

## Malcolm Birdling

YEAR OF CALL: ENGLAND AND WALES: 2011; NEW ZEALAND: 2005;

IRELAND: 2023

*"Malcolm is great to work with and he is razor-sharp." "An exceptional track record in providing top-tier legal advice and representation."*

Chambers & Partners 2024

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## Practice Overview

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Malcolm is a leading junior with a litigation practice specialising in all aspects of public, administrative, EU and commercial dispute resolution.

Malcolm is ranked by both of the leading independent legal directories, who have said that he is "an exceptional talent"; "clever, a good advocate, charming and brilliant "; "very sharp and personable "; and "a highly skilled, highly experienced, tenacious advocate" who "can hit the ground running and really get his head around a case at top speed."

Details of Malcolm's experience is set out by practice areas below. Prior to transferring to the English bar, Malcolm qualified as an English solicitor and at the New Zealand bar, including a period as a judicial assistant, and studied law at the University of Oxford, where he was from 2008 to 2011 a Research Fellow and Tutor in Law at Keble College, specialising in Constitutional and European Union law.

## Public Law

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Malcolm is an experienced public lawyer with expertise across a broad range of subject areas including commercial judicial review, discrimination, public international law, environmental, education, financial regulation, media and advertising, immigration, information law, inquiries, aviation, gaming, pharmaceutical and food regulation and civil liberties and human rights. Malcolm also has considerable experience advising and representing those subject to investigation or enforcement proceedings for suspected breaches of consumer law. He is currently the Secretary of the Constitutional and Administrative Law Bar Association and a member of both the Attorney General's A Panel of Counsel and the Equality and Human Rights Commission's panel of counsel.

Examples of his recent significant or reported cases are:

- *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* (High Court, 2023, awaiting judgment) – acting for the Claimant in the first substantive challenge to an individual designation under the Russia (Sanctions) (EU Exit) Regulations 2019 (led by Lord Anderson KC).
- *R. (on the application of Kanu) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWCA Civ 796 – acting for Secretary of State in successful defence to judicial review challenge concerning the assistance provided to a British national allegedly unlawfully rendered to Nigeria.
- *R. (on the application of CR) v Lord Chancellor* [2023] EWCA Civ 717 – appearing (leading Sophie Bird) for successful Respondent to this appeal concerning the principles applicable on applications to set aside judicial review costs capping orders.
- *R. (on the application of British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) – acting for Secretary of State in successful defence of highly expedited judicial review challenge to subsidies granted in the course of the sale of Bulb Energy.
- *International Game Technology Plc v Gambling Commission* [2023] EWHC 1961 (TCC) – acting for the successful bidder in the contest to operate the UK National Lottery in defending a challenge to the procurement process which led to their selection (led by Helen Davies KC).
- *R. (on the application of WA) v Director of Legal Aid Casework* [2023] EWHC 689 (Admin) – acting (leading Sarah O’Keeffe) for Defendant in claim concerning proper construction of secondary legislation governing legal aid funding.
- *R. (on the application of Newby Foods Ltd) v Food Standards Agency* [2022] 4 W.L.R. 90 – acting for the Food Standards Agency (leading Emma Mockford) in successful defence to judicial review challenge concerning proper classification of meat products.
- *R. (on the application of British Sugar Plc) v Secretary of State for International Trade* [2022] EWHC 393 (Admin) acting (led by Marie Demetriou KC) for British Sugar in the first challenge brought under the post-Brexit subsidy control regime, involving (amongst other things) the proper approach to the state aid rules under the Northern Ireland Protocol.
- *R. (on the application of Garrett) v Legal Aid Agency* [2022] EWHC 1258 (Admin) acting for successful Defendant to judicial review claim concerning availability of public funding for SRA regulatory proceedings.
- *R. (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) – acting (leading Aarushi Sahore) in successful defence of systemic challenge to operation of system for provision of legal aid to those in immigration detention.
- *Greater Manchester Buses South Ltd v Greater Manchester Combined Authority* [2022] EWHC 506 (Admin) acting (led by Marie Demetriou KC) for Stagecoach in judicial review challenge to introduction of bus franchising scheme in Manchester.
- *R. (Youssef) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2022] 1 W.L.R. 2454 – acting (led by Maya Lester KC) for Secretary of State in successful

defence to the first challenge to the post-Brexit sanctions regime established under the Sanctions and Anti-Money Laundering Act 2018.

