Marcus Pilgerstorfer KC

Silk: 2020 Call: 2002

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Marcus is an enormously experienced specialist in the fields of employment and discrimination law; product liability and consumer law; and public, human rights and data privacy law. He has appeared in a number of the leading cases.

He is recognised by the directories as “a superb barrister” who is “just brilliant in court” and “handles clients extremely well and surpasses their expectations”. He has “a brain the size of a planet” and is “clearly much admired by the senior judiciary”.

Marcus is a Civil and Criminal Recorder (part-time judge), is an Advocacy Trainer at Gray’s Inn and was a member of the Attorney General’s A Panel of Counsel to the Crown.

> ***He’s a superb barrister with a phenomenal brain.***
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Expertise

Employment and Discrimination

Marcus is a leading specialist in employment and discrimination law, with extensive experience across the full range of disputes and venues. He has acted for a wide mix of clients including individuals, unions, and employers from SMEs to City Banks, Airlines, Government departments and other large employers. Please see under 'recent cases' for examples of his work.

- **Individual Statutory and Contractual Disputes:** Marcus' experience spans all types of individual employment disputes. He is often instructed in complex multi-allegation whistleblowing and discrimination claims, as well as High Court contractual disputes. He has significant experience of group employment claims, including in the context of employment status disputes, discrimination and holiday pay. Marcus has extensive appellate experience and regularly appears in important test cases in this field.
- **Industrial Relations:** Marcus' work in the industrial relations field includes injunction applications in response to strikes and other industrial action, recognition claims before the CAC and complaints before the Certification Officer. He also appears in individual cases impacted by industrial relations law and is well-versed in Art 11 ECHR arguments that can arise in this context.
- **Business Protection**: Marcus is regularly instructed to advise and act in cases concerning restrictive covenants covering employee competition, non-dealing and poaching, as well as enforcing confidentiality rights.
- **Independent Adjudicator:** Marcus acts as an independent adjudicator on behalf of organisations and has conducted investigations and determined internal appeals, grievances and highly sensitive whistle-blowing complaints.
- **Mediations and Arbitrations**: Marcus has significant experience in acting for clients in mediations and arbitral proceedings.
- **Parliamentary Drafting**: Marcus has also advised on and drafted Employment Bills for Members of Parliament, including a bill which became the Gangmasters (Licensing) Act 2004.
- **Media**: Marcus has commented on employment law issues on BBC News 24, BBC Six o'clock News, the Donal MacIntyre Show and has advised BBC Radio 4's Moneybox programme.

Sargeant v London Fire Commissioner

UKEAT/137/17; [2021] ICR 1057

Construction of s61 Equality Act 2010 (non-discrimination rule for occupational pension schemes) and defence in Schedule 22 para 1(1).

Community Based Care Health Ltd v Narayan

[2019] UKEAT/0162/18 (EAT)

Employment status of 'out of hours' GP; whether the undisclosed principal doctrine applies.

Ahmed v Cardinal Hume Academies

[2019] UKEAT/0196/18 (EAT)

Correct test for harassment and direct disability discrimination under the Equality Act 2010.

Braine & Others v The National Gallery

2201625/2018 (ET)

Employment status of gallery educators; whether s188 TULRCA claims should be extended to "workers" by reference to Directive 98/59 on collective redundancies.

Seahorse Maritime Ltd v Nautilus International

[2018] EWCA CIV 2789, [2019] IRLR 286 (CA) [2017] ICR 1463, UKEAT/281/16 (EAT)

Where crews were supplied to operate ships outside the UK, whether each ship was a separate 'establishment' for the purposes of consultation, and the correct approach to territoriality in a claim for collective redundancy consultation under s188 TULRCA.

King v Sash Window Workshop

CASE C-214/16, [2018] 2 CMLR 10, [2018] ICR 693, [2017] IRLR 142 (CJEU)

Whether a payment in lieu of paid annual leave falls due at termination of a worker/employer relationship for the entirety of that relationship notwithstanding that both parties considered the claimant a worker at the material time.

