



DETERMINATION

Case reference: ADA 2852

Referrer: By order of the High Court of Justice,
Administrative Court

Admission Authority: The academy trust for The London Oratory
School

Date of decision: 19 June 2015

Determination

In accordance with section 88I(5) of the School Standards and Framework Act 1998, I determine that aspects of the admission arrangements for The London Oratory School for entry to the school in September 2014 and September 2015 do not conform with the requirements relating to admission arrangements.

By virtue of section 88K(2) the adjudicator's decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements within two months.

The remittal

1. Following a hearing in the High Court on 24-26 March 2015, a subsequent hearing on 17 April 2015, with judgments handed down on 17 and 29 April, a court order was made on 21 April 2015 and sealed on 27 April, remitting for consideration by the Adjudicator the admission arrangements for September 2014 (the 2014 arrangements) and for September 2015 (the 2015 arrangements) for The London Oratory School (the school)¹. The remittal concerns the extent to which the school had regard to diocesan guidance (the guidance) in some aspects of the 2014 and 2015 arrangements. The school is a Catholic academy school for pupils aged seven to 18 located in the London Borough of Hammersmith and Fulham, the local authority (the LA) and in the Archdiocese of Westminster (the diocese).

¹ The order (§2) refers to "*the School's admission arrangements for entry in 2013/14 and 2014/15*"; this is a typographical error, and all parties are in agreement that the arrangements to which this determination applies are those for 2014/15 and 2015/16.

Jurisdiction

2. The terms of the academy agreement between the academy trust of The London Oratory School and the Secretary of State for Education require that the admissions policy and arrangements for an academy school are in accordance with admissions law as it applies to maintained schools. The 2014 arrangements were determined on 4 March 2013 and the 2015 arrangements on 3 March 2014 by the governing body which, as the academy trust, is the admission authority for the school. I am satisfied that this matter has been properly remitted to me, the judge, Mr Justice Cobb, having had regard to the powers vested by statute and under the Civil Procedure Rules 1998, and that in accordance with section 88I(5) of the School Standards and Framework Act 1998 (the Act) the remittal is within my jurisdiction.

Procedure

3. In considering this matter I have had regard to all relevant legislation and the School Admissions Code (the Code). At the time the arrangements were determined by the academy trust, and of the determination issued on 15 July 2014, the Code issued on 1 February 2012 applied.
4. The documents I have considered in reaching my decision include:
 - a. the school's arrangements for 2014/15;
 - b. the school's arrangements for 2015/16;
 - c. judgments ([2015] EWHC 1012 (Admin) and 1155 (Admin)), published following hearings in the High Court on 24-26 March and 17 April 2015;
 - d. High Court Order (CO/4693/2014), dated 21 and sealed on 27 April 2015;
 - e. correspondence and documents received from the school, dated 23 and 28 April, 7, 14, 15 and 27 May, 2015; those documents are:
 - an email exchange between the school, the OSA and the British Humanist Association between 5 and 12 July 2013;
 - submissions on behalf of The London Oratory School, dated May 2015, and including the witness statement of David McFadden, the witness statement of Richard John Adams, extracts of minutes of meetings of the Governing Body of the London Oratory School held on 11 April 2011, 12 March 2012 and 3 and 4 March 2013; the witness statement of Pauline Devereux; and minutes of a meeting of the Admissions Committee held on 5 April 2011;
 - a letter sent on 19 April 2011 to the Diocesan Director of Education from the Headmaster and Chairman of Governors

and Trustees;

- a copy of determinations ADA/001788 dated 30 September 2010 and ADA2410 dated 28 August 2013;
 - the published judgment [2004] EWCA Civ 55 in the matter of Regina (Khatun and others) v Newham London Borough Council;
 - the school's trust deed, dated 13 December 1973;
 - a sermon (undated) given by Cardinal Basil Hume; and
 - a summary (undated, with no ascribed authorship) of "*some of the ways in which the spirit of St Philip Neri permeates the School and gives it a distinct and individual character*";
- f. a letter received from the diocesan Director of Education, dated 13 May 2015;
- g. a letter from the Department for Education (DfE) to the Office of the Schools Adjudicator (OSA), dated 5 May 2015, and shared with the school and diocese;
- h. the school's website;
- i. the school's funding agreement (2011);
- j. *Joint Guidance on Admissions for the Governing Bodies of Catholic Voluntary Aided Schools*, issued by the Archdiocese of Westminster, Archdiocese of Southwark and Diocese of Brentwood, 2003 (revised February 2007); and
- k. the websites of the Archdioceses of Westminster and Southwark and the Diocese of Brentwood.

I have also taken account of information received during a meeting I convened at the school on 20 May 2015, attended by representatives of the school, the diocese and the school's legal representatives, and of the notes of the meeting taken by the OSA case manager and one of the school's legal representatives.

Background

5. In a determination issued on 15 July 2014, the schools adjudicator concluded that the school had been in breach of its statutory obligations in setting its admissions criteria in the 2014 and 2015 arrangements. By a claim dated 8 October 2014, the school challenged that determination by way of judicial review; permission to pursue the claim was granted on 10 November 2014 and a hearing took place in the High Court on 24-26 March 2015.

