

Comments from the British Humanist Association on the London Oratory School's response to the BHA's objection to its admissions arrangements

11 July 2013

Case reference: ADA/2410

1. These comments are in response to those made by the London Oratory dated 3 July and circulated on 5 July 2013. We suggest it is read in conjunction with that document.

Status of objection

2. I think it is fair to say that the comments in paragraph 2 are clearly hyperbolic, and they are wrong in their implication of prejudice on the part of the BHA. But in the BHA's opinion, the argument set forth in paragraphs 2 to 6 is also incorrect. In paragraph 3 the Oratory gives various limiting examples of who they think Parliament intended to be able to object to a school's admissions arrangements. However, we note that all these examples are individuals or bodies who would have been able to object under the old law, Code and regulations, prior to the 2011 Act, 2012 Code and regulations. Therefore it cannot be right that Parliament's intention was to only limit objections to just those that the Oratory suggests.
3. Indeed, evidence from the time would seem to support this:
 - a) When the consultation on the current code was first launched, the Department for Education (DfE) commented that 'The new admissions process will be more open than before. Currently only a very restricted list of people can object to admissions arrangements they believe are unfair. In future anyone will be able to object.'¹
 - b) The explanatory notes for the relevant section of the Act simply say 'Section 36 amends sections 88H and 88K of SSFA 1998 to allow any body or person to refer to the adjudicator an objection concerning the admission arrangements of any state-funded school.'² This section was first introduced by amendment at the Report Stage of the Bill's passage through the House of Lords. Introducing the amendment, Lord Hill of Oareford commented that 'introduces an important new clause that makes it possible for anyone to object to a school's admission arrangements by referring an objection to the office of the schools adjudicator.' Lord Touhig and Lord Alton of Liverpool both raised concerns that this would 'leave the door open to people who have no direct interest in a school's admissions policy to be able to object', and that these people would make 'vexatious complaints'. Lord Hill responded by saying 'I take the point raised by the two noble Lords about vexatious complaints. We are proposing to put in place a couple of safeguards. First, the adjudicator would not have to reconsider his decision if someone were putting in repeated allegations and accusations on which he had already decided. Secondly, we are making it clear that

¹ Department for Education press release, 'New admissions code: a fairer and simpler system', 27 May 2011: <https://www.gov.uk/government/news/new-admissions-code-a-fairer-and-simpler-system>

² Explanatory notes of section 36 of the Education Act 2011: <http://www.legislation.gov.uk/ukpga/2011/21/notes/division/6/5/2/1>

there cannot be anonymous allegations of that sort to try to ensure that the system works properly.³

- c) The matter was then debated in the Commons during ping pong. Nick Gibb commented that 'My hon. Friend the Member for Beverley and Holderness asked about anyone being able to refer complaints to the adjudicator. We do not believe this change will lead to many more complaints. The regulations on which we are currently consulting will ensure that repetitive, vexatious or anonymous complaints cannot be made. I hope that will provide him with some reassurance. On the issue of spite, which he also raised, **"anyone" does mean anyone, so it could be a school or a charity. The only proviso is that they must be willing to put their name to objections and to refer matters that are new or substantially new to the adjudicator**' (emphasis added).⁴
 - d) Finally, the Department for Education is aware of our objection and has implicitly acknowledged (although not explicitly stated, as it was not a matter for debate when the conversations took place) that the BHA has standing to bring such an objection.
4. The BHA does not believe its complaint is vexatious – the measure of that must surely be whether or not there is a reasonable possibility of a breach of the Code, which the BHA believes there is. The BHA also believes that it has legitimate interest, as it is a charity whose objects include 'The promotion of equality and non-discrimination and the protection of human rights as defined in international instruments to which the united kingdom is party, in each case in particular as relates to religion and belief'.
 5. Given the strength of the above evidence – particularly Nick Gibb's comments during ping pong – we think it is actually somewhat vexatious of the Oratory to suggest the BHA does not have standing.
 6. Paragraphs 7-8 of the Oratory's response are therefore irrelevant.

The factual context

7. Paragraphs 11 to 18 are irrelevant to the simple question as to whether or not the school is in compliance with section 19.e) the admissions code. However, in response to paragraph 15.b), it may be the case that the school is centred in a more affluent part of London, but this does not mean that removing the Catholic service criterion would make the intake less racially or socio-economically inclusive. Indeed, the academic literature shows us that religious selection criteria (especially more strenuous criteria) often are de facto socio-economic selection criteria.⁵ Therefore the Oratory is in all likelihood incorrect on this point.

