

Information Tribunal

Appeal Number: EA/2005/0021

**Data Protection Act 1998**

Heard at the offices of the  
Employment Tribunal Edinburgh  
On 13 March 2006

Decision Promulgated

15th May 2006

Before

**JOHN ANGEL**

CHAIRMAN

**VIVIAN BOWERN AND ELIZABETH HODDER**

LAY MEMBERS

Between

**SCOTTISH NATIONAL PARTY**

Appellant

and

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

For the Appellant: Mr. Mungo Bovey QC (Mr Bovey)

For the Respondent: Mr. Timothy Pitt-Payne (Mr Pitt-Payne)

**Decision**

The Tribunal find that the Enforcement Notice served on the Appellant by the Respondent was in accordance with the law and that the Respondent exercised his discretion properly when issuing the notice. Therefore the Tribunal dismisses this appeal.

## Reasons for Decision

### Background

1. The Telecommunications Data Protection Directive 97/66/EC (TDPD), concerning the processing of personal data and the protection of privacy in the telecommunications sector, was adopted on 15 December 1997. The UK implemented the TDPD through the Telecommunications (Data Protection and Privacy) (Direct Marketing) Regulations 1998 (the 1998 Regulations), which among other things covered direct marketing through automated calling systems.
2. In June 1999 the Information Commissioner (at this time known as the Data Protection Registrar) provided Interim Guidance on the 1998 Regulations, paying particular reference to the definition of “direct marketing” and gave the view that it applied “*not just to the offer for sale of goods or services, but also the promotion of an organisations’ aims and ideals. This would include a charity or a political party making an appeal for funds or support and, for example, an organisation whose campaign is designed to encourage individuals to write to their MP on a particular matter or to attend a public meeting or rally.*”
3. The 1998 Regulations were superseded by the Telecommunications (Data Protection and Privacy) Regulations 1999 (the 1999 Regulations) which revoked the 1998 Regulations, but in the material respects of this appeal contained similar provisions to those considered in the Interim Guidance.
4. In 2000 the Registrar’s office issued a legal advice confirming its view of the definition of direct marketing and its application to political parties.
5. This advice was sent to all political parties, including the Scottish National Party (SNP) by letter dated 2 April 2001.
6. The 1999 Regulations were superseded by the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the 2003 Regulations) which implemented another directive – the full legislative background is described in paragraphs 48 to 57 below - extending the scope of the privacy provisions to new

communications technologies which is explained later in this decision. However for the purposes of this appeal the provisions of the 2003 Regulations were similar to the 1998 and 1999 Regulations.

7. In May 2004 the Information Commissioner introduced Guidance to the 2003 Regulations. Under Part 1: Marketing by Electronic Means, it again recited the view set out in paragraph 1 of this decision that direct marketing covered political parties making appeals for funds or support. The Guidance addressed itself particularly to “Charities/Political Parties/Not-for Profit Organisations”.
8. In February 2005 the Information Commissioner became aware that some political parties were making telephone calls to subscribers registered with the Telephone Preference Service (TPS). The Commissioner wrote again to all the political parties, including the SNP, enclosing a note on “Telephone marketing by Political Parties” dated February 2005.
9. Following the announcement of a proposed General Election in 2005, the Information Commissioner again wrote to all major political parties reminding them of their obligations under the 2003 Regulations in particular in relation to automated calls.
10. The letter to the SNP dated 5 April 2005 included a copy of new guidance entitled “Promotion of a Political Party” (Political Party Guidance) which updated a similarly addressed guidance issued in May 2004 which incorporated the “Telephone Marketing by Political Parties” guidance issued in February 2005.
11. In the Political Party Guidance it deals with automatic calls as follows:

*“This is where a recorded message is played to the person who answers the phone. The (2003 Regulations) strictly prohibit the making of such calls for marketing purposes to anyone (including corporate subscribers) without the subscriber’s prior consent. In our view, obtaining consent to make “voice calls” is not sufficient. It is worth noting that many individuals tell us that they consider such calls to be extremely intrusive and even disturbing.”*

The Political Party Guidance also reiterates the Information Commissioner's view that political parties' appeals for funds and support are direct marketing activities caught by the 2003 Regulations.

### **The agreed facts**

12. The parties are in agreement as to the facts in this appeal. These were mainly presented to the Tribunal in the form of two witness statements by Mr Peter Tierney Murrell, Chief Executive of the SNP (Mr Murrell) and Mr Philip Jones, Assistant Commissioner employed by the Respondent (Mr Jones). Neither witness was called to give any further evidence at the hearing. The facts are as follows.
13. In 2004 a general election was expected to be called in the first half of 2005.
14. In September 2004 a company called Xpedite, describing itself as the "leading global provider of high-volume multimedia messaging solutions", approached the SNP about automated calling. SNP Campaign Director, Mr. Peter Wishart MP, and Head of SNP Campaign Unit, Mr. Grant Thoms met representatives of Xpedite to discuss the forthcoming general election and the use of automated calling as a cost effective and quick way of contacting voters with political messages. It was understood that the Labour and Conservative parties were ready to import this technique which had been used to great effect by the John Kerry (Presidential election) campaign in the United States. It was further understood that the Labour Party had used automated calls from the Deputy Prime Minister in the North East referendum campaign.
15. In taking the decision to proceed to a trial of automated calling the SNP took note of an ICM survey of the electorate for the European Parliament elections in June 2004 which found that 6% of respondents felt that they had received 'too much information' whilst a much larger 48% felt they had received 'not enough' contact. They also took account of several reports from the Electoral Commission which showed that engaging the electorate is a key element in reversing the long term decline in participation at elections. The SNP concluded that given the logistical and financial constraints on the party it was appropriate to look at alternative means of

providing the information that they perceived the electorate to have indicated that they wished to hear.