Hayes & Others v Qantas Cabin Crew (UK) Ltd

3347009/2016 (ET)

Whether requirement to undertake airline standby duty shifts constituted indirect sex discrimination.

Baker v Peninsula Business Services Ltd

[2017] ICR 714, [2017] IRLR 394 (EAT)

Whether asserting a protected characteristic is enough to bring a claimant within the scope of harassment protection.

UN Judge for Staff Appeals

Advising in relation to misconduct allegations against a UN Civil Servant.

Hainsworth v MOD

(2015, SC); [2014] 3 CMLR 43 (CA); AND [2013] EQ LR 1159 (EAT)

Whether the duty to make reasonable adjustments extends to carers of disabled people.

Burrell v Micheldever Tyre Services

[2014] ICR 935 (CA)

Whether the EAT should remit or substitute following a successful appeal.

Commissioner of Police of the Metropolis v Keohane

[2014] ICR 1073 (EAT)

The causal test to be applied in cases of pregnancy discrimination.

Portnykh v Nomura Plc

[2014] IRLR 251 (EAT)

The extent of the 'without prejudice' rule and EAT costs orders in respect of appeal fees.

Qantas Cabin Crew (UK) Ltd v Lopez

[2013] IRLR 4 (EAT)

Construction of employment contracts concerning allowances, doctrine of mistake and time in unauthorised deductions claims.

Edwards v Chesterfield

[2012] 2 AC 22 (SC), [2011] QB 339 (CA)

The application of the Johnson v Unisys principle to express contractual terms in common law breach of contract claim.

English v Thomas Sanderson Blinds

[2009] 2 CMLR 18 (CA)

Whether a straight claimant could be harassed as gay when known not to be.

Enfield Technical Services v Payne

[2008] ICR 1423 (CA)

The scope of the illegality doctrine.

Palfrey v Transco Plc

[2004] IRLR 916 (EAT)

Agreements to vary effective date of termination; per incuriam EAT decisions.

Secretary of State for Justice v The POA

(2016, HC)

Injunction to restrain industrial action by prison officers following the release of health and safety information within the prison estate.

Secretary of State for Education v The NUT

[2016] EWHC 812 (QB), [2016] IRLR 512 (HC)

On the ability of a third party to an employment relationship to obtain declaratory interim relief on lawfulness of industrial action

Advising compatibility of the Trade Union Bill 2015 with the ECHR.

RMT v UK

(2015) 60 EHRR 10 (ECTHR)

On the issue of whether the provisions of TULRECA constitute an unjustifiable interference with Art 11 ECHR (drafting of application).

BA Cabin Crew Industrial action and related litigation (2009-10, HC), including Christmas strike injunction

[2010] IRLR 423

EDF Energy Powerlink Ltd v RMT

[2010] IRLR 114 (HC)

On whether strike lawful given requirement to give notice of industrial action under s226A TULRCA.

Media & Data Privacy

Marcus' Media and Data Privacy practice includes advising clients in relation to many aspects of data protection, information law, and reputation management. He regularly acts and advises in matters brought under the General Data Protection Regulation, the Data Protection Act 2018 and related legislation. This includes issues of data subject access, rectification and erasure as well as damages claims in respect of data breaches. Marcus has particular experience in running group and multi-party litigation and advising in respect of strategic decisions that arise in that context. Marcus' practice also involves advising clients in relation to protection of reputation, particularly in the context of digital communication and social media.

Product Liability and Consumer Rights

Marcus is recognised in the directories as one of the leading product liability and consumer rights specialists. He has been described by the directories as *"a superb barrister with a phenomenal brain"*; and "*brilliant. He gets the law right every time, he's a detail person and the perfect junior to have working with you";* a *"walking encyclopaedia of all matters product liability*".

