for pupils of different abilities": *section 1A(1)(c)* of the *2010 Act*) with some pre-existing partially selective admissions permitted by the *SSFA 1998*. As an Academy, the School is obliged to "provide education for pupils who are wholly or mainly drawn from the area in which it is situated" (*section 1A(1)(d)* of the *2010 Act*). The Adjudicator did not specifically address this statutory requirement in the context of the pan-London mission (referred to above); it has not therefore been necessary for me to do so either in resolving this Claim.

11. As admission authority of the School, the Governing Body is required to consult and notify the "appropriate … body" in connection with its admission arrangements (*section 88F(3)(e)* of *SSFA 1998*). That 'appropriate body' is the one which represents the relevant religion, or religious denomination; by virtue of *regulation 34* and *Schedule 3* of the *2012 Regulations*, for a Roman Catholic school this is to be the "Diocesan Bishop or the equivalent in Canon Law for the diocese in which the school is situated". The School's 2011 Funding Agreement specifically identifies the Roman Catholic Archdiocese of Westminster as its relevant religious body.

12. Annex B to the School's Funding Agreement, binding upon the School, further provides that:

    i) The Secretary of State may direct the School to amend its admission arrangements where it fails to comply with the Admissions Code;

    ii) The School may maintain a proportion of selective admissions for specialist music education (20 pupils in year 3);

    iii) Admission arrangements will include oversubscription criteria, which will be determined in line with the requirements of the Department for Education School Admissions Code in force at the time ("the Admissions Code"). This is reinforced by clause 12(c) of the Funding Agreement, and paragraph 4 of the Admissions Code itself.

13. The arrangements for entry are set approximately 18 months before the start of the relevant school year, and the applications for entry are lodged approximately 11 months before the start of the school year for which the application is made.

The Statutory Framework and Admissions Code

14. Schools' admissions processes are governed by *Part III* of the *SSFA 1998*, and associated regulations, together with the Admissions Code.

15. The Secretary of State for Education ("Secretary of State") is responsible for issuing the Admissions Code, pursuant to *section 84* of *SSFA 1998*. The Admissions Code enjoys statutory status, having been consulted upon in draft (*section 85(2)* of the *SSFA 1998*), and having been subject to the negative resolution procedure before both Houses of Parliament (*section 85(3)* of the *SSFA 1998*).

16. The version of the Admissions Code relevant for the present determination was issued in February 2012 (a more recent version is currently in force). The Admissions Code makes provision as to how relevant bodies should exercise their functions in relation to admissions to schools. *Section 84(2)* of the *SSFA 1998* provides that:

> "(2) The code may impose requirements, and may include guidelines setting out aims, objectives and other matters, in relation to the discharge of their functions under this Chapter by local authorities and such governing bodies.
>
> (3) It shall be the duty of —
> (a) each of the bodies and persons mentioned in subsection (1) when exercising functions under this Chapter, and
> (b) any other person when exercising any function for the purposes of the discharge by a local authority, or the governing body of a maintained school, of functions under this Chapter,
> to act in accordance with any relevant provisions of the code." (emphasis by underlining added)

Section 84(1) and the School's Funding Agreement imposes this duty on the School's Governing Body

17. The Admissions Code has featured centrally in the arguments before me. When interpreting the Admissions Code, I am of the view that

i) It should be read as a whole, applying the natural and ordinary meaning of the words used in the light of the context in which it was published (see by way of analogy *R(DD) v Independent Appeal Panel of the London Borough of Islington* [2013] ELR 483 at [14]), and

ii) Regard should be had to its purpose and underlying objectives which are set out in its introductory section as follows:

> [12] The purpose of the Code is to ensure that all school places for maintained schools (excluding maintained special schools) and Academies are allocated and offered in an open and fair way. The Code has the force of law, and where the

> words '*must*' or '*must not*' are used, these represent a mandatory requirement.
>
> [14] In drawing up their admission arrangements, admission authorities *must* ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective. Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated.
>
> [15(a)] All schools *must* have admission arrangements that clearly set out how children will be admitted, including the criteria that will be applied if there are more applications than places at the school. (In each case, emphasis by italics in the original).

18. Mr Moffett, on behalf of the Secretary of State, advised the Court that the Admissions Code has been designed and adapted to strike a balance for admissions authorities between autonomy (enabling Governing Bodies to set their own admissions criteria relevant to their particular school), and objective fairness (ensuring that such criteria are imposed in a reasonable, fair, clear and objective way). For ease of reference, the provisions of the Code which fall for specific consideration in this Claim are set out below:

> *Oversubscription criteria*
>
> [1.6] The admission authority for the school *must* set out in their arrangements the criteria against which places will be allocated at the school when there are more applications than places and the order in which the criteria will be applied. All children whose statement of special educational needs (SEN) names the school *must* be admitted. If the school is not oversubscribed, all applicants *must* be offered a place (with the exception of designated grammar schools - see paragraph 2.8 of this Code).
>
> [1.8] Oversubscription criteria *must* be reasonable, clear, objective, procedurally fair, and comply with all relevant legislation, including equalities legislation. Admission authorities *must* ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group, or a child with a disability or special educational needs, and that other policies around school uniform or school trips do not discourage parents from applying for a place for their child. Admission arrangements *must* include an effective, clear and fair tie-breaker to decide between two applications that cannot otherwise be separated.
>
> [1.9] It is for admission authorities to formulate their admission arrangements, but they *must not*: …

> b) take into account any previous schools attended, unless it is a named feeder school; …
>
> e) give priority to children on the basis of any practical or financial support parents may give to the school or any associated organisation, including any religious authority; …
>
> i) prioritise children on the basis of their own or their parents' past or current hobbies or activities (schools which have been designated as having a religious character may take account of religious activities, as laid out by the body or person representing the religion or religious denomination);

Social and medical need

[1.16] If admission authorities decide to use social and medical need as an oversubscription criterion, they *must* set out in their arrangements how they will define this need and give clear details about what supporting evidence will be required (e.g. a letter from a doctor or social worker) and then make consistent decisions based on the evidence provided.

Faith based oversubscription criteria in schools with a religious character

[1.36] As with other maintained schools, these schools are required to offer every child who applies, whether of the faith, another faith or no faith, a place at the school if there are places available. Schools designated by the Secretary of State as having a religious character (commonly known as faith schools) may use faith-based oversubscription criteria and allocate places by reference to faith where the school is oversubscribed.

[1.37] Admission authorities *must* ensure that parents can easily understand how any faith-based criteria will be reasonably satisfied. Admission authorities for faith schools may give priority to all looked after children and previously looked after children whether or not of the faith, but they *must* give priority to looked after children and previously looked after children of the faith before other children of the faith. Where any element of priority is given in relation to children not of the faith they *must* give priority to looked after children and previously looked after children not of the faith above other children not of the faith.

[1.38] Admission authorities for schools designated as having a religious character *must* have regard to any

> guidance from the body or person representing the religion or religious denomination when constructing faith-based oversubscription criteria, to the extent that the guidance complies with the mandatory provisions and guidelines of this Code. They *must* also consult with the body or person representing the religion or religious denomination when deciding how membership or practice of the faith is to be demonstrated. Church of England schools *must*, as required by the Diocesan Boards of Education Measure 1991, consult with their diocese about proposed admission arrangements before any public consultation.
>
> *Applying for places*
>
> [2.4] In some cases, admission authorities will need to ask for supplementary information forms in order to process applications. If they do so, they *must* only use supplementary forms that request additional information when it has a direct bearing on decisions about oversubscription criteria or for the purpose of selection by aptitude or ability. They *must not* ask, or use supplementary forms that ask, for any of the information prohibited by paragraph 1.9 above or for:
>
> > a) any personal details about parents and families, such as maiden names, criminal convictions, marital, or financial status (including marriage certificates);
> >
> > b) the first language of parents or the child;
> >
> > c) details about parents' or a child's disabilities, special educational needs or medical conditions;
> >
> > d) parents to agree to support the ethos of the school in a practical way;
> >
> > e) both parents to sign the form, or for the child to complete the form.
>
> (Emphasis in the original)

The role of the Schools Adjudicator

19. The Office of the Schools Adjudicator ("OSA") is a creature of statute (*section 25* of the *SSFA 1998*). The Secretary of State makes the appointment of schools adjudicators, but they are independent of her department. One of the key roles of the adjudicator is to rule on objections to and referrals about state school admission arrangements. Investigations about admissions processes are prompted either by a specific complaint (under *section 88H(2)* of the *SSFA 1998*), or by a referral from the Secretary of State (*section 88I(2)* of the *SSFA 1998*), or where the adjudicator him/herself considers that the admissions criteria do not conform with the

requirements of the Admissions Code (*section 88I(5)* of the *SSFA 1998*). Ouseley J in *R (Metropolitan Borough of Wirral) v The Schools Adjudicator* [2001] ELR 574 at [15] summarised the role thus:

> "So it is plain that the adjudicator is exercising an original jurisdiction as to the appropriateness of admission arrangements. He is not reviewing a local education authority's decision, though obviously what they determine and why is very material."