³ Lords Hansard, Education Act 2011 Report Stage debate on the introduction of section 36 by Government amendment, 26 October 2011: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111026-0001.htm#11102645000272>

⁴ Commons Hansard, Education Act 2011 ping pong debate on section 36, 14 November 2011: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111114/debtext/111114-0002.htm#stpa_o203

⁵ See, for example, *Religious schools in London: school admissions, religious composition and selectivity*, Rebecca Allen, Anne West, Oxford Review of Education Vol. 35, Iss. 4, 2009: <http://www.tandfonline.com/doi/abs/10.1080/03054980903072611#.Uda3SvnVB5F> This reports that 'These are Roman Catholic (RC) schools in Inner London with very affluent intakes, though the areas they are located

The merits of the first complaint (the Catholic service criterion)

8. Paragraph A12 the Diocese's guidance for governing bodies specifies baptism should be used as the test of Catholicity, and paragraphs A23 and A26 add that regular attendance at worship can also be used in exceptional circumstances. Paragraph A29 specifically excludes the activities found in the Catholic service criterion:⁶

*'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.**' (emphasis added)*

9. In paragraph 19, the Oratory suggests that as the Catholic service criterion constitutes religious activities (which are permitted by paragraph 1.9.i)), there therefore is no breach of 1.9.e). The BHA believes this to be incorrect for a number of reasons. First of all, 1.9.i) only permits religious activities 'as laid out by the body or person representing the religion or religious denomination' – but the activities in the Catholic service criterion are not such activities. Secondly, even if they were such activities, it does not follow that because something is permitted by an exception to paragraph 1.9.i), it is therefore the case that they are also permitted by paragraph 1.9.e). If something falls into the exception in 1.9.i) but also falls foul of 1.9.e) then the admissions code says it must not be permitted.
10. Turning to paragraph 1.9.e), the Oxford English Dictionary defines 'practical' as 'of or concerned with the actual doing or use of something rather than with theory and ideas', and defines 'support' as 'give assistance to, especially financially'. Therefore 'practical support', as used in 1.9.e), can be taken to mean support which, while not financial, could be said to have some financial value. This seems to be made clearer by its complementary placing in the Code with 'financial support'.
11. Under this definition, it would plainly not be the case that regular attendance at worship or baptism would be of financial value and so could not be said to be 'practical support'. However, it seems to the BHA that all of the activities in the Catholic service criterion are of financial value and therefore breach paragraph 1.9.e).

in have quite high levels of income deprivation... the evidence suggests that some 'élite' secondary schools are "selecting in" and "selecting out" particular pupils. A range of different admissions criteria and practices are identified which appear to foster school selectivity... Previous research [also] suggests that there is an association between school composition and the use of selective and potentially selective criteria...Overall, religious schools educate a much smaller proportion of pupils eligible for free school meals and their intakes are significantly more affluent than the neighbourhood in which they are located.' The London Oratory School seems to fit this description. Only 6.36% of pupils at the school are eligible for free school meals. This compares with 47.6% and 49.5% of pupils at the two secondary schools without a religious character in the same post code.

The Fair Admissions Campaign, of which the BHA is a part, is currently reviewing all academic literature, and there is a strong consensus on this point. This can be provided to the Adjudicator upon request.

⁶ Joint Guidance on Admissions:

<http://rcdow.org.uk/att/files/education/downloads/governors/admissions/admissionsguidance2007.pdf>

12. In paragraph 20 the Oratory also refers to 'participation in the Liturgy'. However, flower arranging could not be said to be participation as it does not happen during the Liturgy: to arrange the flowers is not to take part in the Liturgy.
13. With regard to the other examples of 'Assisting in parish pastoral work' and 'involvement in wider Catholic Church activities': most of these can be said to be very worthwhile activities and we hope the Oratory will continue to encourage such participation whatever the outcome of this case. However they are also likely to cause socio-economic selection and therefore do not seem to us to be an appropriate part of a school's oversubscription criteria. And adjudicators' decisions must simply be based on the Code, not how worthwhile s/he considers the activity to be.
14. Finally, of these other activities, the Oratory says that they are 'not one of practical assistance to the institution itself.' However, they are support for an 'associated organisation' of the school, even if not always directly for the Church, and this is also disallowed by the Code.
15. With regard to paragraph 23, we note that the ruling of 12 December 2012 said that 'The representatives of the Diocese have indicated that they consider the criterion relating to service within a Catholic parish to be contrary to the guidance provided by the Diocese and to the Code. They consider that, while such a criterion may demonstrate that certain parents and children are conscientiously practising their Catholic faith, it is not an appropriate measure of Catholic practice as it disadvantages other equally conscientious Catholic families who choose to fulfil their obligations in other ways.'⁷

The merits of the second complaint

16. On 31 May some sections of the website⁸ still referred to 'cleaning'. This has since been removed and is now correct.