Marcus' work includes the following (please see under 'recent cases' for examples):

- **Large Multi-Party/Group Litigation**: Marcus acts in a number of the most high profile group litigation cases in this field, including those concerning metal-on-metal hips, PIP breast implants, and pharmaceutical products.
- **Individual Cases**: Marcus has worked on a very wide range of other individual cases concerning products such as cars, bicycles, motorcycles, showers, ladders, lotions, eye lenses, and other pharmaceuticals and medical devices.
- **International**: Marcus has advised in connection with a number of international product cases, including in relation to manufacturing disputes in Hong Kong.

> ***Walking encyclopaedia of all matters product liability***
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- **Product Safety/Regulation:** Marcus acts and advises in product safety and regulatory cases, including in relation to faulty tumble dryers which were liable to catch on fire, as featured on BBC's Watchdog programme.

Marcus has an active research interest in this area and is Joint Editor of the Common Core Product Liability Research Group, an international research project comparing European product liability laws. He has completed a PhD concerning the implementation of the Product Liability Directive in England and Germany.

The DePuy Pinnacle Metal-on-Metal Hip Group Litigation: Gee v DePuy International Ltd

[2018] EWHC 1208 (QB), [2018] MED LR 347 (HC, QBD)

Whether Pinnacle metal-on-metal hip implants were defective within the meaning of the Consumer Protection Act 1987 and Product Liability Directive; correct approach to determining defectiveness and causation (4 month trial).

Whirlpool Tumble Dryers

(2016-date)
Acting in relation to regulatory decisions and individual claims arising from tumble dryers that were liable to catch on fire (featured on BBC's Watchdog programme).

The PIP Breast Implant Group Litigation

(2010-DATE, HC). THE LAWYER TOP 20 CASES OF 2016

Claims against private clinics, credit card companies and insurers concerning whether PIP silicone breast implants were of satisfactory quality.

XYZ v Travelers Insurance Co Ltd

[2019] UKSC 48; [2019] 1 WLR 6075 (SC); [2018] EWCA CIV 1099, [2018] LLOYD'S REP IR 636 (CA); [2017] EWHC 287 (QB), [2017] LLOYD'S REP IR 269 (HC)

Section 51 Supreme Court Act 1981 costs application against non-party insurers in the context of a GLO.

Holloway v Transform Medical Group (CS) Ltd

[2014] EWHC 1641

Application to add further claimants to a GLO register.

The Mix-Match Hip Litigation

(2014-2018, HC)

Claims against surgeons concerning whether they manufactured a defective product by combining hip implant components from different manufacturers when performing hip surgery

The ASR Hip Special Arbitration Process

(2015-18, arbitration process).

The Sabril Group Litigation

(2007-2010, HC)

Claims concerning whether the epilepsy drug Sabril was a defective product under the Consumer Protection Act 1987 and Product Liability Directive.

Public and Human Rights

Marcus has acted in numerous public law and human rights cases including judicial reviews, applications for declarations of incompatibility under the Human Rights Act 1998, challenges to council bye-laws, and claims before the European Court of Human Rights. He has been involved in some very high profile challenges such as **Keyu v Secretary of State (Batang Kali Judicial Review)** [2016] AC 1355 (SC) and has significant experience of cases concerning the Article 8 ECHR implications of deporting foreign prisoners such as **KO (Nigeria) & Others v Secretary of State for the Home Department** [2018] 1 WLR 5273. For examples, please see under 'recent cases'.

Lowe v Secretary of State for the Home Department

[2021] EWCA CIV 62, [2021] IMM AR 792 (CA)

Integration and permissibility of UT's own assessment of the facts.

R (Mahmood) v UT; ME (Malaysia); and RK (Iran) v Secretary of State for the Home Department

[2020] 3 WLR 723

Meaning of "serious harm" within statutory deportation regime.