20. The role of the Schools Adjudicator is described in the Code as follows:

> "[3.1] The Schools Adjudicator *must* consider whether admission arrangements referred to the Adjudicator comply with the Code and the law relating to admissions….
>
> [3.3] Any person or body who considers that any maintained school or Academy's arrangements are unlawful, or not in compliance with the Code or relevant law relating to admissions, can make an objection to the Schools Adjudicator
>
> [3.4] The Adjudicator may also consider arrangements that come to the Adjudicator's attention by other means which the Adjudicator considers may not comply with mandatory requirements." (emphasis by italics in the original).

21. Under *section 88K* of the *SSFA 1998* a decision of the Adjudicator is binding on the admission authority (i.e. the Governing Body) in question.

The School's admissions criteria [2009-2016]

22. Admission arrangements are required to be set annually (*section 88C(1)/(2)* of the *SSFA 1998*). The arrangements which formed the subject of the Adjudicator's Determination were those set by the School in 2014 and 2015. In the course of argument, I have been asked to cast an eye over admission arrangements made in earlier years.

23. In the period reviewed at this hearing (2009/10-2015/6) the School has consistently maintained a mix of faith-based and non-faith-based oversubscription criteria; in 2014, these were set out under sub-headings of 'Primary oversubscription criteria' and 'Other oversubscription criteria', distinctions not specifically expressed in 2015. When applying its widest set of criteria (which has had the effect of reducing the size of the pool of eligible candidates) the School has included the following:

Primary oversubscription criteria:

i) Catholic 'looked after' children (as defined in the *Children Act 1989*) or Catholic adopted children having been 'looked after';

ii) The extent to which the candidate and his Catholic parent (where only one parent is Catholic) or parents meet their obligations in respect of Mass attendance on Sundays and on Holy Days of Obligation;

iii) The extent to which the candidate fulfils the Church's requirements regarding baptism (the highest number of points being allocated to those who were baptised within the first six months of life);

iv) Whether the candidate has received his first Holy Communion;

v) Service in any Catholic parish or in the wider Catholic Church by the candidate or a Catholic parent ("the Catholic Service criterion");

Other oversubscription criteria:

vi) Whether the candidate has a sibling in the school, or is the sibling of a former pupil;

vii) Whether the candidate has attended the London Oratory Primary School or any other Catholic school for the whole of their primary education or the candidate's parent(s) have fulfilled their obligation to ensure a Catholic education for their child;

viii) Whether the candidate and his parents regularly attend Mass on Sundays and Holy Days of Obligation at the London Oratory Church for a sustained period of at least three years.

Criteria (ii), (iii), (iv), (v) and (vii) are demonstrably rooted in the principles of Canon Law.

24. The parent(s) record(s) their responses to the criteria on a bespoke Religious Inquiry Form which is unique to the School, the completion of which is mandatory to support a candidate's application. This accompanies a generic application form which is obtained from, and returned to, the relevant local authority. A scoring system is then applied to the responses provided by the candidate's parent(s) which grades the extent to which the candidate or his parent(s) can demonstrate Catholic observance. The School acknowledges that parent(s) may not be able to demonstrate performance of one or more of these criteria for good medical, social or other reason, and can explain their reason(s) in their Religious Inquiry form.

25. The School wishes to be able to retain all of the criteria listed in [23] above in future years; the Governing Body considers that this will enhance and promote the rich Catholic identity and mission of the School. The School further argues that if these criteria are applied, the admissions process will be more predictable and objective for the candidates and their parent(s). Although the School wishes to avoid excessive reliance on a 'tie-break' (the "game of chance" referred to in the Diocesan Guidance, see [34] below), it inevitably has to apply one in each year to reduce the final pool of candidates to match the specific number of places.

26. In the last few years the 'tie-break' has been determined by way of random selection. Previously, in 2010, the School had applied a tie-break based on 'geography'; this had

the effect of increasing its local intake to 43% (compared with 14% in other years); the School considered that this had an undesirable impact (in diversity terms) on the profile of the intake (i.e. the intake was predominately white middle class).

27. In 2009, the School included the Catholic Service criterion (see [23](v)) for the first time. This was removed in 2010 at the request of the Diocese, but was re-instated in 2012, 2013, and 2014; it was removed again for 2015 in order to avoid further challenge from the Adjudicator. The School considers that there was a discernible reduction in the level of familiarity with the Catholic doctrine and practice among pupils admitted in the year in which Catholic Service was excluded. In 2013 when the full range of faith-based oversubscription criteria were applied, those eligible for consideration (225 candidates) stood a 1 in 2 chance of a place (the reduction was achieved on random selection). When the 'Catholic Service' element ([23](v) above) was removed in 2010, those eligible for consideration (394 candidates) stood a 1 in 3.3 chance of a place.

28. For 2015, the School has applied the minimum oversubscription criteria permitted by the Adjudicator, requesting evidence of (i) baptism of the candidate into the Catholic faith, (ii) attendance at Mass, and (iii) Mass attendance at the Oratory Church. Once those who have satisfied these minimum criteria have been identified, those eligible for consideration stood a 1 in 7 chance of a place.

The Diocesan Guidelines (2003)

29. The Archdiocese of Westminster, as the "representative body of the religion or religious denomination for schools designated as having a religious character" (under the *2012 Regulations*) with whom the School is obliged to consult in relation to its admissions, produced in 2003 (revised in 2007) its own 'Joint Guidance on Admissions for the Governing Bodies of Catholic Voluntary Aided Schools' jointly with the Diocese of Southwark and the Diocese of Brentwood ("the Diocesan Guidance"). It was to be applied by all Catholic voluntary aided schools in its combined geographically extensive diocesan areas.

30. The Diocesan Guidance expressly "tries to reflect that there are some underlying principles which should inform admission arrangements in all Catholic schools". The principles include the provision of a Catholic education to encourage the growth to maturity of "the whole human person", to "enable physical, moral and intellectual talents to be developed harmoniously", to "teach all to know and live the mystery of salvation", and to "assist all to work towards their eternal destiny". The Diocesan Guidance contemplates that Catholic education will be provided at "local" Catholic schools for "local" Catholic communities.

31. In outlining the 'basic framework' for admissions, the Guidance requires that:

> "The governing body must, in discharging its functions, comply with its trust deed and instrument of government. This includes the requirements to serve as a witness to the Catholic faith in Our Lord Jesus Christ, to comply with the requirements of canon law and to give priority to Catholic families"

32. Against the general acknowledgement that Governing Bodies have wide discretion in determining its oversubscription criteria (Guidance [A1]), and can apply a "higher test of 'practising catholic' if there is an absolute shortage of places" ([A22]), the following specific guidance is offered:

> "If a test of 'practising Catholic' is employed, the only test that is acceptable is frequency of attendance at Mass as demonstrated on the diocesan priest's reference form. It is unacceptable for schools themselves to be making judgments on pastoral matters such as Catholic practice." ([A23])
>
> "Where practice is prescribed as a condition in accordance with that described above, attendance or frequency of attendance at Sunday Mass should be used to demonstrate this. The term 'regular attendance at Sunday Mass' may be used without further qualification to signify attendance as required by the rule of the Church." ([A26])
>
> "Under no circumstances may governing bodies receive applications and then produce a 'rank order' based on their own assessment of each applicant's Catholicity instead of using the priest's reference. Any rankings determined by reference to financial contribution, participation in parish committees, service in Church ministry in any capacity or the like are not acceptable." ([A29]) (emphasis by underlining added in each case).

33. The concluding 'Summary' section of the Diocesan Guidance appears not just to be a recital of the material which has gone before, but includes a development or expansion of the same. It acknowledges that there is no prescribed list of acceptable and unacceptable criteria, but suggests the following as generally acceptable criteria (not in order of priority): (a) Religious observance in accordance with the rites and practices of the Church; (b) Sibling links; (c) Exceptional medical, social or educational needs relating to that particular school supported with appropriate documentary evidence; (d) Residence within a specified parish or other defined area; (e) Proximity measured by walking distance or straight-line home to school or other, clearly defined, fixed point (e.g. parish church).

34. Of the criteria generally considered as being *un*acceptable, the Diocesan Guidance deplores the 'drawing of lots', adding that "the allocation of places in schools should not be reduced to the level of a game of chance".

35. Over the years it is clear that the School's position on its faith-based oversubscription criteria has in some (but not all) respects differed from the Guidance proffered by the Archdiocese of Westminster. This issue has brought the School into conflict with the Diocese recently. That said, the last independent Canonical Inspection of the School (on behalf of the Archbishop of Westminster), which was carried out in 2009 contains an extremely positive appraisal of the School. The report, which was cited to the Adjudicator in the School's July 2013 submission to the OSA, discussed the School's

shared liturgical identity with the London Oratory Church, which has "its own very distinctive ethos and tradition of formal church worship and traditional Catholic music and ritual". The independent denominational inspector wrote of the pupil participation in Eucharistic celebrations being "outstanding", and the performance of the orchestra and the Schola in these liturgies "breathtaking". His summary includes these comments:

> "The London Oratory School is an outstanding school that reflects vividly the vision of an educating Catholic community. In this school the high standards of teaching, learning and personal development are integrated into a caring and challenging educating community. There is a strong Catholic identity, a clear vision and a mission based on the charisma of St Philip Neri".

36. The Diocese has consistently and repeatedly made known to the School over a period of time that it regarded the School as acting in breach of its Guidance; the minutes of the Governing Body meetings over a period of years confirm this. While the Diocese has not formally ever complained to the OSA about the School's admissions criteria, it did express its unhappiness about the 2014 and 2015 criteria to the Adjudicator both in writing and at a meeting of the interested parties on 13 May 2014 (see [41] and [71] below).