16. In late November and in early December 2004 the SNP ran a trial of a technique referred to as Automated Voice Polling (AVP) in which 53,000 potential supporters were contacted and played a series of pre-recorded statements on topical issues. Some 50% of those called 'actually picked up the telephone'. Voters were asked to indicate if they agreed or disagreed with the statements by pushing buttons on their touch-tone telephones. The responses were recorded by computer and sent back to SNP Headquarters. It was mostly SNP voters who stayed on the line to complete the survey. However this allowed the SNP to identify households with at least one SNP voter. No complaints were received from members of the public or through regulatory authorities. In this pilot exercise and subsequent automated calling campaigns, the telephone numbers on TPS registers were excluded from the electronic files submitted to the AVP service provider.
17. In mid February 2005, a further 128,675 calls were made on behalf of the SNP using automated calling. This set of calls used a recorded message from SNP leader Mr. Alex Salmond MP (Mr. Salmond) to set out the SNP position on the key issues facing Scotland at the anticipated general election later in the year. This was followed by a question on which party the recipient intended to support at the general election. No complaints were received from members of the public or through regulatory authorities.
18. On 23<sup>rd</sup> February 2005 the Liberal Democrat Party launched a "Stop Nuisance Calls Campaign" on behalf of households registered with the TPS. The campaign was targeted at the Conservative and Labour parties who were alleged to be planning to ignore TPS registered numbers in an automated calling campaign.
19. On 24<sup>th</sup> February 2005, the SNP received a letter from Mr Jones drawing attention to recent media coverage alleging that some political parties had been calling telephone subscribers who were registered on the TPS and providing the Information Commissioner's Guidance on 'Telephone Marketing by Political Parties'. In the Guidance the Commissioner confirmed that, in his view, telephone calls made by a political party to promote the party or to solicit support are a

marketing activity and that as a consequence a political party must not make unsolicited calls for such purposes to a number registered with the TPS. The Commissioner further expressed the view that the term marketing covered the promotion of an organisation's aims and ideals. He further confirmed that in his view a telephone call conducting genuine research, but nothing more, was not a marketing call. He concluded by warning that he would take enforcement action against repeated breach of the 2003 Regulations in respect of unsolicited telephone calls. He warned that any person who suffered damage could sue for compensation the person inflicting the damage.

20. On 12<sup>th</sup> March 2005 the SNP made public that Sir Sean Connery would support the SNP's general election campaign by taking part in an automated telephone calling campaign.
21. On 31<sup>st</sup> March 2005, a programme of automated calls was initiated on behalf of the SNP which in addition took place on the 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 20<sup>th</sup>, and 22<sup>nd</sup> April. The automated call consisted of a 35 second pre-recorded message from Sir Sean Connery, a long term supporter of the SNP. The message was as follows:

*"Hello there. This is Sean Connery. No, its not a joke - unfortunately the real joke is the Labour party. I am calling on behalf of the Scottish National Party. Why? Because it has been acknowledged and voted to be the most trustworthy political party of them all. If Scotland matters to you, then make it matter in Westminster. Vote for the SNP and get Scotland's voice heard in London. I thank you for listening."*

The call ended with another voice asking:

*"If you would like more information on the SNP and how we intend to make Scotland matter at Westminster, please press 1 now.*

*If you intend to vote for the SNP at the general election, please press 2 now.*

*Thank you."*

22. On 1<sup>st</sup> April 2005, the London Evening Standard reported use of automated calling by the Labour Party. Around this date, the Liberal Democrats raised the issue of the automated calls with the Information Commissioner.
23. On 5<sup>th</sup> April 2005, following the calling of the May 2005 general election, the Information Commissioner wrote to all the major political parties including the SNP to remind them of their obligations under the Data Protection Act 1998 (DPA) and the 2003 Regulations. He enclosed updated guidance on the 'Promotion of a Political Party'. This guidance updated that issued in May 2004 and incorporated the 'Telephone Marketing by Political Parties' guidance issued in February 2005. In a paragraph headed "Automated Calls" on page 4 the guidance read:

*"This is where a recorded message is played to the person who answers the phone. The Privacy and Electronic Communications Regulations strictly prohibit the making of such calls for marketing purposes to anyone (including corporate subscribers) without that subscriber's prior consent. In our view, obtaining consent to make "voice calls" is not sufficient. It is worth noting that many individuals tell us that they consider such calls to be extremely intrusive and even disturbing."*
24. In a covering letter dated 5<sup>th</sup> April 2005 the Information Commissioner referred to the SNP website in which it was stated that the SNP intended to make half a million phone calls to voters in Scotland. He drew attention to the attached guidance note and its statement that automated promotional calls can only be made with the prior consent (opt-in) of the intended recipient and warned that any calls made without consent would contravene the 2003 Regulations.
25. By letter dated 6<sup>th</sup> April 2005 to the Information Commissioner, the Liberal Democrats, alleged further evidence of breaches of the law by the SNP, the Labour Party and the Conservative Party.
26. On the 7<sup>th</sup> April 2005 the second set in the Sir Sean Connery automated calls programme took place.