- *R (Khalid & Ors) v Secretary of State for Health and Social Care & Ors* [2021] EWHC 2156 (Admin) acting (unled) for Secretary of State in successful defence of challenge to quarantine requirements imposed on those travelling from “red list” countries during the Covid-19 Pandemic.
- *Neslen v Evans* [2021] EWHC 1909 (QB) – acting (led by Maya Lester KC) in challenge to Labour Party disciplinary proceedings.
- *R (Sarikaya) v Secretary of State for Health and Social Care* [2021] EWHC 1958 – acting (unled) for Secretary of State in judicial review challenge concerning exceptions to Covid-19 quarantine requirements.
- *G v G* [2021] UKSC 9 – acting for the United Nations High Commission for Refugees in this significant Supreme Court appeal concerning the interaction between the 1980 Hague Convention and the Refugee Convention (led by Raza Husain QC).
- *R (Friends of the Earth Ltd and another) v Heathrow Airport Ltd* [2021] PTSR 190 (SC) – acting for the successful appellant before the Supreme Court, overturning the Court of Appeal’s finding that the Secretary of State’s decision to favour the development of a third runway at Heathrow Airport was unlawful because of an alleged failure adequately to consider the United Nations Framework Convention on Climate Change (the Paris Agreement) (led by Lord Anderson of Ipswich QC).
- *Wild Justice v Natural Resources Wales and the Secretary of State for the Environment Food and Rural Affairs* [2021] All ER (D) 88 (Jan) – representing the National Farmers’ Union before the Administrative Court, which confirmed the lawfulness of general licences issued under the Wildlife and Countryside Act 1981 for the control of wild birds, and the compatibility of this regime with EU environmental law.
- *Regina (GR) v Director of Legal Aid Casework* [2021] 1 WLR 1483 – acting for the Director of Legal Aid Casework in this case in which the Court issued guidance as to how regulations setting out the “means test” for legal aid eligibility fell to be construed in circumstances where a strict application would risk breaches of the European Convention on Human Rights.
- *R (Dulgheriu) v Ealing LBC (Liberty Intervening)* [2020] 1 WLR 609 (CA); [2020] 3 All ER 545 (CA) – acting for the intervener (Liberty) in this challenge, the first occasion in which the Court of Appeal considered the lawfulness of a Public Space Protection Order made pursuant to the Anti-social Behaviour, Crime and Policing Act 2014 (led by Victoria Wakefield QC).
- Malcolm represented the Transitional Government of Tamil Eelam in their successful appeal to the Proscribed Organisations Appeal Commission (‘POAC’) against the decision of the Home Secretary to refuse their application to remove the Liberation Tigers of Tamil Eelam (‘the LTTE’) from the list of organisations proscribed under the Terrorism Act in the UK.
- *R. (on the application of Independent Workers Union of Great Britain) v Mayor of London and Transport for London* [2020] 4 WLR 112 (CA) – acting for the defendants before both the Administrative Court and Court of Appeal in their successful defence of this challenge, which contended that amendments to the London congestion charging scheme constituted

unlawful discrimination contrary to the Equality Act 2010 and/or the ECHR (led by Marie Demetriou QC).