6. In his summary judgment (§3i)) following this hearing, Cobb J concluded that *“The Adjudicator applied too stringent a test when concluding that the Governing Body of the School (as the relevant ‘admission authority’ ...) 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) ...) when setting its faith-based oversubscription criteria”*.
7. Cobb J stated (§66) that, in his judgment, the school’s approach *“was also flawed”* and (§67) that *“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”*.
8. Accordingly, in his judgment following the subsequent hearing on 17 April 2015, having received further written and oral submissions, Cobb J ruled in greater detail (§3i)) in the judgment of 29 April that *“The Diocesan Guidance issue should be remitted to a newly appointed Adjudicator for re-consideration and determination, with a direction that the Adjudicator reconsider the matter and reach a decision in accordance with my judgment ([2015] EWHC 1012 (Admin)), specifically having regard to paragraphs [58]-[61] (i.e. the proper approach to the phrase “have regard” in paragraph 1.38 of the Admissions Code)”*. As item 2, a court order, dated 21 April 2015, *“... ORDERED AND DECLARED THAT: ... The issue whether the School’s admission arrangements for entry in 2013/14 [sic] and 2014/15 [sic]² complied with paragraph 1.38 of the School Admissions Code, as set out at paragraph 67 of the judgment, be remitted for determination by a new Adjudicator. The Adjudicator shall make all reasonable efforts to complete such determination by 15 June 2015, and shall in any event issue a determination by 30 June 2015”*.
9. The school is designated by the Secretary of State for Education as having a religious character and, formerly a voluntary aided school, converted to academy status on 1 August 2011. It is a non-selective Catholic school for boys with about 1300 pupils on roll, including more than 300 students in the sixth form. Its funding agreement permits it to admit 20 boys each year into the junior school (year 3) for a specialist music education, based on general ability and aptitude for music; girls are admitted into the sixth form and constitute about one-sixth of the total number of sixth form students. The school is heavily oversubscribed; as many as five or more applications for each of the 160 places for pupils aged 11 (the school’s published admission number (PAN) for pupils aged 11) include the school as one of each applicant’s preferred choice of secondary school.
10. The diocesan bishop is the representative for the religious denomination, as set out in schedule 3 to the School Admissions (Admission Arrangements and Co-ordination of Admission Arrangements) (England) Regulations 2012 (the regulations). A trust deed made between the trustees for the London Oratory Charity and the Greater London Council,

² See note¹ above.

signed on 13 December 1973, states that *“the religious doctrines and practices to be taught and observed shall be in all respects according to the principles and subject to the regulations and discipline of the Roman Catholic Church ...”*. The school’s aims and ethos include the statement that it is *“part of the Catholic Church. It is conducted as a Catholic school in accordance with Canon Law and teachings of the Catholic Church and the trust deed of the London Oratory Charity ... The school aims to assist Catholic parents in fulfilling their obligation to educate their children in accordance with the principles and teaching of the Church ...”*. Over and above this general statement, however, the school declares two distinctive objectives, (i) its *“pan-London mission”*, that is, to serve the Catholic community across the whole of the London area, and (ii) to maintain and strengthen the spiritual and musical traditions of the oratories of St Philip Neri.

11. The Code is issued under Section 84 of the Act; it imposes mandatory requirements and includes guidelines in relation to the discharge of functions relating to admissions. In §1.38 it states that *“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.”* Joint diocesan guidance for the Archdioceses of Westminster and Southwark and the Diocese of Brentwood (the guidance) was published in February 2003 and revised in February 2007. It therefore does not take specific account of the 2012 Code to which the two sets of the school’s arrangements here considered are subject; nor does it refer specifically to academy schools. Nevertheless, the guidance emphasises (§6) that it *“does not reproduce the Admissions Code. Rather, it focuses on those areas that are of most concern to governing bodies ... Governors ... will need to be thoroughly familiar with the Admissions Code as well as this guidance.”* It remains the guidance to which *“schools designated as having a religious character **must** have regard ... “* and was evidently accepted as such by Cobb J in his judgments and in making this remittal.

The 2014 arrangements

12. With regard to this remittal, the relevant oversubscription criteria for 2014/15 are:
 - (2) (Years 3, 7, 12) The extent to which the candidate and his/her Catholic parent (where only one parent is a Catholic) or parents meet their obligations in respect of Mass attendance on Sundays and Holy Days of Obligation.
 - (3) (Years 3, 7, 12) The extent to which the candidate fulfils the Church’s requirements regarding Baptism.
 - (4) (Years 7, 12) Whether the candidate has received his/her first Holy Communion.

- (7) (Years 3 [criterion (6)], 7, 12) Whether the candidate has attended the London Oratory Primary School or any other Catholic School for the whole of their primary education (or to date in the case of an application to year 3), or the candidate's parent(s) have fulfilled their obligation to ensure a Catholic education for their child.

13. Notes to criteria 2, 3 and 7 refer applicants to specific canons in Canon Law. Candidates are scored from 0 (does not meet the criterion in any way) to 4 (meets the criterion fully) or 0 (no) / 1 (yes) against each criterion as appropriate.

14. Applicants are required to complete the common application form (CAF) for the LA in which they are resident, together with the school's religious inquiry form (RIF). This RIF and the school's priest's reference form (SPR) are used rather than the diocesan priest's reference form (PRF)

The 2015 arrangements

15. With regard to this remittal, the relevant oversubscription criteria for 2015/16 are:

- (2) (Years 3, 7, 12) The extent to which the candidate and his/her Catholic parent (where only one parent is a Catholic) or parents meet their obligations in respect of Mass attendance on Sundays and Holy Days of Obligation. This obligation is laid out in Canon Law, canons 1246, 1247, 1248 ... Mass attendance to be endorsed by priest's reference.
- (3) (Years 3, 7, 12) The extent to which the candidate fulfils the Church's requirements regarding Baptism. This is determined with reference to the current Code of Canon Law, canon 867 ... This should be endorsed by an original full certificate of Baptism.
- (4) (Years 7, 12) Whether the candidate has received his/her first Holy Communion.
- (6) (Years 3, 7, 12) 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") [this reference to feeder schools is not in year 3 or year 12 arrangements], parish catechism classes over primary years or other alternative provision.

16. Candidates are scored from 0 (does not meet the criterion in any way) to 4 (meets the criterion fully) or 0 (no) / 1 (yes) against each criterion as appropriate.

17. Applicants are required to complete the CAF for the LA in which they are resident, together with the school's RIF. The SPR is also used, but not

the diocesan PRF.