27. On 8<sup>th</sup> April 2005, the SNP received a copy of the updated guidance 'Promotion of a Political Party' issued by the Information Commissioner on 5<sup>th</sup> April.
28. On the 10<sup>th</sup> and 11<sup>th</sup> April 2005 the third and fourth set in the Sir Sean Connery automated calls programme took place.
29. On 11<sup>th</sup> April 2005, the SNP responded to this guidance in a letter to the Information Commissioner arguing that the inclusion of campaigning by political parties in the term "direct marketing" was contrary to the advice the SNP had received. In order to resolve the matter the SNP sought from the Information Commissioner the basis of the legal advice he had accepted in coming to a contrary view. The SNP also sought a meeting to discuss the issues involved.
30. During April there were a number of media reports about the SNP's intention to make automated telephone calls which came to the Information Commissioner's attention, including Mr Salmond's interview with Sir David Frost on BBC Breakfast with Frost on 10<sup>th</sup> April 2005. In his column in the Scottish Standard on 13<sup>th</sup> April Mr Salmond referred to the recording of Sir Sean Connery being sent to hundreds of thousands of Scots. He also referred to the party having received a warning letter from the Information Commissioner but denied that the SNP was breaking the law.
31. On 14<sup>th</sup> April 2005, the Economist journal reported the use of automated calling by the Conservative Party in an article *Campaign Diary: 'On the trail'*.
32. During April the Information Commissioner received four complaints from private citizens about automated calls being made by the SNP.
33. On 18<sup>th</sup> April 2005 the Information Commissioner responded to the SNP's letter of 11<sup>th</sup> April. He explained that his office's interpretation of the definition of direct marketing was long standing, having been first published in 1999. He referred back to previous guidance issued by his office, and confirmed that he was satisfied that the term "direct marketing" covered the promotion of a political party and gave his legal reasoning for this finding. The Information Commissioner declined to set up a meeting with the SNP to discuss the issues given that his office's interpretation had been so long established and had not been subject to reasoned challenge. However he offered the SNP the opportunity, if the party wished, to set out the



basis of its legal advice in this matter, which he would then consider. The letter also pointed out that the Information Commissioner was actively considering enforcement action.

34. On 20<sup>th</sup> and 22<sup>nd</sup> April 2005 the fifth and final sets of calls in the Sir Sean Connery automated calls programme took place. The number of calls in these six days of calling, totalled 148,972. Of these 49,132 were previously identified supporters of the party and the remaining 99,840 were chosen by campaigning priority in potential areas of support. All numbers to be called were TPS screened.
35. The SNP maintained that only four complaints were received by the TPS. Of these, three were not contained in the screened file supplied by the party's TPS-registered supplier. The final complainant did not apparently receive an automated call.
36. On 22<sup>nd</sup> April 2005 the SNP, replied to the Information Commissioner's letter of the 18<sup>th</sup> April indicating that the SNP had put the matter into the hands of the party's lawyers and would set out their legal advice for the Information Commissioner's consideration in the next few days. In the view of the SNP there were no grounds for enforcement action. The SNP expressed concern that the Information Commissioner appeared to be discriminating against one party, when both the Labour and Conservative parties were also engaged in automated calling.
37. On 4<sup>th</sup> May Mr Richard Thomas (Mr Thomas), the Information Commissioner, wrote to the SNP personally disagreeing with the party's view that there were no grounds for contemplating enforcement action. Mr Thomas acknowledged that neither the 2003 Regulations nor the DPA defined "advertising or marketing material". As a consequence he considered it appropriate to look to definitions used in a Council of Europe Recommendation, by an industry representative body and particularly to the suggestion in recital 30 of Directive 95/46/EC that marketing can be of a 'political nature'. Referring to his guidance issued to political parties on 5<sup>th</sup> April 2005, Mr Thomas observed that from the moment the parties had the opportunity to take account of that guidance he had had no specific evidence of subscribers having received automated calls from other parties. He had however specific evidence regarding the use by the SNP of automated calling. He assured the SNP that were such specific evidence to be forthcoming he would react in the same way towards

other parties. Finally Mr Thomas sought an assurance “that the SNP will not in future use an automated telephone calling system to make calls to those who have not given their prior consent”.

38. On polling day, 5<sup>th</sup> May 2005, the SNP conducted a further round of automated calls to identified supporters, totalling 167,932. This call used Mr. Salmond to urge supporters to vote. The recorded message was followed by a question asking the voter whether they had yet voted that day. No complaints were received from members of the public or through regulatory authorities concerning these calls.
39. By the beginning of June the assurance sought from the SNP in the Information Commissioner’s letter of 4<sup>th</sup> May was not forthcoming and the Information Commissioner felt that he had no reason to believe that the SNP would not continue to make automated calls in breach of the 2003 Regulations. A Preliminary Enforcement Notice was served on the SNP on the 3<sup>rd</sup> June 2005. This Preliminary Notice stated that the Information Commissioner was satisfied that the SNP had contravened Regulation 19 of the 2003 Regulations in that it had used an automated calling system to make telephone calls to subscribers who had not consented to the receipt of such calls. He did not however consider that any person had been caused damage. He nonetheless indicated that he was minded to use his powers under section 40 of DPA to serve an Enforcement Notice requiring the SNP to cease using an automated calling system to transmit communications comprising recorded matter for direct marketing to subscribers who had not previously notified the SNP that they consent to such communications being sent to them. Following his standard practice the Information Commissioner invited the SNP to make representations as to why he should not serve a formal Enforcement Notice on or after 1<sup>st</sup> July 2005 in the terms set out in the Preliminary Enforcement Notice (Preliminary Notice).
40. Annex 1 of the Preliminary Notice explained the procedure to be followed if representations were to be made. It also stated that the Information Commissioner might in exceptional circumstances consider holding a hearing in which oral representations could be made. The SNP were also advised in the letter accompanying the 3<sup>rd</sup> June notice that a Preliminary Notice in the same terms had

been served on the Conservative and Unionist Party about whom complaints had by that time been received concerning their use of automated telephone calls .