The complaint by the British Humanist Association (2013)

37. The British Humanist Association ("BHA") is a national charity working on behalf of non-religious people who seek to live ethical and fulfilling lives on the basis of reason and humanity. It was founded in 1896. It campaigns for a secular state, challenges religious privilege, and seeks to promote equal treatment in law and policy of everyone regardless of religion or belief.

38. The BHA made complaints to the OSA about the School's admissions processes in April and May 2013. The complaints can be summarised thus:

    i) Priority has been given by the School within its faith-based oversubscription criteria to those who can demonstrate compliance with the Catholic Service criterion ([23](v) above); that this was in contravention of para.1.9(e) (or para.1.9(i)) of the Admissions Code;

    ii) There is no provision in the admission arrangements for the admission of children who are "of no faith"; this did not meet the requirements of para.1.6 and para.1.36 of the Admissions Code;

    iii) The School has failed to "have regard" to the Diocesan Guidance when drafting its faith-based oversubscription criteria (contrary to para.1.38 of the Admissions Code); it was selecting on more exacting criteria;

    iv) That the school's website had not been changed to take account of the alteration to the admission arrangements following consultation.

First Determination by the School's Adjudicator (August 2013)

39. The OSA appointed Adjudicator David Lennard Jones to conduct the investigation in to the BHA's complaints. He delivered a Determination dated 28 August 2013. The School objected to his conclusions, and raised a Pre-Action Protocol letter (27 September 2013) alleging that the determination was flawed, citing errors of law. Extensive correspondence, and negotiations between the parties, followed. By letter dated 28 November 2013, the Treasury Solicitor, on behalf of the OSA, conceded that the Determination had indeed contained an "arguable error of law" and could not stand. It was agreed that the Determination would be quashed by consent; an order was made to this effect on 18 March 2014. For that reason, I have not paid any attention to this earlier report.

40. After a false start (two further adjudicators having been proposed by the OSA, and then withdrawn given their previous involvement with the School), Dr. Bryan Slater was appointed on 4 April 2014.

Second Determination by the School's Adjudicator (July 2014)

41. Having conducted a review of the relevant documentary material, on 10 April 2014 the Adjudicator sent a letter to the School outlining a number of potential breaches of the Admissions Code and Diocesan Guidance; he sought an early meeting with the School. On 13 May 2014 the Adjudicator met at the School with representatives from the BHA, the School and the Dioceses.

42. On 15 July 2014 the Adjudicator delivered his Determination; this runs to 137 paragraphs. In more than 25 respects he found that the School had not complied with the Admissions Code in relation to its September 2014 admissions, upholding in part at least (per *section 88H(4)* of the *SSFA 1998*) the BHA's objection; he determined that the arrangements for admissions for 2015, considered under *section 88I(5)* of the *SSFA 1998*, did not conform with the Admissions Code in 18 respects.

The School's Claim

43. Just as the Adjudicator's Determination had contained multiple findings of breach of the Admissions Code in the School's admissions criteria beyond the BHA's complaints, so now does the School complain of a 'root and branch' attack by the Adjudicator upon its admission processes, arguing that in carrying out his statutory duty the Adjudicator erred in a number of material respects, by applying the wrong test, misconstruing the meaning of the Admissions Code, and adopting an unfair procedure.

44. I permitted the School to amend its Claim during the hearing, subject to arguments on costs. The Claim has focused on ten of the Adjudicator's rulings. I take each in turn.

(1) Failure to 'have regard' to the Diocesan Guidance

45. The School's admissions oversubscription criteria for 2014 and 2015 include a number which are specifically faith-based; the candidates are scored according to the degree of fulfilment of the criteria (see [23] and [24] above).

46. The Adjudicator concluded that the majority of the faith-based oversubscription criteria (i.e. other than Mass attendance as demonstrated on the Priest's reference form) contravened para.1.38 of the Admissions Code; he determined that by including these criteria the Governing Body cannot properly have had 'regard to' the Diocesan Guidance, which would not have required these criteria, and indeed would in some respects have prohibited them.

47. In this regard, it is necessary to examine paragraphs 1.36-1.39 of the Admissions Code in a little more detail, as they operate as an exception to the general rules prohibiting discrimination in school admission on grounds of membership of a social or racial group (para.1.8 and para.1.9). They apply in respect of schools which the Secretary of State has designated as having a 'religious character'. The BHA's first objection was that these faith-based criteria contravened para.1.38 of the Admissions Code, in that the School had not "taken account" of the Diocesan Guidance.

48. The key question is whether the Adjudicator rightly concluded that the School had contravened para.1.38 of the Admissions Code in formulating its oversubscription criteria.

What is meant by 'have regard' in para.1.38 of the Admissions Code?

49. Para.1.38 imposes two duties on the Governing Bodies: the first is to "have regard" to the guidance from the appropriate religious body "when constructing faith based oversubscription criteria", and the second is to "consult" that religious body when "deciding how membership or practice of the faith is to be demonstrated". Two different obligations arise, it seems to me: the duty to 'consult' being of a lower order than the duty to 'have regard' to guidance offered.

50. I was referred in argument to a number of the relevant authorities in which the phrase 'have regard to' has been discussed. Mr. Béar QC sought to argue that all that was required in these circumstances was for the Governing Body to take the guidance into account, no more; it would be sufficient for the School merely to consider or examine the Guidance in fulfilment of its obligation. He contended that the phrase had been sufficiently defined for present purposes *a fortiori* by Jackson J (as he then was) in *Governing Body of the London Oratory School (& others) v School's Adjudicator* (see [8] above) where he said at [40]:

> "*Section 84(3)* of the *1998 Act* imposes an obligation, first on the governors of the Oratory School and then on the adjudicator "to have regard to any relevant provisions of the Code". <u>The phrase 'to have regard to' means to take into account.</u> It does not connote slavish obedience or deference on every occasion. It is perfectly possible to have regard to a provision, but not to follow that provision in a particular situation: see the decision of the Privy Council in *Barber v Minister of Environment* 9th June 1997 at page 5 of the transcript". (emphasis by underlining added).

51. Mr. Béar went on to contrast the Diocesan Guidance under consideration here, with guidance issued under *section 7* of *Local Authority Social Services Act 1970* ("*LASSA 1970*"), which imposes a clear duty on local authorities, in the exercise of their social

services functions, to act under the general guidance of the Secretary of State, as in *R v Islington London Borough Council ex parte Rixon* (1996) 1 CCLR 119. Mr. Béar argued that such a code would be entitled to greater deference than Diocesan Guidance, citing Sedley J at p.123 in *Rixon* who referred to the obligation in such circumstances on a local authority:

> "… to follow the path charted by the Secretary of State's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course". (emphasis by underlining added).

He further relied on the Divisional Court's decision in *Police Negotiating Board v Frances & Secretary of State for the Home Department* [2008] EWHC 1173 (Admin) at [42] (which referred to the 'classic' situation where the legislation denotes a discretion resting with the decision-maker) as affording "quite a wide discretion" for the decision-maker (Keene LJ), that is to say, in this case the Governing Body.

52. Mr Béar concedes that greater deference still would need to be paid to guidance which had, through consultation and Parliamentary sanction, the force of statutory guidance, citing, as the clearest example, the Code of Practice to the Mental Health Act 1983 (with its detailed provisions for the use of seclusion for mental patients and reviews) considered by the House of Lords in *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148: see [20] (Lord Bingham) and [68] (Lord Hope). Accordingly, the provisions of the code in *Munjaz* were properly entitled to:

> "… great weight… much more than mere advice which an addressee is free to follow or not as he chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so" [21] (Lord Bingham)

Lord Hope in *Munjaz* also opined that "cogent reasons" ([69]) should be advanced for not following what he described as "[s]tatutory guidance of this kind" ([68] ibid.), defining what he means by 'cogent' in this passage:

> "They must give cogent reasons if in any respect they decide not to follow [the guidance]. These reasons must be spelled out clearly, logically and convincingly" [68].

It was not enough, therefore, that a mere proper or legitimate reason be given; the reason had to be powerful or persuasive, the use of 'convincingly' adding significant colour, in my judgment, to the word 'cogent' in *Munjaz*.

53. By way of further example, I was taken by Mr. Béar to *R v Director of Passenger Rail Franchising, ex parte Save Our Railways* [1996] CLC 589, where, in relation to guidance relating to railway franchises, Bingham MR said:

> "An instruction is a direction with which the recipient must comply. Guidance is advice which the recipient should heed and respect; it should ordinarily be followed but need not if

> there are special reasons for not doing so." (emphasis by underlining added).

54. I further considered in this context (though it was not specifically cited by counsel) the decision of Collins J in *Royal Mail Group plc v Postal Services Commission* [2007] EWHC 1205 (Admin) in which he said (at [33]) (of statutory guidance issued by Parliament after public consultation, in which "[t]o a very large extent Parliament has indicated how [the regulator']s discretion should be exercised"):

> "… an obligation to have regard to a policy is not the same as an obligation to follow it. However, the context and statutory provisions in question are vitally important. A policy cannot normally be applied without the possibility of departure because it would mean that the body in question had fettered its discretion to act as the justice of a particular case demanded…. The obligation to have regard to the policy recognises that there may be circumstances when it does not have to be applied to the letter but in my view there must be very good reasons indeed for not applying it." (emphasis by underlining added).