HA (Iraq); RA (Iraq); AA (Nigeria) v Secretary of State for the Home Department

[2022] UKSC 22; [2022] 1 WLR 3784 (AND PREVIOUSLY [2020] HRLR 21, CA)

How to apply the "unduly harsh" test in relation to qualifying children when assessing whether the effect of deportation on a foreign criminal would breach the convention right to private and family life. Relevance of rehabilitation and seriousness of the offending.

MA (Pakistan) v Secretary of State for the Home Department

[2019] EWCA CIV 1252 (CA)

Whether a change in the law provided a basis for a decision to deport; whether deportation contrary to legitimate expectations; whether very compelling circumstances made out.

JG (Jamaica) v Secretary of State for the Home Department

[2019] EWCA CIV 982 (CA)

Whether judge correct to find very compelling circumstances for deportation; whether a separate assessment of article 8 was legitimate outside of the statutory regime.

Binbuga v Secretary of State for the Home Department

[2019] EWCA CIV 55, [2019] IMM AR 1026; [2019] INLR 403, CA

Test for "persistent offender"; whether 'social and cultural integration' meant lawful integration or whether it could be established by membership of a criminal gang; relevance of appellant being a "home grown criminal".

MS (Philippines) and RA (Iraq) v Secretary of State for the Home Department

[2019] UKUT 122 (IAC), [2019] IMM AR 767; [2019] INLR 607, UT (IAC)

Approach to aspects of deportation post KO (Nigeria).

KO (Nigeria) & others v Secretary of State for the Home Department

[2018] UKSC 53, [2018] 1 WLR 5273, [2019] 1 ALL ER 675 (SC) [2016] EWCA CIV 617, [2016] IMM AR 954, [2017] INLR 15 (CA)

Whether, when assessing if the effect of deportation of a foreign criminal on a qualifying child is unduly harsh, the determination must be based solely on child-centric considerations or should take into account criminality and immigration history.

SC (Zimbabwe) v Secretary of State for the Home Department

[2018] EWCA CIV 929 (CA)

Meaning of 'persistent offender' under statutory scheme; whether that status, once acquired, can be lost.

GD (Ghana) v SSHD

[2017] EWCA CIV 1126, [2018] IMM AR 63, [2017] INLR 882 (CA)

Impact of Family Court orders on Secretary of State's power to deport; effect of s11(5) Children Act 1989 on a residence order upon resumption of parents living together.

KG (Trinidad) v SSHD

[2017] EWCA CIV 789 (CA)

Correct test to apply under s117C of the Nationality, Immigration and Asylum Act 2002.

IT (Jamaica) v SSHD

[2017] EWCA CIV 207 AND [2016] EWCA CIV 301 (CA)

Whether circumstances sufficiently exceptional to avoid deportation; whether freestanding assessment of article 8 considerations permissible.

LT (Kosovo) and DC (Jamaica) v SSHD

[2016] EWCA CIV 1246 (CA)

Whether criminality had caused "serious harm" for the purposes of deportation regime; weight to be attached to Secretary of State's view.

JZ (Zambia) v SSHD

[2016] EWCA CIV 116, [2016] IMM AR 781 (CA)

Whether factors in Immigration Rules 399 and 399A could form part of the aggregation of matters which collectively constituted "exceptional circumstances" for the purposes of avoiding deportation under Rule 398.

Keyu v Secretary of State (Batang Kali Judicial Review)

[2015] UKSC 69, [2016] AC 1355, [2015] 3 WLR 1665, [2016] HRLR 2 (SC)

Whether Article 2 ECHR or customary international law required a public inquiry into historic deaths occurring in Batang Kali, Malaysia in 1948. Whether the standard of irrationality review should be Wednesbury review or proportionality review, and whether decision not to hold an inquiry was irrational.

JA (Ghana) v SSHD

[2015] EWCA CIV 1031 (CA)

Whether UT, having identified error of law, was correct to reach a fresh determination rather than to remit.