41. On 21<sup>st</sup> June the SNP responded to the Preliminary Notice setting out representations as to why the Information Commissioner should not proceed to issue an Enforcement Notice. In addition, the SNP sought an oral hearing for Mr Salmond and Mr. Bovey to elaborate on its representations.
42. On 28<sup>th</sup> July the Information Commissioner wrote to the SNP agreeing to allow oral representations to be made to the Commissioner at his office in Wilmslow, Cheshire. It was stressed that the purpose of such a hearing was to enable representations to be made orally and was not a forum for negotiation. On 9<sup>th</sup> August the SNP wrote to the Information Commissioner to ask if it could make the oral representations in the House of Commons or in some other central London location. On 12<sup>th</sup> August 2005 the Information Commissioner replied that he believed that it would be more appropriate for any oral representations to be made to him at his Head Office, in Wilmslow. It was explained that there was no statutory duty on him to offer an opportunity for oral representations and he considered that such representations should be made in Wilmslow where both he and those of his staff who would need to attend the oral hearing were based.
43. On 15<sup>th</sup> September 2005 the Information Commissioner having received no reply to the letter to the SNP of 12<sup>th</sup> August 2005 wrote again to the SNP asking for the provision of dates on which Mr Salmond and Mr Bovey would be available to make their oral representations.
44. On 29<sup>th</sup> September 2005, having received no response to the letters of 12<sup>th</sup> August and 15<sup>th</sup> September, the Information Commissioner, wrote to the SNP to advise that if there was no reply within the following 7 days the assumption would be made that the SNP no longer wished to make oral representations.
45. On 6<sup>th</sup> October 2005, the SNP wrote to the Information Commissioner noting that the Information Commissioner felt unable apparently to meet representatives of the SNP in Edinburgh or even London. The SNP considered this situation 'unfortunate' but suggested that the Information Commissioner should now proceed to a decision

based on the written submission of 21<sup>st</sup> June 2005, as the SNP would not have an opportunity to present its case orally.

46. On 18<sup>th</sup> October 2005 the Information Commissioner served an Enforcement Notice under section 40 of DPA against the SNP in the terms already set out in the Preliminary Enforcement Notice. In addition the Information Commissioner referred to his consideration of Article 10 of the European Convention of Human Rights (ECHR) together with Article 8. He was, he said, mindful that individual subscribers have a qualified right to respect for private and family life, home and correspondence which may have been infringed by contravention of Regulation 19 of the 2003 Regulations. He was also mindful of the qualified right to freedom of expression as guaranteed under Article 10 of the ECHR. The terms of enforcement were set out as follows:

*“In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the Act, he requires that the Scottish National Party within 30 days of the date of service of this Notice shall, in accordance with Regulation 19 of the Regulations, cease using an automated calling system to transmit communications comprising recorded matter for direct marketing purposes to subscribers who have not previously notified the Scottish National Party that they consent to such communications being sent to them.*

*For the avoidance of doubt, the term “direct marketing” in paragraph 13 includes the promotion of, and appeals for funds or support by, the Scottish National Party”.*

47. On 18<sup>th</sup> October 2005 the Information Commissioner also served an Enforcement Notice on the Conservative and Unionist Party in the same terms. It has not been appealed.

## **The legislative framework**

48. This appeal concerns the application of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, known as the directive on privacy and electronic communications (the 2002 Privacy Directive). The 2002 Directive is described in recital 12 as *supplementing Directive 95/46/EC* (the Framework Directive) in relation to the protection of individuals with regard to the processing of personal data and on the free movement of such data. The predecessor Directive 97/66/EC to the 2002 Privacy Directive, concerning the processing of personal data and the protection of privacy in the telecommunications sector ( the Telecoms Directive), *translated the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector* (recital 4 to the 2002 Privacy Directive). The reason for the 2002 Privacy Directive superseding the Telecoms Directive was because of *new advanced digital technologies* (recital 5) requiring an extension of the telecommunications sector to *the development of the information society* introducing *new electronic communications services* (recital 5).

49. The relationship between the 2002 Privacy Directive and the Framework Directive is set out in recital 10 of the former directive

*“In the electronic communications sector, Directive 95/46/EC applies in particular to all matters concerning the protection of fundamental rights and freedoms, which are not specifically covered by the provisions of this Directive.”*

50. Article 13 the 2002 Privacy Directive provides for unsolicited communications:

*1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.*

*2. Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same*

*natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use.*

*3. Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.*

51. In the UK, the Framework Directive was implemented by the Data Protection Act 1998 (DPA) and the 2002 Directive by The Privacy and Electronic Communications (EC Directive) Regulations 2003 (the 2003 Regulations).