Matters to be considered

18. In scrutinising the extent to which the school's arrangements for 2014 and 2015 have regard to the guidance I will first consider the general observation made by Cobb J (§§49-64, *passim*) concerning the "appropriate test", that is, a "proper approach to the phrase 'having regard' in paragraph 1.38 of the ... Code"; the test is that the guidance must be taken into account and if the school departs from it, it must have and give clear and proper reasons for doing so. In considering any reason for departing from the guidance, he rejects adjectives such as "good", "cogent", or "convincing" as importing "a subjective element into the test, which would have the effect of reducing clarity and predictability." The adjective "compelling", used in the determination of 15 July 2014, is seen to have "placed the bar far higher than is appropriate in this context." Cobb J's view is that, in considering whether the governing body of the school "had regard" to the guidance, "it needs to demonstrate that it has considered and engaged with the Guidance, not ignored it, or merely paid lip-service to it." If the arrangements depart from the guidance, there needs to be a "clear and proper / legitimate" reason, "depend[ing] on the individual circumstances of each case." Quoting Lord Bingham in a previous case, Cobb J suggests (§61) that in making this new determination the 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".

19. In a letter to the school dated 1 May 2015, I set out the areas in which I considered that the school had departed from the guidance and which would therefore be the focus of this determination. These areas were (I quote from my letter to the school):

"The arrangements for 2014/15

- *Criteria (2)-(4), in respect of advice, requirements and prohibitions concerning the appropriate definition of, and tests for, "Catholic". Applicants are required to evidence fulfilment of these criteria by completing the school's RIF, which specifically requests proof of the child's baptism within six months of birth, date and place of first Holy Communion (year 7 and year 12 applicants only), the length of time for which the applicant has lived in a parish and for how long applicants have worshipped at a church if other than in their own parish. These criteria may be seen as having departed from §A12 and §§A21-34 in the guidance in respect of the definition of a Catholic and the test of a practising Catholic, notably §A29, which expressly prohibits the production of a rank order of candidates by a governing body based on its own assessment of a candidate's Catholicity; and §A8 and §A33 in respect of the evidence applicants are asked to provide;*
- *the school's decision to use its own RIF; this may be contrary to the guidance in §A32, which requires schools to use the standard*

diocesan priest's reference form; and

- *criterion (7), concerning applicants' previous Catholic education, which is not an activity laid out in the guidance as an aspect of religious practice that may be used in constructing faith-based oversubscription criteria.*

The arrangements for 2015/16

- *Criteria (2)-(3) for year 3 applicants, and (2)-(4) for other applicants as above for 2014/15, with the same requirements to provide proof of baptism within six months of birth, the date and place of first Holy Communion (year 7 and year 12 applicants only), the length of time for which the applicant has lived in a parish and for how long applicants have worshipped at a church if other than in their own parish. These criteria may again be seen as having departed from §A12 and §§A21-34 in the guidance in respect of the definition of a Catholic and the test of a practising Catholic, notably §A29, which expressly prohibits the production of a rank order of candidates by a governing body based on its own assessment of a candidate's Catholicity; and §A8 and §A33 in respect of the evidence applicants are asked to provide;*
- *the school's decision to use its own RIF; this may be contrary to the guidance in §A32, which requires schools to use the standard diocesan priest's reference form; and*
- *criterion (6) for year 7 applicants, concerning previous Catholic education, which is not an activity laid out in the guidance as an aspect of religious practice that may be used in constructing faith-based oversubscription criteria."*

20. I will consider each of the above matters in accordance with the terms set out in the remittal. I will consider the RIF last, as its "legitimacy" may be seen as dependent on the decisions I make in the other matters.

The definition of "Catholic" and test of "Catholicity"

Baptism

21. The guidance states (§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 ... Membership of a Catholic Church is gained by baptism in that Church"; §A21 states, "Ideally, schools will use 'Catholic' as the basic first category ... ". The school requires applicants to submit, as part of the application, baptismal certificates for parent(s) and child, which is the test of 'Catholic' permitted by the guidance in the sections quoted. Although the requirement for baptismal certificates of one or both parents may appear to go beyond what is implied by the guidance, in reading it as a whole I take the statement in §A10 that "In Catholic schools the foundational duty to give priority to Catholic families is the primary legal duty of governing bodies when*

determining admission criteria" (emphasis by underlining added) as legitimising this request. Furthermore, in §98-101 of his judgment, Cobb J also disposed of the argument that requesting the baptismal certificates of parents was contrary to §2.4a) of the Code.

22. However, it might be argued that the school seeks to rank candidates according to an hierarchical sequence of tests of "Catholicity", the first of which concerns baptism. In attempting to determine *"the extent to which the candidate fulfils the Church's requirements regarding Baptism ... with reference to the current Code of Canon Law, canon 867"* (criterion (3) in both sets of arrangements) it may seem that the school exceeds what the guidance defines as the acceptable *"basic"* test of Catholicity. The canon to which the school refers places an obligation on parents *"to see that their infants are baptised within the first few weeks."* Both sets of arrangements introduce a four-point scoring system according to the period of time that may have elapsed between a candidate's birth and his/her baptism. This is neither prescribed in the canon nor anticipated in the guidance; the latter does not mention, and therefore implicitly attaches no significance to, any period of time that may have elapsed between birth and baptism. In this respect, it is evident that the school has introduced a requirement more demanding – and, arguably, arbitrarily "scored" – than that set out in either canon law or the guidance. On baptism, the guidance also makes reference (§A12) to canon law, but to canon 205 which merely states, *"those baptised are fully in the communion of the Catholic Church ..."* without any mention of the time at which baptism may have taken place.
23. The school's explanation is that parents who have sought baptism for their child *"as a very early and essential priority in the child's life"* show by that choice a closer alignment with the ethos of the school than those who have sought baptism later in life or those who *"regard baptism as a necessary 'price' to pay for the school of choice"* (witness statement of Pauline Devereux (PD), §26). This last point may seem unduly harsh on genuine late converts, although the RIF allows applicants to submit evidence in support of exceptional circumstances that may have delayed baptism. The 2015 arrangements are more helpful than those for 2014 in this respect, since they give examples of what might be accepted as a *"good reason"* for delayed baptism, although all the examples are to do with practical, rather than spiritual, matters. The school's purpose in departing from the guidance in respect of baptism is clear, that is, an intention to identify those applicants deemed to have shown an early alignment with the ethos of the school. However, it seems to me that the school has simply identified an apparently straightforward means of ranking applications against a criterion that does not derive from the guidance and makes assumptions about the relative quality, or genuineness, of applicants' and candidates' faith as evidenced by the time of baptism; assumptions that are given legitimacy neither by the guidance nor by Canon Law.
24. Indeed, to state that *"to allow parents who seek baptism for their child further on in life ... to be considered in the same way as those whose commitment is shown in the fact that they sought baptism for their child as*