- *R. (on the application of FF) v Director of Legal Aid Casework* [2020] 4 WLR 40 – concerning whether public funding must be provided to permit judicial review proceedings to be brought against the Secretary of State for the Home Department in order to ensure that she would properly and lawfully consider the claimant's request that a Bahraini prince be excluded from the United Kingdom.
- *viagogo AG v Competition and Markets Authority* [2020] ECC 5 (Ch) – acting for viagogo AG in this successful application for declaratory relief relating to the construction of an enforcement order made under Part 8 of the Enterprise Act 2002.
- *Connell v Legal Aid Agency* [2019] EWHC 3050 (Admin) – whether it is permissible and compatible with EU law to have differential treatment of Irish nationals as compared to other EEA nationals, on account of nationality, determining in the imposition of a sanction engaging protections of EU law.
- *R (EU Lotto Ltd) v Secretary of State for Digital, Culture, Media and Sport* [2019] 1 CMLR 41 – acting for the Claimants in this challenge to the lawfulness of a ban imposed by secondary legislation on betting on the outcome of the EuroMillions lottery draw (led by Martin Chamberlain QC).
- *R (Liberty) v Director of Legal Aid Casework* [2019] 1 WLR 5185 – acting for the Defendant in his successful defence of this challenge concerning the proper construction of certain provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- *R (Utilita Energy Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2019] EWHC 2612 (Admin) expedited judicial review claim concerning the lawfulness of the implementation of the Government's smart electricity metering programme (led by Victoria Wakefield QC).
- *R (Faulkner) v Lord Chancellor* [2019] 1 WLR 560 (CA) – acting for Defendant in this successful defence (before the Administrative Court and Court of Appeal) to a challenge concerning the extent to which damages for State detention pursuant to the European Convention on Human Rights are subject to the statutory charge applied by the legal aid regime (led by Paul Nicholls QC).
- *Northants County Council v Lord Chancellor* [2019] 1 FLR 169 – acting (unled) for the Lord Chancellor in this application for declaratory relief concerning the procedure for seeking damages for breach of the Human Rights Act 1998 in care proceedings.
- Acting for the claimant in *R (Holmcroft Properties Ltd) v KPMG LLP* [2020] Bus LR 203 (CA); [2019] BCLC 477 (CA) both on appeal and at first instance. This was a judicial review challenge to the process followed by KPMG, an "independent reviewer" appointed to oversee the exercise of a redress scheme operated by Barclays Bank and overseen by the Financial Conduct Authority in respect of mis-sold Interest Rate Hedging Products ("IRHPs"), and concerned the extent to which private bodies (such as KPMG) can be subject to public law challenge by way of judicial review when performing public functions. Led by Richard Gordon QC.
- *R (Ames) v Lord Chancellor* [2018] Lloyd's Rep FC 545 – acting for Defendant before a

Divisional Court in this claim concerning public funding for the defence of a substantial fraud prosecution (led by Paul Nicholls QC).

- *R (Monarch Airlines) v Airport Coordination Ltd* [2018] 1 Lloyd's Rep 549 (CA) – successfully acting for the Administrators of Monarch Airlines in these highly expedited judicial review proceedings concerning whether Monarch entitled to be allocated “slots” at Gatwick and Luton Airports (led by Marie Demetriou QC). Due to the significance and urgency of the case, it was heard by a Divisional Court within a week of the claim being issued, and an appeal was heard by the Court of Appeal a week thereafter.
- *Sophocleous & Others v Secretary of State for the Foreign and Commonwealth Office, Secretary of State for Defence* [2019] QB 949 (CA) – acting for the Claimants at the trial (and appeal) of this preliminary issue concerning the applicable limitation law in this claim relating to the United Kingdom Government's liability for acts of torture allegedly committed by the British Army and colonial forces during the "Cyprus Emergency" of the 1950s (led by Zachary Douglas QC).
- *R (Tirkey) v Lord Chancellor* [2018] 1 WLR 2112 – successfully defending challenge concerning compatibility of charge imposed by section 25 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 with European Convention on Human Rights (unled at permission and detailed grounds stage; led at hearing by Martin Chamberlain QC).
- *R (Ian Stewart-Brady) v Lord Chancellor* [2017] EWHC 410 (Admin); [2017] MHLR 274 – Malcolm appeared (unled) for the Lord Chancellor in his successful defence of this challenge, brought by Ian Stewart Brady (the Moors Murderer), who contended that the Lord Chancellor had breached Articles 5, 6 or 8 of the European Convention on Human Rights by failing to provide a lawyer of his choice in proceedings by which he wished to establish that he ought to be released from Ashworth Psychiatric Hospital.
- *R (on the application of Ibori) v Secretary of State for the Home Department* [2017] All ER (D) 23 (Jun) Malcolm acted (unled) for the Home Secretary in defending this challenge by the former Governor of Delta State in Nigeria, to his detention and (following his release) his claim for damages for false imprisonment. The High Court ordered his release following an urgent hearing, but at the subsequent hearing of his damages claim, awarded only nominal damages of only £1 for false imprisonment. The Claimant was refused permission to appeal to the Court of Appeal against this decision.
- *R (Troitino) v National Crime Agency v Secretary of State for the Home Department, Spanish Judicial Authority* [2017] EWHC 931 (Admin) – appearing (unled) for successful Defendant before the Divisional Court in judicial review proceedings concerning the extradition of a convicted terrorist.
- *Thompson v Director of Legal Aid Casework* [2017] EWHC 230 (Admin); [2017] 1 Costs LR 163 – acting (unled) for successful defendant in claim which contended Defendant's decision violated the Claimant's rights under Article 8 of the European Convention on Human Rights.
- *R(IS) v Director of Legal Aid Casework & Lord Chancellor* [2016] 1 WLR 4733 (CA). Acting (led by Martin Chamberlain QC) in this successful defence of the legality of the Exceptional Case Funding (ECF) scheme for the administration of legal aid.
- *R (Collins) v Secretary of State for Justice* [2016] QB 862; [2016] 2 WLR 1303; [2016] 3 All

ER 490; Times, February 23, 2016 concerning the circumstances in which the so called "Householder Defence" law introduced by the Crime and Courts Act 2013 affords a defence to those who use disproportionate force against people believed to be intruders in their home, and the compatibility of this law with the European Convention on Human Rights (led by Paul Bowen QC).