The merits of the third complaint

17. With regards to paragraph 27, the statement 'the School will not offer a place to a non-Catholic applicant if it would thereby be unable to offer a place to a suitable Catholic applicant' is equivalent to 'the school might offer a place to a non-Catholic applicant if it can do so while still being able to offer a place to all suitable Catholic applicants'. This does not mean that the school will offer a place to all non-Catholic applicants that apply, and it is worth noting that non-religious applicants are only a subset of non-Catholic applicants.
18. The tie-breaking portion says that 'In the event of a tie for a place after the above criteria have been applied a ballot system of random allocation will be used'. This means that the criteria must necessarily be applied first of all, and then the tie breaker must be used if there is a tie between multiple applicants who both fall into one particular criterion. However, the lowest of all the criteria, namely footnote [1], simply says 'In the event of there being fewer Catholic applicants than places, consideration will be given to non-Catholic applicants who actively support the aims, values, expectations and ethos of the School, in the following order: ... members of the Church of England; members of other Christian denominations; members of non-Christian faiths.' This implicitly excludes those of no faith (as well as those

⁷ Case reference ADA/2387 and 2389

⁸ Such as <http://www.london-oratory.org/tlos/htdocs/content.asp?cat=8&sub=105&sec=106> which the BHA noted to the adjudicator at the time.

of any religion or belief who are not willing to actively support the aims, values, expectations and ethos of the School – which in itself is a somewhat subjective requirement).

19. Therefore the BHA believes that there is a breach of paragraph 1.6 (that all applicants must be admitted if there is space) and paragraph 1.36 (the same, but for faith schools). However, if the adjudicator does not agree with this reasoning, the BHA hopes he will at least agree that there is a breach of paragraph 1.8 (that criteria must be clear).

The merits of the fourth complaint

20. Paragraphs 8 and 15 of the BHA's response set out that the Catholic service criterion seemingly breach the Diocese's guidance. It seems to the BHA that the Oratory is wrong to think that it is compatible. The question therefore is whether such a breach is acceptable within the Code.
21. Relevant to this decision may be a previous decision involving Cardinal Vaughan School and the same Diocese.⁹ Here, it was concluded that 'where there is a difference of view between the school and the diocese on such 'religious matters' I would need to see a strong justification from the school to support a decision on their part not to accept the diocese's advice. One such argument might be that a religious authority was attempting to enforce an approach to admissions that was inconsistent with the Code; there may be others but they would need to be very persuasive.' In this case as in that one, no such justification has been provided.
22. That, however, was argued under the old Code, and while the relevant portions largely remain intact, there have been some changes. It is therefore worth also considering the situation under the new Code.
23. As things stand then, paragraph 1.38 says 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. 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.'*

24. This, as the Oratory says, only suggests that they need to *have regard* to the Diocese's guidance, not that they are compelled to follow it. However, paragraph 1.9.i) seems to do this:

*'It is for admission authorities to formulate their admission arrangements, but they **must not**: 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)'*

⁹ ADA/001720, paragraphs 17-28:

<http://webarchive.nationalarchives.gov.uk/20110218204125/http://www.schoolsadjudicator.gov.uk/upload/ADA1720%20Cardinal%20Vaughan%20Revised%2025May2010.doc>, 25 May 2010.

25. In other words, the exception to 1.9.i)'s prohibition is a limited one. *On the specific point of religious activities*, 1.9.i) states that schools may only take account of such activities *to the extent that they are permitted by their religious denomination*. If they go any further than this then they fall foul of 1.9.i).
26. Perhaps this therefore represents a breach of paragraph 1.9.i) and not 1.38 (in which case, we would like the adjudicator to consider it). However, it seems to the BHA that 1.9.i) means that insufficient regard has been had to the Diocese's guidance (sufficient regard being that the guidance would have been followed on the point of religious activities), and therefore 1.38 has been breached as well.