a very early and essential priority in the child's life does not fairly assist the latter group, who have shown themselves to be more closely aligned with the ethos of the school" (PD, *ibid*) seems to me both unfair and illogical and does not show proper regard to the inclusivity of the guidance's position on baptism. I discuss later in connection with candidates' previous Catholic education the unacceptability of the school, in effect, requiring candidates to "*align*" with the ethos of the school in order to have their applications regarded favourably. Nor does the reference to late-baptised candidates whose parent(s) may have "*regard[ed] baptism as a necessary 'price' to pay for the school of choice*" seem to me a proper or legitimate reason for imposing a test of Catholicity on all applicants that demands more than the guidance permits concerning baptism. Several discussions between the school and the diocese, amply documented, show more regard to have been given to the operation of this criterion than to its propriety. In one account of such a meeting, a senior member of the school's staff is reported to have commented that it "*was trying to find functional ways to whittle through the numbers of applicants*" (Admissions Committee, 5 April 2011). The purpose of the baptism criterion is thus perfectly clear and, in purely pragmatic (or "*functional*") terms, that is, in respect of sifting applications, one might not dismiss it; however, this is not, in my opinion, a proper or legitimate reason for departing from the guidance which specifically prohibits the ranking of applicants' and candidates' Catholicity, as I now further discuss in respect of families' frequency of attendance at Mass.

Attendance at Mass

25. The guidance acknowledges (§A22) that there may be "*an absolute shortage of places in the locality*", in which case "*a higher test of 'practising Catholic' may be employed.*" The "*only ... acceptable ... [test]*" is then defined (§A23) as "*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.*" In both sets of arrangements, to secure the highest score under criterion (2), a candidate and his/her family are required to attend regularly Mass on Holy Days of Obligation as well as on Sundays, going beyond the requirement stated in the guidance, which refers to Sunday Mass only (§A26). It might be argued, therefore, that in this respect the school has departed not only from §A22 of the guidance quoted above but also from §A29 where it is stated unequivocally that "*Under no circumstances may governing bodies receive applications and then produce a 'rank order' based on their own assessment of each candidate's Catholicity instead of using the priest's reference.*" Against this, it might be argued that the arrangements make explicit the scoring system used and that, although this might be seen as governors producing a rank order "*based on their own assessment*", it is nevertheless "*frequency of attendance at Mass*" that is being assessed and the priest's endorsement – or not – of an applicant's claim on the SPR that is the final arbiter. The school contends that additional questions concerning the place and duration of families' worship are designed to ensure that applicants' claims are validated by a priest with sufficient first-hand knowledge of their practice, which I accept.

26. The phrase “*frequency of attendance at Mass*” in the guidance could be seen logically to imply that different frequencies might lead to different outcomes in allocating school places where oversubscription is an issue. If so, I would not see the school’s criterion as necessarily an improper departure from the guidance in this respect, but rather a considered response to it. Moreover, I note a lack of consistency between the guidance and the PRF. To repeat, §A23 in the guidance states that “*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.*” However, although applicants are required to complete details of the frequency of their attendance at Mass on Sundays and Holy Days of Obligation on Part A of the PRF, this part of the form remains with the priest and only a general endorsement of “practice” goes to the school as Part B; the school therefore would have no knowledge of a family’s “frequency” of attendance at Mass if it used only the diocesan form to allocate places. It is perhaps worth mentioning also that, although there is no reference to Holy Days of Obligation in the body of the guidance, applicants are required to state on Part A of the PRF whether they attend Mass on Holy Days of Obligation as well as on Sundays. To this extent, it might be argued that, far from not having proper regard to diocesan guidance in this respect, the school’s procedures in fact enable an aspect of diocesan guidance that its own documentation and procedures do not facilitate.

27. The school’s position is that frequency of attendance at Mass is a criterion permitted by the guidance and moreover that it “*sets great value on celebrating Holy Days and Feast Days as a Catholic community*” (PD, §23). In my view, the school has gone beyond the guidance in its requirement for attendance at Mass on Holy Days of Obligation as well as on Sundays to the extent only that it is transparent and consistent; the question of “frequency” of Mass attendance is explicitly mentioned in the guidance as a “test” that is “acceptable”, and the school has had regard to this. That the school for its part makes explicit the impact on applications of frequency of attendance at Mass is arguably not a departure from the guidance, but clarification of an inconsistency between the guidance and the PRF. The Code requires (§14) admission arrangements to be “clear” and that they enable parents “*to look at a set of arrangements and understand easily how places for that school will be allocated.*” Simply using the phrase “*frequency of attendance at Mass*” could mean that what one priest accepts as demonstrating being a practising Catholic is different from another priest’s view. The school is not judging the “Catholicity” of applicants or candidates, but is asking through its SPR a priest to endorse the family’s frequency of worship, which the guidance lays out (§A23) as an “acceptable” test. Insofar as this criterion in both sets of arrangements could be seen as a departure from the guidance, and I do not believe that it is, it seems to me both proper and legitimate in meeting the principle of clarity required by the Code as well as clarifying inconsistencies in the guidance.