55. Mr. Goudie QC and, separately, Mr. Moffett argued that Mr. Béar's reliance on Jackson J's judgment in *Governing Body of the London Oratory School (& others) v School's Adjudicator* (above) was misplaced given (a) that a more rigorous statutory admissions regime is now in place compared with ten years ago, providing a different context in which the issue is being considered, and (b) that Jackson J's comments were not in any event central to his decision in that dispute. While commenting on, and distinguishing, the many authorities which I have cited above, they made common cause in describing the "conventional law" in this respect as that articulated by Laws LJ in *R (Khatun) v Newham London Borough Council* [2005] QB 37 at [47] (a case concerning guidance issued pursuant to *Part VII* of the *Housing Act 1996*, to which the decision-maker must 'have regard', cited recently with approval in *Nzolameso v City of Westminster* [2015] UKSC 22):

> "… namely that respondents to such a circular must (a) take it into account and (b) if they decide to depart from it, give clear reasons for doing so".

56. Mr. Moffett developed his submission (reliant on *Khatun*) to propose that a "clear reason" would have to be a "good and proper" reason, and this would need to be demonstrated to justify departure from the Diocesan Guidance. Mr Goudie appeared to support that approach relying on the judgment of Wilson LJ (as he then was) in *R(G) v Lambeth Borough Council* [2012] PTSR 364 at [17] where, in relation to guidance issued under *section 7* of *LASSA 1970*, he said that:

> "In the absence of a considered decision that there is good reason to deviate from it, it *must* be followed" (emphasis in the original).

57. It is evident from the authorities cited above that when considering when and how a decision-maker can depart from guidance or code, the legislative background or

context of the document under consideration is important, and must be carefully considered (see also specifically on this point *R (Brown) v Secretary of State for Work & Pensions (& others)* [2009] PTSR 1506 at [118], and *Police Negotiating Board v Frances & Secretary of State for the Home Department* (above) at [42]). Significant characteristics of the Diocesan Guidance are that:

i) It has been published voluntarily, though is directly contemplated by the *2012 Regulations*;

ii) It has effect only regionally (i.e. by diocese) not nationally (albeit it is the work of, and covers the area of, three large Dioceses);

iii) Unlike the guidance in *Munjaz*, it has not been the subject of consultation, nor does it have Parliamentary authority;

iv) It does not enjoy the status of guidance published under *LASSA 1970*.

On the other hand:

v) It has been issued under the auspices of statute (the *SSFA 1998* and the *2012 Regulations*);

vi) As reflected in the Admissions Code (also published under statutory authority) it is designed to play an important role in providing informed advice on issues relevant to the composition of the pupil cohort attending faith-based schools;

vii) The Secretary of State relies on the involvement of relevant religious bodies generally to exercise influence on how admissions authorities set their faith-based admissions criteria.

As mentioned above ([18]), the scheme operated by the Admissions Code and the Diocesan Guidance seeks to strike a balance between autonomy for the Governing Bodies and objective fairness for the candidates. The Diocesan Guidance plays an important role in achieving that balance, and the views promulgated there are, in my judgment, entitled to proper respect given that:

viii) The named body (the Diocese) is well-placed to give a proper steer to schools' admission authorities on matters of religious observance in the context of admissions procedures;

And

ix) Adherence to the guidance is likely to promote a consistency of approach among faith-based schools of the same religion more generally, thereby reducing the potential emergence of a patchwork of schools where different school admissions criteria are applied; inconsistency would work to the disadvantage of candidates.

58. Having considered the jurisprudence discussed above, and paying particular attention to the factors relevant to this situation in [57] above, it seems to me that the 'conventional' approach summarised in *Khatun* (see [55] above) should be applied

when Governing Bodies 'have regard' to the Diocesan Guidance when "constructing faith-based oversubscription criteria" (para.1.38 Admissions Code). That is to say, Governing Bodies must take the Diocesan Guidance into account and if they decide to depart from it, they must have and give "clear reasons" for doing so. As indicated above, in a case of this kind, 'have regard to' involves a greater degree of consideration than merely to 'consult' (see [49] above) but plainly does not mean (and in this respect I agree with Jackson J in *Governing Body of the London Oratory School (& others) v School's Adjudicator* (above)) 'follow', or 'slavishly obey'. I would add that the "clear reasons" referred to by Laws LJ must in my judgment objectively be proper reasons, or legitimate reasons. While recognising that 'good' as a qualifying adjective has been widely used by many distinguished judges in previous authorities, I resist Mr. Moffett's invitation to use that adjective to describe 'reason', as 'good' in my judgment imports (or may import) a subjective element into the test, which would have the effect of reducing clarity and predictability. I further resist the use of the word 'cogent' to qualify 'reason'; a 'cogent' reason, if used in the sense of 'convincing' (see the quotations from *Munjaz* at [52] above), again has a strong and unwarranted subjective element, and probably raises the bar too high in this context. It seems to me that 'compelling' introduces a subjective ingredient which is stronger even than 'good' or 'cogent', and again places the bar far higher than is appropriate in this context.

59. In considering whether a Governing Body has 'had regard' to the Diocesan Guidance, it needs to demonstrate that it has considered and engaged with the Guidance, not ignored it, or merely paid lip-service to it. The reasons plainly do not need to be documented (see *Khatun*), but it is preferable if they are. The Governing Body must further have a proper evidential basis for its decision to depart from the Diocesan Guidance: *R (Calgin) v Enfield London Borough Council* [2005] EWHC 1716 (Admin), [2006] HLR 58, para 32; it must be clear from the decision that proper consideration has been given to the relevant matters required by the *SSFA 1998*, the Admissions Code and the Diocesan Guidance.

60. What amounts to a 'clear and proper' reason will depend on the individual circumstances of each case. Having heard argument and reviewed the authorities, it seems to me that it would be more difficult for an admissions authority to demonstrate a clear and proper / legitimate reason for departing from Diocesan Guidance where the proposed faith-based criteria:

    i) Fundamentally undermines the core or underlying principles of the Diocesan Guidance;

    ii) Is expressly forbidden by, or in conflict with, the Diocesan Guidance; or

    iii) Is substantially different in a material respect from the Diocesan Guidance.

61. As for the evaluation of the reasons for departing from the Guidance, in my judgment a Schools Adjudicator should:

> "…scrutinise the reasons given by the [addressee] for departure [from the Code] with the intensity which the importance and sensitivity of the subject matter requires" (per Lord Bingham in *Munjaz* at [21]).

Where an admission authority departs from the Diocesan Guidance in a significant or extensive way, then plainly the scrutiny which will be brought to bear upon its reasoning will be greater than if the departure is minimal. I do not consider that this calls for reasons of a different quality, or a 'sliding scale' as applied by the Adjudicator.

The Adjudicator's approach to the test

62. The Adjudicator approached this issue by stating (per Determination §44):

> "When the school responded to the objection, it pointed out that the effect of the requirement to "have regard to" the guidance is that it must be taken into account, but that it need not necessarily be followed. I agree. However, I do not think that this means that the guidance can be lightly disregarded. Guidance cannot be taken into account, but rejected, unless for a reason in my view. If no reason can be given, then either there is no reason not to accept the guidance or it has not been taken into account at all. If a reasoned decision not to follow guidance is taken, then in order for this to have been done on reasonable grounds, that reason would need to be a sufficient one".

63. Although not entirely in line with my formulation in [58] above, there is nothing objectionable about the Adjudicator's approach in the passage quoted immediately above, which considers 'reasonable' and 'sufficient' grounds for departure. However, the Adjudicator's formulation develops in a later section of his Determination, by adding two further ingredients to his test. First, he indicated that the reason for departing from the Diocesan Guidance should be a "good one" (§62). Then he introduced the need for the Governing Body to demonstrate a 'compelling' reason or something very close to it. Specifically, he declared that he did not find the School's reasoning for departing from the Diocesan Guidance "in any way compelling" (Determination §62). He went on to find that "wholesale" departure from the Guidance required "more compelling justification" than minor departure, repeating later that the reasons given by the Governing Body for departing from the Guidance "are not sufficiently compelling" (Determination §63).

64. These passages (at §44, §62, and §63), when read together, reveal that the Adjudicator was ostensibly looking not just for a 'clear and proper reason', but a 'compelling reason' (or something close to it) to warrant departure from the Diocesan Guidance. That, in my judgment, was to create too high a threshold to justify divergence from the guidance, more akin to the requirement described in *Munjaz*, which would be apposite for departure from 'statutory guidance', but not from a document of the status of this Diocesan Guidance.

65. The Adjudicator's erroneous approach to the relevant test vitiates his consequential findings on the adequacy of the School's reasons for departing from the Diocesan Guidance. He summarised those reasons as follows:

    i) That the School believed that "it did not have to have good reason for departing from Diocesan Guidance" (Determination §49 / §62);

ii) That the use of additional faith-based oversubscription criteria was beneficial in reducing the random element of selection, with the associated uncertainty for parents and candidates (Determination §49);

iii) "The existing admissions criteria "enhance the extent to which admissions reflect the intense and specific Catholicism which is at the heart of the School's mission"" (the quote embedded in this extract from the Determination is taken directly from the School's July 2013 response) (Determination §50);

iv) That there is a socio-economic justification for rejecting alternative over-subscription criteria (Determination §52).