- *R (BD) v Director of Legal Aid Casework* [2016] EWCA Civ 733 concerning relevant principles on assessment of costs in compromised judicial review proceedings (led by Guy Mansfield QC).
- *R (RJ) v Director of Legal Aid Casework* [2016] Inquest LR 91; [2016] EWHC 645 (Admin) concerning the extent to which interested persons at inquests may benefit from the procedural protections of Article 6 of the European Convention on Human Rights.
- *R (Barda) v Mayor of London* [2016] 4 WLR 20. Malcolm is instructed by Liberty (led by Marie Demetriou QC) in this case which concerns alleged breaches of the right to protest during demonstrations by the "Occupy Democracy" movement in the lead up to the 2015 general election.
- *R (Letts) v Lord Chancellor (Equality and Human Rights Commission Intervening)* [2015] EWHC 402 (Admin); [2015] 1 W.L.R. 4497; [2016] 2 All E.R. 968; [2015] 2 Costs L.R. 217; [2015] Inquest L.R. 15 Defending challenge to the lawfulness of guidance regarding the circumstances in which Article 2 of the European Convention on Human Rights requires public funding for representation at inquests (led by Martin Chamberlain QC).
- *R (Gudanaviciene & Ors) v Lord Chancellor & Director of Legal Aid Casework* [2014] EWCA Civ 1622 [2015] 1 W.L.R. 2247; [2015] 3 All E.R. 827 Acting for Defendants (led by Martin Chamberlain QC) in these six joined applications for judicial review. These were intended as test cases regarding the circumstances in which legal aid must be made available in immigration cases and were heard in the Administrative Court over five days and by the Court of Appeal over four days.
- *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs - Appearing* (led by Martin Chamberlain QC) before the Supreme Court (reported at [2014] 1 WLR 2697), Court of Appeal (reported at [2013] 1 WLR 2938) and Administrative Court ([2013] EWHC 168 (Admin)) in this case, which concerned whether Mrs Sandiford, a British National facing the death penalty in Indonesia had an enforceable EU, ECHR or domestic law right to legal assistance.
- *J Sainsbury's Ltd v Independent Reviewer of Advertising Standards Authority Adjudications (Tesco Supermarkets Ltd, Interested Party)* [2014] EWHC 3680 (Admin) - Appearing for the interested party (led by David Anderson QC) in this judicial review claim concerning the application of Directive 2006/114/EC concerning misleading and comparative advertising and Directive 2005/29/EC on unfair business-to-consumer commercial practices.
- *Bimini Blue Coalition Ltd v Prime Minister of The Bahamas & Ors* [2014] UKPC 23 - Appearing (led by Richard Gordon QC) before the Judicial Committee of the Privy Council in this appeal involving an appeal against the refusal of interim relief in judicial review proceedings to restrain development works, the legality of which was the subject of the underlying proceedings.

- *R (Pressbof) v Secretary of State for Culture, Media and Sport & Ors* [2014] EWCA Civ 965 – Acting for the Claimants in this challenge to the 2013 Royal Charter for Press Regulation (led by Richard Gordon QC).
- Acting as junior counsel to the ‘Pollard Review’, chaired by former Head of Sky News Nick Pollard into matters surrounding a dropped Newsnight investigation which featured allegations of sexual abuse by Jimmy Savile.
- To defend a substantial *Frankovich* damages claim concerning financial regulation before the Commercial Court (led by Andrew Henshaw QC).
- To advise and assist the Financial Services Authority (now the Financial Conduct Authority) on the consequences of the Financial Services Act 2012.
- Appearing before the First Tier Tribunal, Upper Tribunal and Administrative Court in a large number of immigration and asylum cases across a range of areas (including Asylum appeals, PBS appeals, ECO refusals and judicial review applications).
- *R v Lundy* [2013] UKPC 28; (2013) Times, December 10; [2014] 2 NZLR 273 – Appearing as sole junior counsel for the successful appellant in this historical miscarriage of justice case from New Zealand which was heard by the Judicial Committee of the Privy Council over three days.
- *Taylor v R* [2013] 1 WLR 1144 – Appearing *pro bono* for the appellant before the Judicial Committee of the Privy Council in this historical miscarriage of justice appeal from Jamaica.
- *R v Pora* [2015] UKPC 9; [2016] 1 Cr. App. R. 3; [2015] Crim. L.R. 884; Times, April 20, 2015 – Appearing as junior counsel for the Appellant in this historical miscarriage of justice case from New Zealand which was heard by the Board over two days in early November 2014.