52. The particular provision of relevance to this appeal under the 2003 Regulations is Regulation 19 covering the **use of automated calling systems** which provides

(1) *A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling system except in the circumstances referred to in paragraph (2).*

(2) *Those circumstances are where the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communication being sent by, or at the instigation of, the caller on that line.*

53. There is no definition of 'direct marketing' in the 2003 Regulations but under Regulation 2(2)

*Expressions used in these Regulations that are not defined in paragraph (1) and are defined in the Data Protection Act 1998 shall have the same meaning as in that Act.*

54. Under s11(3) of DPA “*direct marketing*” means the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.

55. In recital 10 of the Framework Directive it is stated that

*The object of the national laws in the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognised both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law;...the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community.*

Article 8 of ECHR contains the right to respect for private and family life – *everyone has the right to respect for his private and family life, his home and his correspondence.*

56. The ECHR is incorporated into UK law by the Human Rights Act 1998 (HRA)

57. Article 10 of ECHR, which is contained in Schedule I HRA, covers freedom of expression:

(1) *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*

(2) *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing*

*the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

### **Whether the 2002 Privacy Directive extends to direct marketing by political parties**

#### **The Appellant's contentions**

58. Mr Bovey contends that the scope of the 2002 Privacy Directive does not extend to direct marketing by political parties. He further contends that the dual test set out by Article 10 of ECHR, in effect, does not allow the rights both of political parties to impart their ideas and of individuals to receive them, to be restricted by the 2002 Privacy Directive. The basis for this contention is in two parts.
59. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. (*Sunday Times v United Kingdom* [1979] 2 EHRR 249 at paragraph 49).
60. He refers the Tribunal to recitals 40 and 41 of the 2002 Privacy Directive -
- (40)“Safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes in particular by means of automated calling machines, telefaxes, and e-mails, including SMS messages. These forms of **unsolicited commercial communications** may on the one hand be relatively easy and cheap to send and on the other may impose a*



*burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communications networks and terminal equipment. For **such forms of unsolicited communications for direct marketing**, it is justified to require that prior explicit consent of the recipients is obtained before such communications are addressed to them. The single market requires a harmonised approach to ensure simple, Community-wide rules for **businesses and users.**”*

*(41)“Within the context of an existing **customer relationship**, it is reasonable to allow the use of electronic contact details for the offering of similar products or services, but only by the same company that has obtained the electronic contact details in accordance with Directive 95/46/EC. When electronic contact details are obtained, the customer should be informed about their further use for direct marketing in a clear and distinct manner, and be given the opportunity to refuse such usage. This opportunity should continue to be offered with each subsequent direct marketing message, free of charge, except for any costs for the transmission of this refusal. Paragraph 2 and, prior to obtaining consent, for the purposes mentioned in paragraph 3. communications network or publicly available communications service or of the third party providing the value added service, and must be restricted to what is necessary for the purposes of providing the value added service.””*

He points out the words highlighted in bold in the recitals for his contention that the 2002 Privacy Directive only covers commercial communications, businesses and their customers, and not political parties. He further contends in relation to recital 41, that if the 2002 Privacy Directive were to apply to political parties then such parties, who do not have ‘customers’, would be placed in a more restricted position than commercial organisations. Such an unlikely possibility, bearing in mind Article 10 of ECHR, supports his view that Article 13 of the 2002 Privacy Directive only applies to commercial organisations.

61. Mr Bovey further refers the Tribunal to the press release issued by the European Commission on 5 December 2003 (the Review) on the launch of the 2002 Privacy Directive where the Review refers to the provisions of Article 13 as relating to 'unsolicited commercial communications', which he contends supports his argument that Article 13 does not apply to political parties.
62. He also referred to the Department of Trade and Industry's Consultation document of March 2003 which sought views on the implementation of the 2002 Privacy Directive in the UK. Chapter 6 of that document, entitled "unsolicited commercial communications" appeared, he argued, to limit the understanding of the scope of unsolicited communications to those communications with a commercial purpose.
63. Mr Bovey further argues that recital 8 of the 2002 Privacy Directive, set out below, shows that the 2002 Privacy Directive relates to the proper functioning of the internal market in a commercial way and is not about politics -

*"Legal, regulatory and technical provisions adopted by the Member States concerning the protection of personal data, privacy and the legitimate interest of legal persons in the electronic communication sector, should be harmonized in order to avoid obstacles to the internal market for electronic communication in accordance with Article 14 of the Treaty. Harmonisation should be limited to requirements necessary to guarantee that the promotion and development of new electronic communications services and networks between Member States are not hindered".*

64. He further submits that the sources of law referred to above do not permit the SNP to foresee to the requisite degree the restrictions sought to be imposed on its ECHR rights, and that the proper approach to legislative interpretation at common law is set out by Lord Hoffmann's elegant explanation of the principle of legality quoted at paragraph 27 of the House of Lords decision in *Regina v. Secretary of State for the Home Department and another ex parte Anufrijeva* [2003] UKHL 36:

*"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The*

*constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document".*

65. Mr Bovey refers the Tribunal to paragraph 42 of the European Court of Human Rights decision in *Castells v Spain* 11798/85 [1992] ECHR 48 (23 April 1992)

*"The Court recalls that the freedom of expression, enshrined in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, inter alia, the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 23, para. 49, and the *Observer and Guardian* judgment, cited above, Series A no. 216, p. 30, para. 59 (a))."*

Mr Bovey argues that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests.

Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the Appellant, call for the closest scrutiny on the part of a court.

66. He makes the point that the role played by political parties in the exercise of freedoms of expression should only be limited if clearly provided for in legislation, particularly in relation to opposition parties like the SNP. Mr Murrell, in his witness statement refers to several reports from the Electoral Commission which had shown that engaging the electorate is a key element in reversing the long-term decline in participation at elections.
67. Mr Bovey considers that there are five categories of activities undertaken by political parties:
- (1) Sales, for example of T shirts, mugs etc;
  - (2) Fundraising;
  - (3) Membership and affiliations;
  - (4) Political campaigning – putting forward party messages;
  - (5) Opinion research.
68. He does not accept that any of these activities amount to direct marketing as provided for under the 2002 Privacy Directive. However, he argues that even if the Tribunal finds that political parties are caught by the 2002 Privacy Directive for say sales and fundraising, they are certainly not caught for campaigning, the activity which is the subject of this appeal.

### **The Respondent's contentions**

69. Not surprisingly Mr Pitt-Payne takes a different view and considers the 2002 Privacy Directive applies to political parties. He considers that the first four activities of political parties identified in paragraph 67 above are direct marketing activities caught by the 2002 Privacy Directive, including Article 13.
70. Mr Pitt-Payne submits that there is nothing in Article 13.1 of 2002 Privacy Directive that either limits the term "direct marketing" to commercial communications, or

specifically excludes communication by political parties. If any such limitation or exclusion had been intended it would have been stated in clear terms in the body of the 2002 Privacy Directive; one cannot infer such a limitation merely from the preamble to the 2002 Privacy Directive (as the SNP seeks to do, relying on recitals 40 and 41 of the 2002 Privacy Directive).

71. He contends that where the Framework Directive and the 2002 Privacy Directive, (the latter providing specific rules for the electronic communications sector) uses similar terms in the same context, such as ‘direct marketing’, then they should be interpreted in the same way unless there is a different intention, which Mr Pitt-Payne says is not the case. Recital 30 to the Framework Directive states

*“Member States may determine the circumstances in which personal data may be used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies; whereas Member States may similarly specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organization or by any other association or foundation, of a political nature for example, subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons.”*

This recital recognises that marketing is not an intrinsically commercial concept; there is commercial marketing and other marketing. Article 14(b) of the Framework Directive is the subject of recital 30 and anticipates that if, say, the SNP holds personal data and anticipates using it for direct marketing then the data subject has the right to object to the processing or to be informed before the SNP uses the personal data and be offered the right to object to such use. If Article 13 of the 2002 Privacy Directive took a different position it would provide as such.

72. Mr Pitt-Payne’s argument continues that in policy terms, a limitation of the term “direct marketing” to commercial communications would be difficult to explain. The objection to automated calling systems is that they can be intrusive in relation to individual privacy, as they make possible “cold calling” on a very wide scale. This

objection applies just as much (if not more so) to communications by political parties, charities and other campaigning organisations as it does to communications by commercial organisations.

73. He contends that Opinion 5/2004 of the Framework Directive's Article 29 Data Protection Working Party further supports this approach to the construction of the Directive:

*"3.3 The concept of direct marketing*

*There is no definition of direct marketing in either the specific or general data protection Directives. There is however a description of marketing purposes in Recital 30 of Directive 95/46/EC, which states that: "(...) whereas Member States may similarly specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organisation or by any other association or foundation, of a political nature for example, subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons".*

The Working Party's view is that Article 13 of Directive 2002/58/EC consequently covers any form of sales promotion, including direct marketing of charities and political organisations (e.g. fund raising, etc).

The Opinion specifically refers to fund raising by political parties and charities as an example of direct marketing, but does not suggest that fund raising is the *only* kind of political communication that would fall within Article 13.1.

74. In relation to recital 8 of 2002 Privacy Directive Mr Pitt-Payne makes the point that the 2002 Privacy Directive is not purely about the internal market but about privacy. He continues that it is wrong to say that political parties have nothing to do with the functioning of the market. They promote themselves and buy services, as the SNP did here from Xpedite, and therefore have an impact on the market. A concern behind the 2002 Privacy Directive is that techniques, like spam, can gum up networks, which can affect the proper functioning of the market. Activities of political

parties, for example campaigning, can do this in the same way as commercial bodies.

75. Mr Pitt-Payne distinguishes the *Anufrijeva* case because it was based on a completely different set of facts involving an adverse decision against an asylum seeker having his benefits withdrawn. In contrast, he maintains, what is at stake in this appeal is whether the SNP can make calls to anyone or only those who have given their consent.
76. He also distinguishes the *Castells* case which involved an MP who faced sanctions in relation to what he said. In this appeal, he maintains, it is not the content which is being restricted but the form of communications.