First Holy Communion

28. Criterion (4) in both sets of arrangements seeks information about

whether or not a candidate has made his/her First Holy Communion. The guidance (§A33) states that *“Governing bodies may not request certificates or references from priests about sacraments other than baptism. Confirmation, marriage and ordination are the only other sacraments where parish priests are obliged to keep registers, and these sacraments are not relevant to school admission. In the case of other sacraments, there is therefore no official record from which a certificate can be obtained. For these reasons ... criteria relating to these sacraments may not be used.”* It then continues (§A34) to state specifically that *“In particular, certificates of reception of first holy communion, not being based on a register, have no official standing and are therefore not universally obtainable.”* The school does not ask on its SPR for any validation of what an applicant may have written on the RIF concerning a candidate’s First Holy Communion, and the extract quoted from the guidance shows that no records would enable any such validation to be given. The request for this information seems to fall clearly into the category of the governing body making its *“own assessment”* of a candidate’s Catholicity, not least since canon 205, referenced in the guidance (§A12) and previously quoted, states that *“those baptised are fully in the communion of the Catholic Church ...”* with no suggestion that having taken First Holy Communion affects that status.

29. The school contends that *“For a Catholic child to reach secondary school age and not to have made his First Communion would suggest that the practice of the child’s family is not particularly strong”* (PD, §27). The school further argues that this criterion is an effective and legitimate way, in relation to sustaining the distinctive ethos of the school, of reducing the number of applications that have to be decided by a tie-break. However, the school somewhat undermines its case by acknowledging that *“It is true with regard to First Holy Communion, as with Mass attendance on Holy Days of Obligation, that not many applicants currently fall short of the requirement”* (PD, §28). It might also be pointed out that, while the school may appear to question some applicants’ motives for the late baptism of candidates, there is no check on the veracity of the details supplied of candidates’ First Holy Communion – as indeed there cannot be, since no register is kept and, as pointed out by the diocese (notes of meeting, 20 May 2015), *“you can go into [a] shop and buy [a] first communion certificate and sign it yourself”*.
30. To use this criterion to rank or order candidates is clearly contrary to the general prohibition in §A29 of the guidance, quoted previously, regarding assessments of applicants’ and candidates’ Catholicity made by admission authorities rather than by priests. The school has not shown that this criterion has any significant impact on the allocation of places and has clearly deviated from the guidance by including First Holy Communion as an oversubscription criterion. The Code (§1.9i) states that *“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”*; First Holy Communion is not *“laid out”* as a permitted faith-based oversubscription criterion in the guidance. My view is that for the arrangements to depart from an explicit prohibition, and not to take account of the limits of the

permission in §1.9i) of the Code, is therefore neither proper nor legitimate.

31. I will now summarise my decisions on the three issues concerning the tests of Catholicity imposed on applicants and candidates by both sets of arrangements. Frequency of attendance at Mass as enquired after in the arrangements is, I feel, proper and legitimate as it is a criterion securely grounded in the guidance and is helpful to applicants in clarifying its potential impact on the allocation of places. Ascribing a numerical value to the time of a candidate's baptism, however, and asking whether s/he has made her/his First Holy Communion is not permitted by the guidance and, on the school's own admission, has little effect on the allocation of places. Against this last point, the school has argued (PD, §28) that *"if these criteria are not maintained the School envisages many more applications on which these criteria are not met, as their removal is likely to encourage applications from less committed families who are looking for 'a good education' and not an Oratorian education."* This comment, it seems to me, does not propose a reason that is either proper or legitimate for departing from the guidance; I cannot understand how the time at which a candidate was baptised, for example, would make her or him more or less likely to be committed to, or to benefit from, an Oratorian – as opposed to any other kind of Catholic – education. As noted, there is in any case no way of checking that the information supplied about a candidate's First Holy Communion is truthful. I have identified what I consider to be unfounded presumptions made by the school concerning the motivation – and the quality of the faith – of applicants. It is quite clear from the guidance that schools should not be making judgments of this kind based on criteria that are not *"laid out"* in the guidance and that there is no proper or legitimate reason in this case for the school to have done so.

Previous Catholic education

32. The guidance (§A21) sets out what schools will *"ideally"* use, that is, "Catholic", as the basic first category in oversubscription criteria, *"and this will be followed by other (geographical etc.) criteria, worked out with other schools so that there are no groups of the faithful who are effectively denied a Catholic education"*. However, it acknowledges (§A31) that *"in any one year, more parents may meet the published level of practice and other criteria will be required to differentiate between applicants."* The guidance does not suggest any additional faith-based criteria other than frequency of attendance at Mass as discussed above, but lists a number of prohibitions including, for example, certificates or references from priests concerning any sacrament other than baptism, as previously noted. In §46 onwards there is guidance about other criteria (such as geographical criteria) and in the section headed *"Summary"* (§A62), the guidance summarises a range of acceptable oversubscription criteria including sibling links, specified areas of residence and proximity of an applicant's home to the school. These are not faith-based criteria and so admission authorities are not bound to have any regard to them. This being so, and given the issues I have already discussed, it is evident that the guidance envisages faith-based criteria that take account of baptism and frequency of attendance at Mass only; no other faith-based activities

are explicitly *“laid out”* in the body of the document as permitted by §1.9i) in the Code, previously quoted. What I consider now, therefore, is whether the school, in seeking to give priority to those candidates for whom their parents have secured a Catholic education, has had sufficient regard to the limitation on faith-based criteria imposed by the Code in relation to what is *“laid out”* in the guidance and also, therefore, whether the arrangements in this respect are compliant with §1.38 in the Code which states that admission authorities ***“must have regard to 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 [the] Code.”***

33. This issue touches also on §1.15 in the Code, which says that *“Admission authorities may wish to name a ... school as a feeder school. The selection of a feeder school or schools as an oversubscription criterion **must** be transparent and made on reasonable grounds.”* I note here that the two sets of arrangements differ: those for year 7 places in September 2014 have as criterion (7) *“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”*; for applicants to year 12, the criterion includes *“primary and secondary [Catholic] education”*, while for applicants to year 3 the time requirement to have had a Catholic education is *“to date”*. In the arrangements for places in Years 3, 7 and 12 in September 2015, criterion (6) is *“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.”* The parenthetical reference to *“named feeder schools”* is not in the arrangements for entry to year 3 or year 12.