RMT v UK

(2015) 60 EHRR 10 (ECTHR)

Whether the provisions of TULRECA constitute an unjustifiable interference with Art 11 ECHR (drafting of application following EDF Energy Powerlink Ltd v RMT [2010] IRLR 114).

Advising compatibility of the Trade Union Bill 2015 with the ECHR.

Recent cases

AFEX v IFEX

[2010] EWHC 1178 (CH), [2010] IRLR 964

On the enforceability of restrictive covenants in the context of the foreign exchange industry.

Achievements

Appointments

- Queen's Counsel (2020)
- Adjunct Professor, City University of Hong Kong (2020, 2021)
- Recorder (Crime 2018, Civil 2019)
- Attorney General's Panel of Counsel to the Crown: A Panel (2019), B Panel (2014) C Panel (2008)
- Advocacy Trainer (Gray's Inn) (2014)
- Pupil Supervisor (2010)

News, Articles & Publications

Regular Publications

- Civil Court Practice ('the Green Book') (contributor 2016-date)
- Tolley's Employment Law Handbook (contributor 2013-date)

Book Chapters

- *Munkman on Employer's Liability,* Bennett (Ed), chapter on the liability of third parties to an injured employee *(2019)*
- *Research Handbook in EU Health Law,* Hervey & Young (Eds), chapter on EU law and policy on pharmaceuticals marketing and post-market control including product liability *(2017)*
- *Cambridge Companion to European Private Law,* Twigg-Flesner (Ed), chapter on Product Liability *(2010)*
- *Discrimination in Employment,* Tucker & George (Eds), chapter on Injury to Feelings Awards *(2007)*

Articles

- *Procurement of Covid-19 vaccines: why were legal liabilities transferred to the public sector? InDret 2.2021 p364-366 (available here)*
- *Products in a Pandemic: Liability for Medical Products and the Fight against Covid-19 (2020) European Journal of Risk Regulation, 1-39. (available here)*
- *European product liability after Boston Scientific: an assessment of the Court's judgment on defect, damage and causation (2017) 28 European Business Law Review 879*
- *The Product Liability Directive: Time to get Soft? (2013) 4 Journal of European Tort Law 1*
- *Transferred Discrimination in European Law: Case C-303/06 Coleman v Attridge Law (2008) 37 ILJ 384*
- *Direct and Indirect Discrimination: Is there something in between? (2008) 37 ILJ 347*
- *A Dog's Dinner? Reconsidering Contractual Illegality in the Employment Sphere (2008) 37 ILJ 279*
- *Taking Discrimination Personally? An Analysis of the Doctrine of Transferred Discrimination (2008) 19 Kings College Law Journal 265*

- *Expert Evidence: The Requirement of Independence [2008] JPIL 224*
- *Illegally Formed Contracts of Employment and Equal Treatment at Work (2005) 34 ILJ 158*
- *The Development Risk Defence – Knowledge, Discoverability and Creative Leaps [2004] JPIL 258*

Research

- *Common Core of European Private Law – Product Liability Project* (Joint Editor), ongoing.

Education

University of Oxford (St John's College and Universität Regensburg, Germany)
MA English Law with German Law, First Class Honours.

University of Manchester
PhD: *European Product Liability – A Comparative Study of "Development Risks" in English and German Law*

Other

Languages

- German
- French (basic)

Scholarships

- Lord Justice Holker Scholar of Gray's Inn

Memberships

- Discrimination Law Association
- Employment Lawyers Association
- Employment Law Bar Association
- Industrial Law Society
- International Bar Association
- Product Liability Forum of the British Institute of International and Comparative Law

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Highly responsive and commercial, has made his mark in this area with his efforts on drafting employment bills intended for Parliament

CHAMBERS & PARTNERS

A rising star according to judges, and has a good presentational style

CHAMBERS & PARTNERS

He is just brilliant in court and relates well to clients

CHAMBERS & PARTNERS

One of the brightest junior counsel

LEGAL 500

A very good, analytical brain

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