66. It is not appropriate for me to address the Adjudicator's analysis of those reasons in any detail at this stage, save to observe briefly (and I hope helpfully) as follows:

i) In my judgment the School's approach to the relevant test was also flawed. I have therefore disposed of [65](i) above (see [58] above);

ii) In relation to [65](ii) the Adjudicator reasoned (Determination §49), rightly in my view, that reliance on random selection at tie-break stage could be reduced (at least to some extent) by the deployment of other oversubscription criteria which did not offend against Diocesan Guidance;

iii) It will be a matter for future determination whether the preservation and enhancement of the School's particular Catholic ethos ([65](iii)) represents a clear and proper/legitimate reason for departing from the Guidance; in this regard, I note that the Adjudicator did not appear to challenge the legitimacy of the dual objectives of the School ([7] above), Mr. Goudie indicating that the Adjudicator was 'prepared to assume' them in order to consider whether they were being lawfully achieved. Plainly, if the School can demonstrate that its unusually strong Catholic ethos, taken together with its pan-London mission, is a clear and proper reason for departing from the Guidance, then the relevant faith-based oversubscription criteria (either in a particular respect or generally) will survive. It follows that my comments on the School's incorporation of the request for parents' baptismal certificates (see [98-101] below) and provision of Catholic education (see [102-106] below) is dependent on a future finding that there is a clear and proper reason for departing from the Guidance in these respects;

iv) The Adjudicator's approach to socio-economic discrimination – [65](iv) above – is addressed as a separate topic below.

67. There will, in my judgment, need to be a further determination of the School's approach to the Diocesan Guidance, its compliance with para.1.38 of the Admissions Code, and the adequacy of the reasons for departure, applying the appropriate test. While Parliament has entrusted investigation and decision-making in this regard to a School's Adjudicator, Mr. Béar has invited me to consider exercising my own discretion not to remit the matter for fresh determination ("[t]he School has already faced a heavy burden and excessive period in dealing with the objection and two adjudications on it. At some point a line must be drawn"), and, presumably, to

exercise my own judgment. Mr. Goudie has not expressed a particular view on this point at this stage. I shall accordingly invite further submissions. If the Court is to determine this issue, consideration may need to be given to inviting the Archdiocese of Westminster to make representations, if it wishes to do so, as an interested party.

(2) Socio-economic discrimination

68. Within the Adjudicator's finding that the School had offered 'no compelling reason' for departure from the Admissions Code is his conclusion that the School's faith-based oversubscription criteria unfairly disadvantaged less well-off families, contrary to the Admission Code's requirement of fairness to social and economic groups.

69. Para.1.8 of the Admissions Code provides that admission authorities must ensure that their arrangements will not "disadvantage unfairly", whether directly or indirectly, a child from a particular social or racial group. The Adjudicator concluded that the oversubscription criteria of the School in 2014 and 2015 had the effect of selecting candidates "it would seem by post-code" (Determination §61), producing "at the very least a degree of social selection" (Determination §62), adding that:

> "… the evidence which I have seen also leads me to believe that the arrangements unfairly disadvantage Catholic families who are less well off, in contravention of paragraph 1.8 of the Code." (Determination §63).

70. The School was unsurprisingly anxious to challenge these particular findings. While Mr. Goudie conceded that the Adjudicator's reference to 'post-code' selection was "infelicitous", the Adjudicator sought to defend these conclusions within these proceedings. In the circumstances, it is necessary to follow the sequence of events which gave rise to consideration of this issue, examine the Adjudicator's chain of reasoning, and assess whether his conclusion can stand.

71. The issue of the socio-economic profile of the School was initially raised as part of the objection by the BHA on 12 July 2013. It was a short-lived complaint, as the BHA withdrew it within days, conceding that "discussion of socio-economic selection is not relevant in the eyes of the Code" (23 July 2013). When Dr. Slater was first appointed some months later (April 2014), he raised a number of issues of concern with the School in correspondence (see [41] above); socio-economic discrimination was not one of them. On 9 May 2014, the BHA wrote to the Schools Adjudicator seeking to resurrect the issue, arguing that the Catholic Service criterion was "a cause of the socio-economic selection", and was therefore discriminatory. At the meeting which then followed on the 13 May 2014, the issue of socio-economic selection was raised; the notes of that meeting record different accounts of what was actually said, but it is sufficiently clear (and the Adjudicator's witness statement confirms this) that he resolved not to consider this as a discrete and "new" objection, but would consider the effect of the oversubscription criteria on the socio-economic composition of the school "in the round". The notes of the meeting are consistent in reflecting that there was no substantive discussion about this issue.

72. It is reasonably clear from the Determination that the Adjudicator proceeded to consider this issue in the belief that the School was actively advancing its high level of diversity as "justification" (Determination §52) for its faith-based oversubscription

criteria. In fact, this was a misapprehension and I am satisfied that the School was not doing this, but was in fact seeking to demonstrate that the effect of introducing other forms of oversubscription criteria, namely geography, was or could be socio-economically *disadvantageous*, as it favoured white middle class Catholic locals of London SW6.

73. In forming his views about this issue (see Determination §53), the Adjudicator drew upon the academic evidence which had been "cited" by the BHA (the BHA had advanced a case based on 'Academic Literature' in its 9 May 2014 submission) and to the School's general submissions. Significantly, he embarked on his own research of the socio-economic profile of the locality, and of the schools in this area; he did so without reference to the School. The reasoning and conclusions on this aspect were largely based upon data he located in the Department for Education publication 'Schools, Pupils and their Characteristics', and the annual School's census. In formulating his views, he considered the ethnic mix of the school, and the number of pupils eligible for free school meals at the School (as an indicator of social disadvantage), and compared this with data for other Catholic schools in the vicinity.

74. Without reverting to or seeking clarification from the School, the Adjudicator speculated about the School's statements about its level of diversity compared with the immediate locality ("Perhaps the school considers that it is justified in making such a statement because…": Determination §55); he expressed himself "not convinced" that the School could claim a "high level of ethnic diversity in real terms" (ibid.), and tentatively dismissed the School's claim that its ethnic composition was even representative of that of the Catholic children attending schools in the part of London in which it is located (Determination §57). His conclusions were drawn without any apparent recognition (there is certainly nothing to this effect in the report) of the actual locality of the comparator schools, or their admissions policies. He rightly considered, on the limited information on which he worked, that the data "do not present a simple picture" (Determination §60).

75. Having accepted (probably rightly in my judgment) the existence of some inherent social selection of school candidates within the Catholic population as a whole (Determination §60), he nonetheless concluded that "there is good reason to believe that the admission arrangements" of the School "have the effect of acting to produce at the very least a degree of social selection" (Determination §62), and an unfair "disadvantage" to "Catholic families who are less well off" (§63). This translated into a finding, at the conclusion of the report, that the School's admission arrangements "disadvantage unfairly children from a particular social group" (see Determination §133(v)).

76. As it happens, the data relied on by the School showed that six of the eight schools with similarly high percentages of Catholic pupils had similar levels of pupils entitled to free school meals to the School, yet the Adjudicator's conclusion (that the data "tended to support the existence of some level of social selection") was used to strike out the School's faith-based oversubscription criteria. The Adjudicator further did not specifically conclude that the faith-based oversubscription criteria was the cause of the disadvantage to the social group, and significantly did not go on to find (as he was required to do to demonstrate breach of para.1.8 of the Admissions Code) that if such disadvantage existed, that the criteria set by the School was itself creating that

'unfairness'. A dual finding (i.e. on disadvantage and unfairness) is critical; failure to make a specific finding on the 'unfairness' element caused the Court to quash a similar decision in *R (Governing Body of Drayton Manor School) v School's Adjudicator* [2009] ELR 127 (see [40-41]). It follows that this finding of the Adjudicator cannot stand, given his flawed and/or deficient reasoning.

77. There is a second challenge to the Adjudicator's approach in this regard.

78. The Adjudicator did not inform the School that he was considering the data from the Department for Education publication referred to above. He did not inform the Governing Body that he would be drawing his conclusions very considerably (if not exclusively) from material that they had not seen, nor, it follows, did he ask for their comments on it. The Adjudicator did not seek to clarify with the School its statement about comparative diversity, even though he evidently speculated about its meaning. The School considers that the process by which this conclusion was reached was unfair. I agree.

79. While the Adjudicator was entitled to consider the issue of socio-economic impact "in the round", particularly given the terms of para.1.8 of the Admissions Code, in doing so, his approach had to be 'fair'. That is common ground in this case. Fairness in this situation is as it is understood in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560 (Lord Mustill):

> "1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. <u>What fairness demands is dependent on the context of the decision,</u> and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. <u>Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification</u>; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests <u>fairness will very often require that he is informed of the gist of the case which he has to answer</u>." (emphasis by underlining added)

80. It is not a proper response to the last of these general points in *Doody* (as Mr Goudie urged me) that the material relied on was in the public domain, and that there was not, therefore, the same onus of disclosure on the Adjudicator as if it were only privately

available evidence on which he wished to rely. This argument significantly misses the point that a person who may be subject to adverse findings is surely entitled to know (a) what publicly available information is actually going to be relied on or at least the gist of it, and (b) the manner in which it is to be used (i.e. the reasoning of the Adjudicator).