34. Cobb J states (§105) that *“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”*. He further acknowledges that the previous Adjudicator’s conclusion, in the determination issued in July 2014, that the school *“has not named feeder schools on reasonable grounds’ is not in the circumstances challengeable on Wednesbury grounds.”* However, Cobb J cedes two important points: first (§104v)), that the school was previously advised by the DfE that *“it can have a 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”*; second (§106), that no evidence has been found that the school has taken into account *“the identity of any specific previous schools of the candidates”* and so is not in contravention of the Code, which states (§1.9b)) that arrangements ***“must not ... take into account any previous schools attended, unless it is a named feeder school”***. In the view of Cobb J (§106), the criteria citing Catholic education do not take account of previous schools attended *per se*; they simply assess whether

an applicant has received a Catholic education, that is, in a Catholic primary school rather than by other means, such as parish classes.

35. A further aspect of this issue, mentioned in passing by Cobb J (§10), is that the funding agreement for the school, in accordance with section 1A(1)(c) of the Academies Act 2010, requires it to “*provide education for pupils who are wholly or mainly drawn from the area in which it is situated.*” Advice from the DfE on this specific point, in a letter to the OSA dated 5 May 2015, and shared with the school and diocese is that “*Faith schools, whose mission is to first serve pupils of their faith designation and then their broader community, can ... lawfully draw their ‘faith’ pupils from a wider area than schools without a faith designation ...* “. It would appear, therefore, that in two pieces of advice, the DfE is of the opinion that it is permissible for the school to have a long list of named feeder schools, and that a faith academy may draw its pupils from a wider area than would be expected of a non-faith academy. My view is that the first piece of advice is clearly non-compliant with §1.15 in the Code; while a list of Catholic primary schools is arguably “*transparent*”, I would contend that it is demonstrably not “*reasonable*” on either geographical or educational grounds.
36. In explaining my reasoning I return first to the school’s two distinctive objectives, previously quoted: (i) its “*pan-London mission*”, that is, to serve the Catholic community across the whole of the London area, and (ii) to maintain and strengthen the spiritual and musical traditions of the oratories of St Philip Neri. These objectives are central to the school’s position on this issue. To fulfil and maintain the objectives, the school is desirous of accepting applications from the whole of the London area, and believes that a previous Catholic education, either within a Catholic primary school or through some other mechanism such as parish classes, is necessary if applicants are to benefit from, and to contribute to and sustain, the distinctive ethos of the school. With regard to the second objective in particular, the school claims a distinctiveness – acknowledged by the diocese – that justifies its wish to identify, through specific faith-based criteria, including a previous Catholic education, those candidates who will most gain from, and contribute to, its ethos.
37. What precisely the school means by “pan-London” I find difficult to accept: referring to a list of every Catholic primary school in the three dioceses to which the guidance applies means that schools in places such as Harwich, Clacton-on-Sea, Dover and Ramsgate find themselves as part of this amorphous geographical area characterised as “pan-London”. In reality, the school admits pupils from a large number of London boroughs and just a few beyond. It would appear that applicants decide for themselves if it would be feasible in terms of access for their child to attend the school; this decision, quite rightly, is the responsibility of the applicant rather than of the school. The criterion therefore, in the school’s view, is a legitimate way of offering a distinctive Catholic education beyond its immediate locality to those families whose children it is felt will most benefit from it. The school also claims to achieve through this approach (in conjunction with its other faith-based criteria) a greater social mix of pupils within the school than would be obtained if drawing “*wholly*

or *mainly*” from its immediate locality, as required by its funding agreement. There are thus some outcomes of the “pan-London” objective that might appear reasonable. However, the “long list” of supposed “feeder schools” is to my mind unreasonable, on two counts: first, the school does not actually name these “feeders” in its arrangements, and applicants must go through a lengthy and complex search on different diocesan websites to identify them; second, there is no practical opportunity for the parent of a child attending a Catholic primary school in those parts of Kent or Essex furthest from the school’s location in West London to make a genuine application to the school. The list of schools, in my view, is simply a way of the school attempting to justify an additional faith-based criterion that has no basis in the guidance and which, despite initial advice from the DfE described by Cobb J (§105) as “*surprising*”, is also non-compliant with §1.15 in the Code. Even were I to accept that the school has “named” feeders, which I dispute, geographical “reasonableness” is not a predominant feature of the list.

38. In educational terms, there is no dispute that the school offers a distinctive form of Catholic education, and it is understandable that it should wish to continue so to do. However, I would reiterate my point that applicants choose schools, not *vice versa*; in allocating places, schools must apply oversubscription criteria (Code, §1.8) that are “*reasonable, clear, objective, procedurally fair and comply with all relevant legislation ...*”. Candidates and their families may well be attracted to the mission and ethos of the school, just as other potential applicants may indeed be deterred by them, but the school cannot – for purposes of allocating places – impose faith-based tests that are not “*laid out*” in diocesan guidance, nor can it deviate from the guidance without “*proper / legitimate*” reasons for doing so. I cannot see either propriety or legitimacy in the requirement for candidates to have experienced a previous Catholic education. The guidance is clear that the only permitted tests of Catholicity for the purposes of school admissions are baptism and frequency of attendance at Mass. As regards education, it is for the school – as is the challenge for any school – to inculcate its mission and ethos amongst its pupils after they have been admitted to it, not to make arbitrary demands of candidates and their families in relation to these values before they become members of its community. I use the word “arbitrary” since, echoing the point I made earlier concerning any significance that might be attached to the time at which a child was baptised, it does not seem to me that a candidate’s having attended a particular Catholic school, or a particular sequence of parish classes, is any more likely to be suited to an Oratorian education than a candidate who has attended any other Catholic school or different Catholic classes. In this respect, the specific naming of the London Oratory Primary School in the 2014 arrangements (although not the conjoined reference to “*any other Catholic school*”) would seem both transparent and reasonable, on geographical grounds and also assuming curricular links and shared values between the two institutions. Similarly, in respect of the more recent advice from the DfE quoted previously, naming other feeder schools, not necessarily in the immediate vicinity of the school but with which there are clear and meaningful curricular and spiritual links, might

be equally acceptable and could comply with the Code.