## Other experience

Malcolm is a former fellow of Keble College, University of Oxford, where he taught Constitutional and European Union law. While working as an academic, Malcolm assisted with a number of public law cases, including *Barlow v the Queen* [2009] UKPC 30 (regarding the Privy Council's prerogative jurisdiction to hear historical appeals from New Zealand); *FH (Bangladesh) v Secretary of State for the Home Department* [2009] EWCA Civ 385 (successful appeal to the Court of Appeal on grounds of delay in considering application for leave to remain on human rights grounds) and *Dore v Leicestershire County Council* [2010] EWHC 34 (Ch).

Malcolm was appointed in 2003 by the New Zealand Human Rights Commission to a National Advisory Council overseeing the development of a national plan of action for human rights, which was published in 2006. He has co-authored a number of reports, including on barriers to claims for human rights abuses in the Democratic Republic of Congo for United Nations Special Representative John Ruggie, and on remedies under human rights legislation for an Australian government inquiry. While an academic, he provided legal research assistance to Hon Anthony Ford, then Chief Justice of Tonga.

## EU law

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Malcolm has an extensive EU law practice, both in the English Courts (concerning the application of retained-EU law post-Brexit) and before the Courts of the European Union where (as a dual qualified Irish and English barrister) Malcolm remains qualified to appear. Examples of his recent experience and instructions include:

- Case T<sup>1</sup>426/21 *Nizar Assaad v Council of the European Union* ECLI:EU:T:2023:114 – acting (led by Maya Lester KC) in successful challenge to an individual designation under Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria.
- Case T<sup>1</sup>239/21 *Dana Astra IOOO v Council of the European Union* ECLI:EU:T:2023:364 – acting (led by Maya Lester KC) in challenge to designation under Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus.
- *R. (on the application of British Sugar Plc) v Secretary of State for International Trade* [2022] EWHC 393 (Admin) acting (led by Marie Demetriou KC) for British Sugar in the first challenge before the English courts concerning alleged breaches of the Trade and Co-Operation Agreement between the UK and the EU, involving (amongst other things) the proper approach to the state aid rules under the Northern Ireland Protocol.
- C-359/18P *EMA v Shire Pharmaceuticals Ireland* – acting for successful applicant in this action for annulment in which the Court of Justice (upholding the decision of the General Court) provided important guidance as to the approach which ought to be taken by the European Medicines Agency ("EMA") in respect of applications for designation as an "orphan medicinal product" pursuant to the terms of Regulation (EC) No 141/2000 (the "Orphan Regulation") (led by Lord Anderson of Ipswich QC).
- *R (EU Lotto Ltd) v Secretary of State for Digital, Culture, Media and Sport* [2019] 1 CMLR 41 – acting for the Claimants in this Article 56 TFEU challenge to the lawfulness of a ban imposed by secondary legislation on betting on the outcome of the EuroMillions lottery draw (led by Martin Chamberlain QC).
- C-267/16 *Buhagjar & Ors v Minister for Justice* [2018] 2 CMLR 30 – appearing before the Grand Chamber of the Court of Justice of the European Union on behalf of the United Kingdom government on this reference concerning the scope of Gibraltar's exclusion from the common customs union and the TFEU provisions on free movement of goods (led by Marie Demetriou QC).
- E-15/16 *Yara International ASA v Norway* [2018] 1 CMLR 25 – acting (unled) for the United Kingdom Government in this significant EFTA Court reference concerning the compatibility of Norwegian tax rules relating to intra-group transfers with EEA law.
- *R (Monarch Airlines) v Airport Coordination Ltd* [2018] 1 Lloyd's Rep 549 (CA) – successfully acting for the Administrators of Monarch Airlines in this leading case on the application of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports ("the Slots Regulation") (led by Marie Demetriou QC).
- *Accord Healthcare Ltd and another v Astellas Pharma GmbH and another* [2018] 1 CMLR 17 (led by Kelyn Bacon QC)