### **Whether the 2003 Regulations cover direct marketing by political parties**

#### **The Appellant's contentions**

77. Mr Bovey contends that the terms of section 11(3) of DPA are not wide enough to extend the meaning of direct marketing beyond that to be found in the 2002 Privacy Directive. In both the Enforcement Notice and the Respondent's response to the grounds of appeal, the Respondent relies upon Regulation 2(2) of the 2003 Regulations incorporating definitions in the DPA. Because the Respondent sees section 11 as defining "direct marketing" in a manner that would extend to political parties, the Respondent maintains that this definition applies to the 2003 Regulations as a whole and Regulation 19 in particular.
78. However, Mr Bovey considers that the Enforcement Notice erred in extending the meaning of direct marketing to include approaches made by political parties making appeals for funds or support. In particular, the Enforcement Notice, he says, is wrong to apply the definition contained in section 11(3) of DPA. The notice is wrong to hold that Regulation 2 applies the definition of direct marketing found in section 11, which he maintains is specifically limited to that section. Contrast the approach in section 71 which shows provisions defining or otherwise explaining expressions used in the DPA. Direct marketing is not one of them.

79. Mr Bovey says that as is clear from the first paragraph of the explanatory note to the 2003 Regulations the purpose of the 2003 Regulations is to implement the 2002 Privacy Directive. It would not have been open to those drafting the 2003 Regulations to make them materially different from the 2003 Regulations without making this clear. In any event, it is most unlikely that had the United Kingdom's Government intended to make the 2003 Regulations wider than the 2002 Privacy Directive, it would have failed to make this clear. He contends, therefore, that the 2003 Regulations do not apply to direct marketing by political parties.

### **The Respondent's contentions**

80. Mr Pitt-Payne contends that the implications of Mr Bovey's arguments are far reaching. If Regulation 19 does not apply to political parties or other not for profit organisations then they could all make automated calls without restraint. The limitations on the use of other forms of communication covered by the 2003 Regulations – fax, telephone and email, would similarly not apply to such organisations. There would be no need for them to take heed of the TPS.
81. He argues that it is common ground that the SNP transmitted or instigated the transmission of communications comprising recorded matter. It is also common ground that they did this by means of an automated calling system as defined in Regulation 19(4). No issue arises under Regulation 19(3). Hence the issue of construction between the parties is a narrow one, namely whether what the SNP did was done "for direct marketing purposes".
82. The Information Commissioner in the Enforcement Notice considered that the term "direct marketing" included approaches by political parties making appeals for funds or support. The approach taken by the Information Commissioner reflected the guidance that he had previously given about his understanding of Regulation 19. It follows from this approach that the dissemination by automated calling of the message by Sir Sean Connery amounted to "direct marketing". This is so even if one accepts the SNP's position that this message was solely part of the SNP's political campaign and not for membership or fundraising or commercial purposes. On the Information Commissioner's approach there is no distinction between communication by a political party soliciting support at an election, and



communication soliciting funds or membership. Either would constitute “direct marketing” within Regulation 19.

83. Mr Pitt-Payne contends that the construction of Regulation 19, as reflected in the Information Commissioner’s various guidance communications is the correct approach and explains why as follows.
84. Regulation 2(1) of the 2003 Regulations includes a number of specific definitions. The term “direct marketing” is not specifically defined. However, Regulation 2(2) states that expressions used in the 2003 Regulations that are not defined in Regulation 2(1) and are defined in the DPA shall have the same meaning as in that DPA.
85. Section 11 of DPA confers a right on individuals to require data controllers not to process personal data “for the purposes of direct marketing”. Section 11(3) states that in this section direct marketing means “the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals”. By reason of Regulation 2(2) of the 2003 Regulations, the expression “direct marketing” bears the same meaning in Regulation 19 as it does in section 11(3) of DPA.
86. Regulation 2(2) of the 2003 Regulations is not limited to those expressions that are defined in section 1 (basic interpretative provisions) or section 70 (supplementary definitions) of DPA, and neither is Regulation 2(2) limited to those expressions included in the index of defined expressions in Section 71 of DPA. Hence the fact that the definition of “direct marketing” does not appear in sections 1, 70 or 71 of DPA, but only in section 11(3), is immaterial. Regulation 2(2) of the 2003 Regulations requires the definition in section 11(3) of DPA to be “read into” Regulation 19 of the 2003 Regulations.
87. Applying this approach, communication by a political party seeking funds or support amounts to “direct marketing”. Both the term “marketing” and the term “advertising” on their ordinary meaning would extend to this kind of communication.
88. Mr Pitt-Payne further argues that the following references illustrate this point about the scope of the terms “marketing” and “advertising”.

- (1) Section 8 of the Broadcasting Act 1990 treats partisan political communications as being “advertisements” (and prohibits commercial television stations from carrying such advertisements).
- (2) The current edition of the *British Code of Advertising, Sales Promotion and Direct Marketing* (“the Code”: available on [www.cap.org.uk](http://www.cap.org.uk)) treats communications of this nature by political parties as constituting both “advertising” and “marketing”: see clause 12.1 and 12.1 of the Code, at page 8.
- (3) The current edition of the *Television Advertising Standards Code* (“the Television Code”: available on the same website) treats communications of this nature as constituting “advertisements”: see section 4 of the Television Code, at page 17.

**Whether there is an interference with the SNP’s rights to freedom of expression which is disproportionate to any legitimate aim being pursued**

**The Appellant’s contention**

89. Mr Bovey’s final contention is that in any event the interference with the Appellant’s rights to freedom of expression is disproportionate to any legitimate aim being pursued by the Respondent in this appeal. The Enforcement Notice fails to give adequate or comprehensive reasons addressing proportionality particularly for opposition political parties as recognised in *Castells*. The number of complaints is few and they appear to be linked to a campaign by the SNP’s political opponents. In these circumstances, the interference with the SNP’s rights to freedom of expression is disproportionate to any legitimate aim being pursued.