39. Finally in this matter, I would point out that – as is the case concerning First Holy Communion – there is no way of checking any claim made by an applicant regarding a candidate's previous education in a Catholic school. If any attempt were made to do so, this would contravene §1.9g) of the Code, which states that admission authorities ***“must not ... take account of reports from previous schools about children's past ... attendance ...”***.
40. I find therefore that, regarding the criterion requiring a previous Catholic education, both sets of arrangements go beyond the faith-based criteria laid out as permissible in the guidance, without proper or legitimate reason; furthermore, the arrangements are not compliant with §1.9i), §1.15 or §1.38 in the Code in this respect.

The school's RIF

41. As discussed above, applications are scored against oversubscription criterion (2) concerning the family's frequency of attendance at Mass. The diocesan PRF, not used by the school, asks for a considerable amount of information from applicants (including place, frequency and duration of worship, on Holy Days of Obligation as well as on Sundays) in Part A, which is completed by the applicant but is retained by the priest and used by him as the basis for a simple, unquantified, declaration in Part B (sent to admission authorities that use this form) that *“the child is a member of a practising Catholic family for the purposes of school admissions in accordance with Diocesan Guidance.”* With regard to this system, the guidance (§ A32) states that *“The standard diocesan Priest's Reference Form is to be adopted for use by all schools where the governing body has decided to have ‘practice’ as an oversubscription criterion.”* Somewhat confusingly – and in contravention of the Code – there is a further statement on the PRF itself, to the effect that *“This form is a Diocesan Form. It does not form part of any school's admission arrangements.”* If so, I find it difficult to see how the diocese could insist on the form being used as a means of determining the allocation of places on the basis of Catholic “practice”. The only purpose of the form is in connection with admissions, in determining whether or not a candidate is a member of a practising Catholic family, or not.
42. The question might be asked whether, given the diocese's acknowledgement in the guidance (§A22) that a shortage of places may require admission authorities to apply *“a higher test of ‘practising Catholic’”* than baptism alone, an unquantified priest's endorsement that *“the family and [] the child is a member of a practising Catholic family for the purposes of school admissions in accordance with Diocesan Guidance”* is of any practical use in a situation of heavy oversubscription such as that encountered by the school. The guidance states (§A32) that the diocesan PRF *“is to be adopted”* but I am of the opinion that the diocesan form, as it stands, would not be helpful to the school in attempting to discriminate between large numbers of applicants for a limited number of places.

43. The school uses instead of the diocesan PRF its own RIF; this seeks the same basic information as the PRF with additional questions that include the candidate's time of baptism, whether or not the candidate has taken his/her first Holy Communion and information about previous Catholic education, as discussed above. On receipt of a completed RIF, the school sends its own SPR to the parish named as the regular place of worship on the RIF. The SPR is similar to the diocesan PRF, except that it asks the priest to confirm precise details of church attendance (such as frequency and duration, including Holy Days of Obligation) that applicants have claimed on the school's RIF. The SPR may therefore be seen as both a check on the validity of details concerning worship submitted on the RIF but also, as noted previously, as an opportunity for the priest to make the final judgement concerning a family's Catholic practice. Given that the part of the diocesan PRF forwarded to admission authorities does not provide information about frequency of attendance at Mass ("laid out" as an *"acceptable ... higher test"* of Catholicity at §A23 in the guidance), the SPR seems to me useful and even essential in ranking applications. Arguably, I repeat, it gives the final word on who is *"making judgments on pastoral matters such as Catholic practice"* (guidance, §A23) to a priest, not the school's governing body and so, with regard to the issue of frequency of attendance at Mass, avoids the prohibition in §A29 of the guidance on admission authorities producing a rank order *"based on their own assessment of each applicant's Catholicity"*.
44. I have suggested above that, although the scoring system applied by the school to the questions on the RIF may appear arbitrary, it nevertheless provides some indication to parents that they might be more or less likely to be allocated a place for their child given the scores that would apply to them in relation to the various oversubscription criteria. Use of the diocesan PRF alone would give applicants no indication of their chances beyond the most basic test – yes or no – of their (unquantified) Catholic practice. In this respect it seems to me that the school is making a genuine effort to meet the Code at §14 of the Introduction, that is, to ensure that *"Parents should be able to look at a set of arrangements and understand easily how places for that school will be allocated."*
45. In considering the school's use of its own RIF, my view is that the school has had regard to the guidance in deciding that the PRF is not fit for purpose in gathering the information it requires to apply its oversubscription criterion concerning "frequency of attendance at Mass" and to give applicants a reasonable indication of the likelihood of their child being allocated a place at the school. In using a form that provides more clarity for applicants in understanding their chances of likely success, the school is, in my view, paying proper regard to the requirement in the Code for clarity. The use of the RIF is therefore proper and legitimate, although in view of my decisions above concerning criteria relating to candidates' dates of baptism, First Holy Communion and previous Catholic education, there are parts of the form that need to be amended.