- *Merck Sharp & Dohme Corp v Comptroller-General of Patents, Designs and Trade Marks* [2017] RPC 2 (Ch). Acting (led by Nicholas Saunders) in this significant case concerning the correct interpretation of the supplementary protection certificate regulation, subsequently confirmed on reference to the CJEU.
- *J Sainsbury's Ltd v Independent Reviewer of Advertising Standards Authority Adjudications (Tesco Supermarkets Ltd, Interested Party)* [2014] EWHC 3680 (Admin) - Appearing for the interested party (led by David Anderson QC) in this judicial review claim concerning the application of Directive 2006/114/EC concerning misleading and comparative advertising and Directive 2005/29/EC on unfair business-to-consumer commercial practices.
- *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581 and [2013] EWHC 168 (Admin) - Appearing for the Defendant in this claim which considered the scope of application of the European Charter of Fundamental Rights and the status of former 'third pillar' measures in UK law (led by Martin Chamberlain QC).
- *WH Newson Holdings Ltd & Ors v IMI & Ors* - Acting (led by Daniel Jowell QC) for Third Defendant (also a Part 20 Defendant) in this follow on damages claim following the European Commission's decision regarding the existence of a cartel between copper fittings manufacturers.
- To defend a substantial *Frankovich* damages claim concerning financial regulation before the Commercial Court (ultimately settled, led by Andrew Henshaw QC).

## Commercial

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Malcolm practises in all areas of commercial dispute resolution, with particular expertise and experience in cases involving a public, regulatory, human rights or international law element. Examples of his recent experience and instructions include:

- Acting in confidential LCIA arbitration in natural resources sector (2023 – ongoing).
- Acting in confidential LCIA arbitration in aviation sector (2020 – 2021).
- Advising multinational technology company throughout Competitions and Markets Authority investigation into the fairness and lawfulness of its consumer contracts and practices.
- *viagogo AG v Competition and Markets Authority* [2020] ECC 5 (Ch) – acting for viagogo AG in this successful application for declaratory relief relating to the construction of a consent order.
- *Elite Property Holdings Ltd v Barclays Bank PLC* [2019] Bus LR 129 (CA) – concerning whether bank under a contractual obligation to its customers in relation to its conduct of a review of consequential losses for misselling of IRHPs.
- *Lifestyle Equities & Anor v Sports Direct International PLC & Ors* [2018] EWHC 728 (Ch); [2018] ETMR 25, Chancery Division trial of claim for damages for inducing a breach of contract and trademark infringement (led by Nicholas Saunders QC).
- Successfully appearing unled before the Court of Appeal in *British Gas Trading Ltd v Oak Cash and Carry* [2016] 1 WLR 4530. The decision below, where Malcolm also appeared unled

is reported at [2015] 1 All ER (Comm) 1000 and [2014] 6 Costs L.R. 1122.

- *Bimini Blue Coalition Ltd v Prime Minister of The Bahamas & Ors* [2014] UKPC 23 - Appearing (led by Richard Gordon QC) before the Judicial Committee of the Privy Council in this appeal involving an appeal against the refusal of interim relief in judicial review proceedings to restrain development works, the legality of which was the subject of the underlying proceedings.
- Acting as sole junior counsel for the Claimants (led by Russell Coleman SC) in Hong Kong seated international arbitration relating to a dispute arising under a Directors' and Officers' liability insurance policy.
- *Watson v Sadiq & Anor* [2013] EWCA Civ 822 – Appeal to Court of Appeal concerning whether a settlement contained in a Tomlin Order may be set aside on the basis that trial judge 'entered the arena' and exerted undue and inappropriate pressure on the Claimant to enter into a settlement agreement.
- Appearing unled for Claimant in application for ex-parte freezing injunction in case of suspected pension fund fraud. The injunction was granted following an urgent telephone hearing and made final at the interparty return hearing.
- Appearing unled in Queen's Bench Division for successful Defendant to application for committal for contempt of court following alleged failure to comply with terms of freezing injunction.

## Public international law

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Malcolm has considerable experience advising private individuals and bodies, NGOs and Government bodies in relation to public international law issues across a broad range of subject matter including sanctions, international aviation, trade and tariffs, revocation of citizenship, transit of goods, taxation and terrorist proscription.