**The Respondent’s contention**

90. Mr Pitt-Payne argues that there is nothing in the HRA or in Article 10 of ECHR that requires a different approach to be taken to the construction of Regulation 19 from the approach he has taken.

91. There are two potentially relevant provisions of HRA:
- (1) Section 3 (requiring primary and subordinate legislation to be read and given effect in a way which is compatible with Convention rights); and
  - (2) Section 6(1) (rendering it unlawful for a public authority to act inconsistently with Convention rights).
92. Regulation 19 of the 2003 Regulations engages the right to freedom of expression protected by Article 10(1) of the ECHR; this is so whether the Information Commissioner's construction or the SNP's rival construction is adopted. However, even on the Information Commissioner's construction, the interference is very limited. Looking at the circumstances of this appeal in particular, on the Information Commissioner's construction there is no limit on the content of any communication that may be made by a political party. The only limit is on the circumstances in which a particular communication technology may be used. So there is nothing to prevent the SNP from using automated call systems for campaigning provided the data subject consents to receiving them.
93. Further, any interference with the Article 10(1) right is justified under Article 10(2) and hence does not involve a breach of ECHR. The interference comes within Article 10(2) as it is for the purpose of protecting the rights of others. Regulation 19 protects individual privacy which is itself the subject of Article 8 of the ECHR. In particular:
- (1) The interference is "prescribed by law". Its scope is set out both in the 2002 Privacy Directive and in the 2003 Regulations.
  - (2) The interference is both necessary and proportionate, applying the three stage test set out in *R v Secretary of State ex parte Daly* [2001] UKHL 26, paragraph 27.
94. The relevant passage from *Daly* is as follows:

*The contours of the principle of proportionality are familiar. In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 the Privy Council adopted a*

*three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:*

*"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."*

95. Mr Pitt-Payne applies the three-fold test as follows:

- (1) The legislative object of protecting individual privacy is sufficiently important to justify some restriction on freedom of speech.
- (2) There is a clear rational connection between the restriction on the use of automated calling systems and the objective of protecting privacy. Automated calling systems have the potential to undermine individual privacy in that they make it possible to make unsolicited calls to a large number of individuals, and/or repeated calls to the same individual. The use of such systems is not prohibited outright: it is restricted to those who have given their prior consent to be contacted in this way.
- (3) The measures in question go no further than is necessary for the legislative purpose. A restriction which was confined to the commercial use of automated calling systems would not be adequate to meet that purpose; the non-commercial use of such systems is just as capable of being detrimental to individual privacy.

96. From this he contends it follows that:

- (1) section 3 of HRA does not require this Tribunal to reject the Information Commissioner's construction of Regulation 19; and
- (2) in acting on that construction, the Information Commissioner did not breach section 6(1) of HRA 1998.

### **Fair hearing**

97. The SNP raised a further ground of appeal, that the Information Commissioner had not given the SNP a fair hearing before issuing the Enforcement Notice, the circumstances of which are set out in paragraphs 42 to 45 of this decision. During the course of the appeal hearing Mr Bovey made it clear that he no longer wished to pursue this ground of appeal, hence we make no finding on the matter.

### **The Tribunal's decision**

98. The Tribunal has considered the well presented arguments of both parties. We find that the 2003 Regulations do apply to political parties and their campaigning activities and that the automatic calls made by the SNP were in contravention of Regulation 19, because the SNP did not obtain the consent of data subjects to the use of an automated calling system before making those calls. The Tribunal, in effect, prefers the legal arguments of the Respondent in making this finding, in particular that the 2002 Privacy Directive, the DPA and the 2003 Regulations do not exclude from regulation the direct marketing of not for profit organisations such as political parties.

99. In making this finding we have, inter alia, taken into account that:

- (1) If we had accepted Mr Bovey's contention that political parties are outside the remit of Regulation 19 it would then be possible that political parties would be outside the remit of all the other provisions of the 2003 Regulations relating to direct marketing;
- (2) It is not only political parties which would be outside the scope of the 2003 Regulations but other not for profit making organisations such as charities;
- (3) The SNP despite contending that Regulation 19 did not apply still chose to take steps not to make calls to TPS registered subscribers. This appears to us to be an inconsistent approach to the interpretation and application of the

2003 Regulations, in effect accepting that parts applied and others did not. This suggested to us that the SNP, through their actions, accepted that the Regulations applied, at least in part, to political parties.

- (4) There is no evidence that the SNP, or for that matter any other political party, raised the matter of their different interpretation of the 2003 Regulations with the Information Commissioner until after he started to write to the SNP about what he considered to be their breaches of Regulation 19; in other words although the Information Commissioner's guidance had been posted on his web site for some years and he took the trouble to write to each political party prior to the 2005 general election making it quite clear how he interpreted the Regulations, no political party sought to take issue with him at the time.
- (5) The only limitation being placed on the SNP is as to the method of conveyance of a communication, not as to its content, and only to the extent that an individual or data subject had not previously consented or opted-in to receiving automated calls. In our view this does not amount to a breach of the ECHR.

100. Therefore we find that the Information Commissioner

100.1 was correct in law in finding that the SNP was in breach of Regulation 19 of the 2003 Regulations, and

100.2 he exercised his discretion properly in serving the Enforcement Notice, the subject of this appeal.

Signed

Date 15th May 2006

John Angel  
Chairman