Conclusion

46. I have considered those aspects of the school's arrangements for 2014 and 2015 that, as outlined in my letter to the school following Cobb J's remittal to the OSA, appear to have departed from diocesan guidance and therefore might be in breach of §1.38 of the Code. In weighing "*the adequacy of the reasons for departure, applying the appropriate test*" (Cobb J, §67), I have considered whether the school has "[had] regard to" the guidance and whether it has had "*a clear and proper / legitimate*" (Cobb J, §60) reason for any departure from it.
47. I have drawn attention to inconsistencies and tensions that underlie the issues I have considered. There are inconsistencies between the guidance and the PRF that accompanies it, tensions between the views of the school and the diocese, and between the school's commitment to preserve its distinctiveness and the requirements of its funding agreement and of the Code. The conclusions to which I have come in applying what I consider to be the appropriate test in each case have been made against this background, and in recognition of the acknowledgement made by the diocese that "*some things which we will say while we would prefer schools don't do this [sic], there will be reasons that some schools do do it*" (notes of meeting of 20 May 2015). Overall, I have had to consider whether the school's departures from the guidance fundamentally undermine that guidance's core or guiding principles; go against its express prohibitions or are in conflict with it; or differ substantially in a material respect from it (see Cobb J, §60) and the extent to which any departures are therefore proper and legitimate and/or whether they are compliant with the Code.
48. Cobb J commented (§66 iii)), "*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.*" He further noted that, in the previous determination that was subject to judicial review and as a result of which this remittal was made, "*the Adjudicator did not appear to challenge the legitimacy of the dual objectives of the School*". In the meeting I held on 20 May 2015 the diocese commented, "*Parents want [the] traditional Oratorian ethos. This matters to our community.*" I too have accepted the objectives that make the school distinctive and have considered each apparent departure from the guidance with this in mind and according to Lord Bingham's method previously quoted (Cobb J, §61), that is to "*scrutinise the reasons given by the [addressee] for departure ... with the intensity which the importance and sensitivity of the subject matter requires*".
49. The school has stated in papers submitted to me that "*In setting oversubscription criteria the Governors seek to comply with their duties under the School Admissions Code and to honour the trust placed in them to preserve the ethos and mission of the School.*" These "*duties*" include having regard to diocesan guidance as set out in the Code. "*To preserve the ethos of the school*" is an objective that, however desirable and worthy

in itself, is not something that can be regulated through admission arrangements. I note that, despite concerns, recorded in detail in minutes of various meetings and acknowledged in a letter from the school to the diocese dated 19 April 2011, the diocese has never made a formal objection to the OSA concerning the school's arrangements. However, the general view of the diocese, expressed in a letter to me, is that *"the views promulgated [in the guidance] are entitled to proper respect"* and that, in working with the school *"to address all the concerns we have highlighted to them ... the wider Catholic community will welcome a more compliant policy and this is to the benefit of future applicants to the school."* Despite this suggestion of continuing discussion of these *"concerns"* and hoped-for closer agreement in the future between the school and the diocese, my remit concerns only the arrangements for 2014 and 2015, about which one of the diocesan representatives at the meeting held on 20 May 2015 commented, *"where we have grave reservations is ... the school's decision to quantify the Catholicism of the applicant ... no-one can grade someone's Catholicism. They are Catholic."*

50. In accepting the distinctiveness of the religious character of the school, while nevertheless being mindful of its legal status as an academy school and its duty to comply with the Code, I have considered each departure from the diocesan guidance separately, with a view to the clarity of the school's reasoning in each case when judging the propriety and legitimacy of each. As a result, I am of the view that seeking information about the frequency of applicants' and candidates' attendance at Mass is permissible and in fact has regard to the wording of the guidance. However, the request for information about, and consequent allocation of a numerical value to, a candidate's time of baptism is neither proper nor legitimate, and the request for information about a candidate's First Holy Communion similarly goes beyond what the guidance permits in respect of seeking information about the Church's sacraments and in making judgments about the Catholicity of applicant families. The oversubscription criterion that requires candidates to have had a Catholic education, in or out of school, is not an activity *"laid down"* in the guidance for the purposes of admission arrangements; the school does not have a proper or legitimate reason for disregarding the guidance in this respect and, moreover, is not compliant with the requirements of the Code regarding the naming of feeder schools. I find the school's departure from the guidance in using its own RIF rather than the PRF as proper, legitimate and necessary in order to gather the information it requires to allocate places, notably concerning frequency of attendance at Mass by applicant families, although the form requires amendment to take account of my decisions about the criteria that refer to baptism, First Holy Communion and previous Catholic education.

51. There is a further point to be made which, while not a direct aspect of this remittal, nevertheless underlies the school's argument for its use of additional faith-based criteria over and above those permitted in the guidance. The school contends that the accumulation of faith-related oversubscription criteria in both sets of arrangements, some of which I have now determined to be unacceptable, reduces the number of

applications that are subject to the tie-break which, in both sets of arrangements, is random allocation. The guidance at §A21 and §A46 onwards gives guidance on what other criteria may be used. It also (§A62) deplores the drawing of lots, characterising it as “*a game of chance*”. This is not a faith criterion and the school is not bound to have any regard to it. Nevertheless, and in view of my decisions regarding baptism, First Holy Communion and previous Catholic education, and the school’s contention that the removal of these criteria would increase the number of applications that would become subject to a tie-break and so reduce applicants’ ability to predict the outcome of the allocation of places with any degree of certainty, the school might wish to explore further – as it has on previous occasions – the possibilities of alternative tie-break mechanisms that could be less random in effect and so more helpful to applicants in weighing their chances of success. This exploration might take place alongside the suggestions offered in the guidance and a reconsideration of the feeder school issue.

52. It is for the reasons given above that I conclude that some aspects of the school’s arrangements for 2014 and 2015 are not compliant with §1.38 of the Code in that they do not have regard to diocesan guidance in respect of faith-based criteria, or are not saved by being laid out in the guidance. They must be revised as set out in paragraph 3.1 of the Code.

Determination

53. In accordance with section 88I(5) of the School Standards and Framework Act 1998, I determine that aspects of the admission arrangements for The London Oratory School for entry to the school in September 2014 and September 2015 do not conform with the requirements relating to admission arrangements.
54. By virtue of section 88K(2) the adjudicator’s decision is binding on the admission authority. The School Admissions Code requires the admission authority to revise its admission arrangements within two months.

Dated: 19 June 2015

Signed:

Schools Adjudicator: Andrew Bennett