81. Mr. Goudie further argued that as the Adjudicator's investigation was an essentially inquisitorial process, the same duty of prior disclosure of material did not arise (compared with an adversarial engagement), particularly as the Adjudicator is an 'expert' in the field of education provision. I do not agree with either of these submissions. Although essentially inquisitorial in nature, the Adjudicator's role is in part a fact-finding one, and he is a decision-maker; fairness demands that, when interrogating those facts on which conclusions will be based – particularly where on one construction of those facts adverse findings are likely to be made – the School should be given the opportunity to comment. In this respect attention was drawn to *Mahon v Air New Zealand* [1984] AC 808; while this was a materially different case on its facts, counsel on both sides of this claim sought support from its judgments. What is evident from the speech of Lord Diplock is that the principles of natural justice apply just as much to an essentially investigative process as it does to an adversarial process (see 814E-815D, 820F-821C), including the principle that the investigator:

> "… must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person … whose interests (including in that term career or reputation) may be adversely affected by it may wish to place before him or would have so wished if he had been aware of the risk of the finding being made. …
>
> ... any person ... who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result". [p.820-821]

82. The Adjudicator's expertise in the field of education is undoubted; he plainly has considerable knowledge and experience. This factor does not address, let alone mitigate, the deficiencies of this process; in this respect the Supreme Court's decision in *AH (Sudan) v SSHD* [2007] UKHL 49, [2008] 1 AC 678 does not help him. He was obliged to deploy his knowledge and expertise fairly.

83. The School has submitted to me, with justification, that it would have wished to make representations to the Adjudicator about the socio-economic mix of the school, and about the socio-economic mix of the comparator schools. It would have wished to raise, for the Adjudicator's consideration, the legitimate argument (in my view) that families who seek the particular religious tradition of the School, and who are impressed by its reputation for Latin teaching and traditional church music, may be in

a different socio-economic group from those who aspire to a different form of religious and/or academic education. The Adjudicator is not able, in my judgment, to demonstrate that he would inevitably have reached the same decision had he had the benefit of such representations. Indeed, it seems distinctly possible to me that the School's comments may well have made a difference.

84. My view is that the School had a right to expect to be able to comment on the material; that right is a strong one. I cannot conclude that the representations would have made no difference.

85. The Adjudicator's conclusions on this aspect plainly adversely affected the school. I am satisfied that the Adjudicator reached this conclusion by a mix of flawed reasoning and unfair process. In the circumstances, I am satisfied that this finding must be quashed.

(3) Catholic Service

86. The Adjudicator concluded that the 'Catholic Service' criterion ([23](v)) was not permitted under the Admissions Code, offending against para.1.9(i) (see Determination §36); he declined to state whether this criterion also breached para.1.9(e) – offending against the prohibition on providing 'practical or financial help'. Para.1.9(i) prohibits the prioritisation of children on the basis of 'hobbies or activities', but exceptionally permits schools which have been designated as having a religious character to "take account of religious activities, as laid out by the body or person representing the religion or religious denomination".

87. Illustrations of Catholic Service are provided in the School's admissions application as including:

> "Assisting in the liturgy; for example by reading, singing in the choir or playing an instrument, altar serving, flower arranging.
>
> Assisting in parish pastoral work; by example by visiting those in need, participating in parish groups such as St Vincent de Paul, Catholic Women's League, Union of Catholic mothers, Legion of Mary or similar prayer groups or societies.
>
> Examples of involvement in wider Catholic Church activities: Assisting in or membership of organisations or groups; Voluntary work by visiting or helping the sick, housebound or disadvantaged."

The Adjudicator records at §35 of his Determination the School's case that the activities credited under the 'Catholic Service' criterion are "generally required by Canon Law".

88. The Diocesan Guidance does not envisage Catholic Service as being one of the oversubscription criteria. Quite the contrary, it specifically prohibits schools from "making judgments on pastoral matters such as Catholic practice" (see [32] above:

[A23] of the Guidance), permitting only "frequency of attendance at Mass" as a relevant oversubscription factor. In explanatory documents issued by the Diocese following amendments to the Guidance (seen by the Adjudicator and referred to at Determination §35), the Diocese re-inforces the point that Catholic Service criterion is "contrary to Diocesan requirements and the school has been requested on a number of occasions to remove it."

89. The School maintained before the Adjudicator, as it has before me, that because 'Catholic Service' is embedded in Catholic teaching and in Canon Law, both of which are actively promoted by the Archdiocese of Westminster and referred to in the Diocesan Guidance, it can justifiably incorporate a Catholic Service component into its admissions criteria. It is, in this way, it argues, a "religious activit[y], as laid out by the body or person representing the religion or religious denomination" (see [11]/[18]/[29] above). Mr Béar argues that the 'general principles' of the Diocesan Guidance and the 'acceptable' criteria in the Guidance's concluding Summary (see [33] above) can and should be widely interpreted, to incorporate fully the tenets of Canon Law.

90. Para.1.38 and para.1.9(i) of the Admissions Code address different issues; whereas the former (which concerns faith-based oversubscription criteria generally) permits the schools admissions authority to depart from the Diocesan Guidance (as I find, only for clear and proper reason), the latter (which prohibits preferences being given to candidates on account of their hobbies or activities, save for faith-based activities of the candidates or parents who are applying to faith-based schools) does not. The footnote to para.1.9(i) explicitly affords no room for the conclusion that the draftsman intended that the religious activities exempted could be wider than those 'laid out' by the relevant religious body. The Adjudicator rightly describes these distinctions at §43 of the Determination.

91. In my judgment, para.1.9(i) does not exempt forms of activity which are not specifically 'laid out' or specified by the religious body. Mr Goudie submitted that 'laid out' means 'approved or deemed as necessary by the religious authority so charged with that responsibility within the Regulations, not any other form of religious authority' (Skeleton Argument §108). I concur with that general view, but conclude that the phrase "laid out" means specifically 'laid out' in schools admissions guidance published by the religious authority – i.e. 'specifically provided for in or authorised by' such guidance.

92. I agree with the Adjudicator that the language of this subparagraph does not give of the much wider interpretation (i.e. including the tenets of Canon law) which was urged on the Court by Mr. Béar; to follow the School's approach would open up the exception far wider than I believe was intended. The Adjudicator summarises the position thus:

> "… none of the activities used by the School have been <u>laid out</u> by it as the relevant body for the purposes of paragraph 1.9(i), since the use of any such activities has been specifically forbidden." (Determination §36) (emphasis by underlining added).

In the circumstances, the Adjudicator was right to conclude that it is not permissible to include 'Catholic Service' as one of the faith-based oversubscription criteria, and the School's challenge to the Adjudicator's conclusion in this regard fails.

(4) Catholicity: Parent or Parents

93. The Adjudicator found that the School's admissions procedures failed the test of 'fairness' contrary to para.1.8 of the Admissions Code (i.e. the requirement to be "reasonable, clear, objective, procedurally fair") in failing to make sufficiently clear that a single Catholic parent would be treated no less favourably than two married Catholic parents demonstrating the same level of Catholic observance: see Determination §64.

94. The Adjudicator rightly identified that if (i) one of two married parents was a "lapsed" Catholic, a lower rating would be achieved for them as a couple than if both parents were fully observant (i.e. conscientious attendees at Mass), and that (ii) if only one parent is in fact Catholic, then only that parent's Catholicity will be considered (with no account taken of the fact that the other parent is not Catholic). However, the Adjudicator wrongly observed that non-attendance by one parent because of "other commitments" would not be taken into account by the School; there is specific provision for this in the Religious Inquiry Form.

95. The Adjudicator's main complaint was that repeated reference to "parents" in the Religious Inquiry Form and the accompanying Admissions Arrangements guide may well discourage some parents (i.e. single parents) from applying to the School, leading to indirect and unfair discrimination against single parent families (Determination §65). The Admission Arrangement notes for 2014 published by the School spells out clearly on its face that:

> "In these arrangements, "parent" means the parent or parents, or guardian, of the child (candidate) for whom a place at [the School] is being sought. Where the plural "parents" is used, it refers both to the mother and the father of the candidate or to the guardian of the candidate."

96. The Admissions Arrangements guide to support the 2015 admissions was modified by incorporation of the words "… (or to one parent if the child resides with only one of the parents) …" after "… the mother and the father of the candidate …" in the second sentence. The Adjudicator draws no distinction between the different terminologies of the notes to support the admission arrangements published in the sequential years (2014-2015).

97. While the Adjudicator may have been entitled to the view that the 2014 Admissions Arrangements guide lacked sufficient clarity, in my judgment, his conclusion cannot stand in relation to the 2015 process. It is notable that he does not make any reference in his Determination to this 'definition' section, which appears prominently early in both sets of Admissions Arrangements notes. In this regard he has in my judgment plainly "neglected to take into account matters which [he] ought to take into account", or has otherwise reached a conclusion which is unreasonable in a *Wednesbury* sense (*Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223) and his conclusion cannot stand.