Recent significant cases include:

- *R. (on the application of Kanu) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWCA Civ 796 – acting for Secretary of State in challenge concerning alleged breaches of public international law in context of alleged unlawful rendition of a British citizen to Nigeria.
- Acting for applicant to European Court of Human Rights in series of claims concerning violations of Convention right to freedom of expression in context of conflict in Ukraine (2022 – ongoing).
- *R (Friends of the Earth Ltd and another) v Heathrow Airport Ltd* [2021] PTSR 190 (SC) – Supreme Court decision considering impact of the United Kingdom's ratification of the United Nations Framework Convention on Climate Change (the Paris Agreement) on domestic aviation policy (led by Lord Anderson of Ipswich QC).
- *G v G* [2021] UKSC 9 – acting for the United Nations High Commission for Refugees in this significant Supreme Court appeal concerning the interaction between the 1980 Hague

- Convention and the Refugee Convention (led by Raza Husain QC).
- Malcolm represented the Transitional Government of Tamil Eelam in their successful appeal to the Proscribed Organisations Appeal Commission ('POAC') against the decision of the Home Secretary to refuse their application to remove the Liberation Tigers of Tamil Eelam ('the LTTE') from the list of organisations proscribed under the Terrorism Act in the UK. (led by Maya Lester QC)
  - *Sophocleous & Others v Secretary of State for the Foreign and Commonwealth Office, Secretary of State for Defence* [2019] QB 949 (CA) – acting for the Claimants throughout these proceedings concerning the United Kingdom Government's liability for acts of torture allegedly committed by the British Army and colonial forces during the "Cyprus Emergency" of the 1950s (led by Professor Zachary Douglas QC).
  - Acting for applicant to European Court of Human Rights in case concerning compatibility of English "householder defence" law with the European Convention on Human Rights.

Additionally, as a member of the Attorney General's panel of counsel, Malcolm regularly advises the UK Government in relation to its international law rights and obligations, including those arising out of European and International Human Rights law, the EU-UK Withdrawal Agreement and other international instruments entered into to facilitate the United Kingdom's withdrawal from the European Union.

## International Human Rights Law

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Malcolm acts for Government bodies, private individuals and bodies and NGOs and public interest groups across a broad spectrum of international human rights work before both international and domestic tribunals.

Examples of Malcolm's recent instructions include:

- Acting for applicant to European Court of Human Rights in series of claims concerning violations of Convention right to freedom of expression in context of conflict in Ukraine (2022 – ongoing).
- *G v G* [2021] UKSC 9 – acting for the United Nations High Commission for Refugees in this significant Supreme Court appeal concerning the interaction between the 1980 Hague Convention and the Refugee Convention (led by Raza Husain QC).
- Advising UK Government bodies as to the human rights implications of the United Kingdom's withdrawal from the European Union.
- Representing the Transitional Government of Tamil Eelam in their successful appeal to the Proscribed Organisations Appeal Commission ('POAC') against the decision of the Home Secretary to refuse their application to remove the Liberation Tigers of Tamil Eelam ('the LTTE') from the list of organisations proscribed under the Terrorism Act in the UK.
- *Sophocleous & Others v Secretary of State for the Foreign and Commonwealth Office, Secretary of State for Defence* [2019] QB 949 (CA) – acting for the Claimants throughout

these proceedings concerning the United Kingdom Government's liability for acts of torture allegedly committed by the British Army and colonial forces during the "Cyprus Emergency" of the 1950s (led by Professor Zachary Douglas QC).

- Acting for applicant to European Court of Human Rights in case concerning compatibility of English "householder defence" law with the European Convention on Human Rights

Malcolm's domestic civil liberties and public law practice often involves issues at the intersection of civil liberties and public international law, including, for example, the extent of the UK Government's obligations towards victims of trafficking (*R (Turkey) v Lord Chancellor* [2018] 1 WLR 2112; the interface between extradition and asylum obligations *R (Troitino) v National Crime Agency v Secretary of State for the Home Department* (Divisional Court) and the extent of the United Kingdom's obligations under the European Convention on Human Rights to British nationals imprisoned abroad (*R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* (Supreme Court)).

Malcolm also has considerable experience in bringing claims before the Judicial Committee of the Privy Council in respect of suspected miscarriages of justice from Commonwealth jurisdictions. Reported cases include *Pora v The Queen*; *Lundy v The Queen* and *Taylor v The Queen*.