(5) Request for parents' baptismal certificates

98. In order to satisfy itself of the Catholic faith of the parent or parents of the candidates, the School requests formal evidence by production of the parents' baptismal certificate. The School's reason is that a parents' attendance at Mass (and a Priest's certificate to that effect) would not be sufficient to establish the parents' Catholicity; indeed it may not demonstrate Catholicity at all, given that non-Catholics may attend Catholic Mass. Although the Diocesan Guidance contemplates attendance at Mass as the qualifying criteria (to which the School must of course "have regard"), specifically the Guidance provides ([A12]) that:

> "For the purposes of admission criteria, the term 'Catholic' is taken to denote a baptised person who is in full communion with the Catholic Church, that is to say, a member of any Catholic Church that is in full communion with the See of Rome. Membership of a Catholic Church is gained by baptism in that Church. It can also be gained by other baptised Christians who are subsequently received into the Catholic Church." (emphasis by underlining added)

And that:

> "Membership of a Catholic Church is normally shown by a certificate of baptism from a Catholic Church or a certificate of reception into the Catholic Church." ([A15]) (emphasis by underlining added).

Which is itself supported by:

> "Governing bodies may not request certificates or references from priests about sacraments other than baptism." ([A33]) (emphasis by underlining added).

99. The Adjudicator concluded that the request for the parents' baptismal certificate was "forbidden" by para.2.4(a) of the Admissions Code (see [18] above), and "offends against" its general prohibition (ibid.). Para.2.4(a) prohibits requests for information such as 'maiden names', which would be likely to be revealed on mother's baptismal certificates. Mr Goudie contended that a request for documentation which may even incidentally reveal information proscribed by para.2.4 would be impermissible.

100. Mr Béar, supported by Mr Moffett, contended that the Adjudicator has wrongly, and too narrowly, interpreted para.2.4, arguing that where an admissions authority sets legitimate oversubscription criteria, compliance with which can only be demonstrated by the production of a document which incidentally reveals one or more of the types of information identified in para.2.4, the Admissions Code does not prohibit the admission authority from requesting that document.

101. In my judgment, para.2.4 is designed to support the prohibition on illegitimate oversubscription criteria; as Mr. Moffett contended, para.2.4 is not to be read in such a way that would place a Governing Body in the position of being unable to apply a

legitimate oversubscription criterion in practice just because it was prevented from requiring the necessary evidence. In the circumstances, I conclude that the Adjudicator's conclusion in this regard was erroneous, and cannot stand.

(6) Previous Catholic education

102. The Adjudicator found (Determination §82-83) that the School contravened the Admissions Code in both years (2014/2015) by giving applicants priority on the basis of having attended a previous Catholic school. In 2014, the School's admission criteria requested the following information:

> "Whether the candidate has attended the London Oratory Primary School or any other Catholic School for the whole of their primary or secondary education, or the candidate's parent(s) have fulfilled their obligation to ensure a Catholic education for their child.

The wording in the 2015 admission form (for Year 3 candidates) was amended to read:

> "Whether the candidate's parent(s) have fulfilled their obligations to ensure a Catholic education for their child. This is in accordance with Canon Law, canon 798, … This should be endorsed by evidence such as attendance at a Catholic school, parish catechism classes over primary years, or other alternative provision."

For entry into first form in 2015 (for Year 7 candidates) the wording was as follows:

> "Whether the candidate's parent(s) have fulfilled their obligation to ensure a Catholic education for their child. This is in accordance with Canon Law, canon 798… This should be endorsed by evidence such as attendance at any Catholic School named in the Westminster, Southwark or Brentwood pages of the Catholic directory website… ("the named feeder schools"), parish catechism classes over primary years or other alternative provision."

103. The Adjudicator's complaint is two-fold:

i) That admission based on attendance at a previous Catholic School is specifically prohibited by para.1.9(b) of the Admissions Code (see [18] above);

And that

ii) In 2015, the identification of numerous schools ("any Catholic School named in the Westminster, Southwark or Brentwood pages of the Catholic directory website") as 'feeder' schools cannot have been within the contemplation of para.1.15 of the Admissions Code (see [18] above). Para.1.15 provides:

> "Admission authorities may wish to name a primary or middle school as a feeder school. The selection of a feeder school or schools as an oversubscription criteria must be transparent and made on reasonable grounds"

The Adjudicator opined that to fall within para.1.15 "specific and active curricular or other links between the primary school and the secondary school" would need to be demonstrated "… where continuity throughout a child's period of schooling is provided through such collaborations…".

104. The School justifies its approach to preserving this criterion by:

i) Pointing out that the primary information sought from the candidate's parent(s) is *whether* the candidate has attended a Catholic School (not *which* school), even though the name of the school is requested as proof of that education;

ii) That the Adjudicator failed to consider the wording of this criterion in its entirety; the School was equally explicitly interested in whether the candidate may have received a Catholic education otherwise than in a Catholic school;

iii) Indeed, the Adjudicator's apparent reliance on the recorded view of the Diocese (that "there may be good reasons for a child not being able to secure a place at a Catholic primary school") overlooked the fact that the School had provided separately for compliance with this criterion by evidencing attendance at Parish catechism classes;

iv) That seeking information about education which happened to reveal the name of any previous school was not the same as "taking into account" the "previous school attended" (para.1.9(b));

v) That the Department for Education had suggested that the School name London Catholic Schools as feeder schools in a schedule to its admission arrangement for Year 7 candidates ("it can have a long schedule of every Catholic Primary and Junior in London if it wishes, or a more focused list of local, or priority feeders, but feeders must be named);

vi) That it is incumbent on parents to ensure a Catholic education for their children within the tenets of Canon Law.

105. The wording of the School's Catholic education criteria in 2015 for Year 7 in my judgment makes a mockery of the 'feeder school' provision of para.1.15 of the Admissions Code, although I accept that an approach to similar effect was surprisingly suggested by the Department for Education. I agree with the Adjudicator that it is "not possible for [the School] to have such active and specific links with the schools it has named", and his conclusion that "it has not named feeder schools on reasonable grounds" is not in the circumstances challengeable on *Wednesbury* grounds.

106. That said, there is no prohibition within the Admissions Code (para.1.9(b)) upon a Governing Body asking the name of previous schools; what *is* prohibited is "taking

into account" the previous school in considering admission. The School maintains that it has not 'taken into account' the identity of any specific previous schools of the candidates, and the Adjudicator has not pointed to any evidence that it has. Specifically in relation to (i) the 2014 Admissions process, and (ii) the process for admissions into Year 3 in 2015, I therefore consider that (subject to the School being able to justify departure from the Diocesan Guidance on the construction of its faith-based oversubscription criteria) this criterion was lawful, and the Adjudicator was wrong, and/or acted unreasonably, in striking it out.

(7) Choristers

107. The School's Admission Arrangements forms for both 2014 and 2015 contain the following information about entry to Junior House:

> "Twenty boys will be admitted to the Junior House at the age of seven for a specialist musical education. Of the twenty places, ten may be offered to choristers …
>
> Candidates will be tested for general ability and will be tested aurally and orally for general musical aptitude and potential, and, in the case of a chorister, for choral aptitude and suitability as a chorister. The purpose of the audition is to assess the candidate's musical potential and suitability as a chorister. The purpose of the audition is to assess the candidate's musical potential and suitability for a specialist musical education at the School. A candidate whose application for a place as a chorister is unsuccessful, may still be considered for a place as a non-chorister."

108. The phrase "may be offered to choristers" within the School's admission's arrangements (above) was found, by the Adjudicator, not to be sufficiently clear, and was therefore in breach of para.14 of the introduction to the Admissions Code (see [17](ii) above), and para.1.8 (ibid) ([18] above). He was concerned that the wording "implies that boys must already be choristers to be considered for a place" (see Determination §102).

109. In my judgment, the Adjudicator erred in concluding that any unclear wording in this regard constitutes a breach of para.1.8 of the Admissions Code; para.1.8 only applies to the oversubscription criteria.

110. That said, while I consider that the admissions form in this respect is tolerably clear, I recognise that there is scope for potential misunderstanding, which a modest amendment to the form would correct (i.e. add the word 'potential' or 'would-be' before 'choristers'). I would not necessarily have concluded that the passage offends against para.14 of the introduction to the Admissions Code, but I do not consider that the conclusion reached by the Adjudicator is so *Wednesbury* unreasonable or unsupportable ("so unreasonable that no reasonable [adjudicator] could ever have come to it") that his decision in this respect should be quashed.

(8) Statement of 'Medical and social need' on Religious Inquiry Form

111. Parents or guardians provide the information relevant to the oversubscription criteria on the School's Religious Inquiry Form (which is designed to accompany the application form). Immediately above the standard declaration (and place for signature), the following text is set out in the 2014 form:

> "If there is a medical or social need, which may need to be considered in regard to Catholic practice and meeting the oversubscription criteria, please provide details and attach evidence". (emphasis by underlining added).

In the 2015 version of the form the words underlined above have been substituted by the words "impacts upon" (i.e. 'which impacts upon the oversubscription criteria…')

112. The Adjudicator found that while the wording of the 2015 form was "clearer" than in the previous year, in both forms it was insufficiently clear, and therefore in breach of para.1.8 of the Code. Specifically he found that in neither form was it apparent "how such information would be used", or to what extent attribution of further points may arise, continuing:

> "Neither do the arrangements make clear how these needs are defined or give details about the kinds of supporting evidence that would be required, as stipulated for the employment of medical or social need as an oversubscription criterion in paragraph 1.16 of the Code. Both are therefore unclear and fail to meet what paragraph 1.8 of the Code requires" (Determination §122).

113. Mr Goudie contended that whether someone falls within 'medical or social need' as an oversubscription criterion (which is acknowledged as legitimate by the Code – see para.1.16), or wishes to claim it as an exception to the oversubscription criteria, the effect is the same in respect of admission, and that the information which the School should provide to parents should be evidenced in a similar manner. Mr Goudie echoed the Adjudicator's proposal that to address this lack of clarity, the School could/should have included pointers in the form in relation to the ways in which this could be demonstrated (e.g. by a letter from a doctor or social worker).

114. While there is a danger that by giving examples these then become the only recognised way of proving the exception, in general terms I cannot say that the Adjudicator's approach or his conclusion is unreasonable or irrational in the *Wednesbury* sense.

(9) Parents' signature(s)

115. The Adjudicator found that the requirement for a signature on the Religious Inquiry Form in 2014 from both parents violated para.2.4(e) of the Admissions Code (above) which prohibits schools from asking for "both" parents to sign the form. The 2015 form had been amended to include "and/or" between mother/guardian "and/or" father/guardian, but the Adjudicator remained of the view that this "falls short" of what the Code requires, commenting:

> "If space is provided for two parents to sign, my belief is that even if both signatures are not required most parents would be loathe not to do so, believing that this would convey a negative message to the school."

116. Para.2.4(e) of the Code prohibits the School from asking or using supplementary forms which ask for "both parents to sign the form, or for the child to complete the form". While I acknowledge that the Code does not render it impermissible to allow both parents to sign the form, I do not consider that the Adjudicator could legitimately be criticised for concluding that the 2014 form violated para.2.4(e).

117. His critique of the 2015 form in this regard verges on the pedantic; however his conclusion that the form "also falls short of what the Code requires" is not "so unreasonable that no reasonable [adjudicator] could ever have come to it" (per Lord Greene MR in *Wednesbury*), and the School's challenge to this finding therefore fails.

(10) Consultation on admissions criteria

118. When changes are proposed to admission arrangements for the following academic year, all admission authorities must consult upon them (*section 88C(2)* of the *SSFA 1998* and *Chapter 3* of the *2012 Regulations*); where the admission arrangements have not changed from the previous year, there is no such obligation. *Section 88C(2)* provides:

> "The admission authority must, before determining the admission arrangements that are to apply for a year, carry out such consultation about the arrangements as may be prescribed."

Statute provides that the consultation must last for a minimum of 8 weeks and must take place between 1 November and 1 March in the determination year (*Regulation 17* of the *2012 Regulations*).

119. *Regulation 12* of the *2012 Regulations* prescribes the classes of '[p]ersons who must be consulted' about proposed admission arrangements for a school. That group identifies six categories, one of which is "parents of children between the ages of two and eighteen who are resident in the relevant area" (per *Regulation 12(2)(d)* of the *2012 Regulations*; note that 'relevant area' is defined in *regulation 2(2)* of the *2012 Regulations* and *section 88F(4)* of the *SSFA 1998* as "the area of the local authority in which the school in question is situated"; the list of categories of persons to be consulted is also to be found in para.1.44 of the Admissions Code).

120. *Regulation 16(1)* of the *2012 Regulations* provides (under the title 'Manner of Consultation'):

> "(1) During a period of consultation an admission authority must—
>
> (a) publish their proposed admission arrangements on their website (if they have one), together with details of the person within the admission authority to whom comments may be sent, for the duration of the

> consultation held by virtue of regulation 12(1) and (2), and
> (b) send upon request to each person who must be consulted by virtue of sub-paragraphs (a) to (f) of regulation 12(2) a copy of the proposed admission arrangements, inviting their comments."

This is repeated in para.1.43-1.46 of the Admissions Code.

121. The School contended that *Regulation 16* prescribes the only required manner for consultation on its admissions criteria; it does not specify a minimum 'manner' of consultation. It was drawn to my attention that *Regulation 16* of the *2012 Regulations* had modified its predecessor (*Regulation 16* of the *School Admissions (Admission Arrangements) (England) Regulations 2008*) by removing the requirement to consult by publishing the relevant information (i.e. about where a copy of the proposed admission arrangements may be obtained) in a newspaper (*Regulation 16(1)(c)* ibid); it made other minor changes too. Notably, the School argued, *Regulation 16* of the *2012 Regulations* contains no language which suggests that the prescribed modes of consultation are additional to others, and there is no general provision for consultation by other means so as to ensure effective notification to those listed in *Regulation 12*. It further argued that the title of the regulation ('Manner of Consultation') would be misleading if it was not intended to convey the complete 'manner' in which consultation should occur.

122. The Adjudicator found that the School had failed to comply with the duty to consult on its admissions criteria (Determination §127-130). The Adjudicator specifically concluded (Determination §129/130):

> "I have been unable to find any suggestion in the correspondence that the addressees [of the e-mails in which changes to the admissions procedure were notified] should bring the school's proposed arrangements to the attention of the parents of children in the required age range. The school has provided me with no evidence either of any newspaper or similar advertisements which would have had this effect. In summary I have seen nothing which I can say constitutes a meaningful attempt to bring the school's proposed arrangements to the attention of the group in question…. I have come to the view that the school did not meet the requirement of paragraph 1.44(a) of the Code [i.e. parents of children aged between two and eighteen] concerning consultation… "

123. If consultation is embarked upon it must be carried out properly (per *R v North & East Devon HA ex parte Coughlan* [1999] EWCA 1871, per Lord Woolf MR at [108]):

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those

> consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

A statutory duty to consult, as here, can be complemented by the common law upon a public authority to act fairly: "irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted" (per Lord Wilson in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56 at [23]). Consultation is for the benefit of the decision-maker (to be better informed and thus enhance the quality of the decision-making) as much as for the consultee (to have the chance to comment on what is proposed).

124. The School rejected the Adjudicator's conclusion that it had made no "meaningful attempt to bring the school's proposed arrangements to the attention of the group in question" (the "group in question" being the parents of children at the younger end of the 2-18 age range: *Regulation 12(2)(d)* of the *2012 Regulations*). Mr. Béar pointed to the fact that the School has in fact conventionally gone beyond what was required by *Regulation 16*, consulting on its admissions criteria in a number of ways: by posting the information on the website, by sending (by e-mail) the proposed arrangements to all primary and secondary schools in the area of its own local authority "and an extensive number of similar Catholic schools outside our local authority". It further consults with sixteen local authority directors of education / child services and with the Diocese (8 July 2013), and notifies existing parents in a weekly e-mail bulletin. One lone voice among the School's Governing Body had expressed disquiet about the effectiveness of consultation in 2013, but had not attracted support for his concerns from others.

125. Mr. Goudie replied that if the School's construction of *Regulation 16* were correct, there would be no need to identify the persons for whom consultation was directed in *Regulation 12*. I agree. It also seems to me that were *Regulation 16* to represent the entire 'manner' of required consultation, it would not have opened with the words "During a period of consultation…", but would have been more explicit in prescribing that what followed in the regulation represented the only (and necessarily limited) mode of consultation.

126. Moreover, *Regulation 16* clearly contemplates that a school may not have a website (i.e. "website (if they have one)…"); if a school does not have a website (for example those from the Orthodox Jewish community may not), this would mean, on the School's construction of the statute and the regulations, that there could or would be no consultation at all. That cannot be right. In my judgment, *Regulation 16* is not intended to describe the manner of consultation exhaustively; it is designed to ensure that where the School has a website, the information is presented there. This is important and indeed sensible, given the universality of the worldwide web as a common resource for reference and information, significantly overtaking print media in that respect. It seems to me that publication on a website is intended to achieve to some extent the required 'reach' to those persons identified in *Regulation 12* (including young parents), but that is not in my judgment the limit of the legitimate

expectation of consultation in this context. Were it otherwise, the "common law duty of procedural fairness" (per Lord Wilson) would not be met.

127. While I do not agree with the School's construction of *Regulation 16* of the *2012 Regulations*, I nonetheless find it impossible to support the Adjudicator's conclusion that the School had shown "no evidence … which … constitutes a meaningful attempt to bring the school's proposed arrangements to the attention of the group in question". It follows that the Adjudicator's conclusions in this respect cannot stand. I was advised that the School has in fact taken additional steps in determining the 2016 admission arrangements (over and above those mentioned in [124] above) to advertise the change in its admissions processes by placing notices in parish magazines. These additional measures are in my judgment entirely apposite to meet the Adjudicator's concerns.

Conclusion

128. It is highly regrettable that the two investigations undertaken in relation to this School since May 2013 have now been shown in material respects to be flawed. While I believe that the Adjudicator has, in the main, endeavoured to fulfil his responsibilities conscientiously for the long-term benefit of the School, the candidates and their parents, his approach to his task in the specific respects set out in [4] above have in my judgment been shown to be unlawful and/or unreasonable, and cannot stand. This will be of little comfort to the School which has, I am sure, found this process extremely challenging.

129. For reasons set out in particular at [67] above, I fear that my conclusions do not necessarily signal the end of this lengthy process of investigation, which has already been on-going for far too long.

130. That is my judgment.