## Publications

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- Co-Author, Competition Law: General Principles in Vaughan and Robertson's Encyclopaedia of EU Law (Oxford University Press, 2014).
- "Correcting Miscarriages of Justice" New Zealand Law Journal (2013) p413ff.
- "" (DPhil thesis, University of Oxford)
- "Delays and Stays" New Zealand Law Journal (2009), p253 ff (Co-Author with Zannah Johnston, University of Toronto).
- "Self Incrimination comes to Strasbourg" International Journal of Evidence & Proof (Vol 12, 2008), p58 ff.
- "Filtering and the International System: A Question of Commitment" in *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT Press, 2008) (Co-Author with Mary Rundle, Stanford University).
- "Healing the Past or Harming the Future? Large Natural Groupings and the Waitangi Settlement Process" New Zealand Journal of Public and International Law (Vol 2, No 2 2004), p259 ff.
- *Making Sense of the Foreshore and Seabed* (Wellington, 2004) (Co-Author with Tom Bennion and Rebecca Paton).

## Career & Qualifications

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- Barrister-at-law, Ireland (2023)
- Doctor of Philosophy in Law, University of Oxford
- Master of Philosophy in Law, University of Oxford
- Bachelor of Civil Law (Distinction), University of Oxford
- Bachelor of Arts in Political Science / Bachelor of Laws (1<sup>st</sup>), Victoria University of Wellington
- Barrister (Inner Temple) Called 2011
- Barrister (New Zealand) Called 2005 (currently non-practising)
- Solicitor of the Senior Courts of England and Wales (Non-Practising)
- Overseas Scholarship, St Catherine's College, University of Oxford (2008)
- Sir Rupert Cross Prize for the Law of Evidence, University of Oxford (2007)
- Cleary Memorial Award, New Zealand Law Society (2006)
- Rhodes Scholarship (2005)
- Quentin Baxter Prize for International Law, Victoria University of Wellington (2003)
- Student Trust Scholarship, Victoria University of Wellington (2003)
- Mario Patrono Scholarship, Victoria University of Wellington (2000)
- Faculty of Law Prize, Victoria University of Wellington (1999)

## Directory Quotes

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- "Malcolm is great to work with and he is razor-sharp." (Chambers & Partners 2024)
- "He is very responsive and his advice is very pragmatic and practical." (Chambers & Partners 2024)
- "An exceptional track record in providing top-tier legal advice and representation to both government entities and individuals." (Chambers & Partners 2024)
- "He is incisive and smart and I value his common sense and judgement." (Chambers & Partners 2024)
- "Malcolm is one of the go-to juniors for sanctions work. His drafting is superb, and his understanding of the relevant regulations is unrivalled." (Chambers & Partners 2024)
- "He demonstrated a real depth of knowledge in the area; he's a formidable opponent for that reason but it is a pleasure to be on the right side of him. An excellent human rights and public lawyer." (Chambers & Partners 2024)
- "Malcolm is a frighteningly clever public law barrister. His drafting of the pleadings was excellent and he had a keen strategic sense of what the Supreme Court would find persuasive. His legal research was also excellent." (Legal 500 2024)
- "An exceptionally bright and articulate junior." (Legal 500 2024)
- "Malcolm is someone who really knows not only his public law principles but ECHR rights, too. He is very good at navigating principles and knowing how they apply." (Chambers & Partners 2023)

- "He is extremely innovative and hard-working - a fantastic junior to work with." (Chambers & Partners 2023)
- "He is very experienced, intelligent and responsive. He turns things around very swiftly and is excellent at communicating to the right audience." (Chambers & Partners 2023)
- "With an encyclopedic knowledge of administrative law, Malcolm is one of the top juniors in the field. His precise and effective drafting is so powerful that cases can be won before even getting to court. A great strategic brain." (Legal 500 2023)
- "Superb drafting in complex legal cases and identifying the strongest points to run with." (Legal 500 2023)
- "He's a very sensible, pragmatic and commercial barrister who takes well-considered and well-argued points." "He is easy to work with and just gets what clients need." (Chambers & Partners 2022)
- "Malcolm has really good attention to detail and he is very thorough." (Chambers & Partners 2022)
- "Superb drafting in complex legal cases and identifying the strongest points to run with." (Legal 500 2022)
- "Malcolm has an absolutely first-rate understanding of public law. He also drafts pleadings really really well in a precise but persuasive style." (Legal 500 2022)
- "Responsive and able to crunch difficult points." "An extraordinarily brilliant young barrister." (Chambers & Partners 2021)
- "He makes really strong, well thought-out points." "He's very knowledgeable, very easy to work with and sensitive to client needs." (Chambers & Partners 2021)
- "He is fantastic. He is lightning quick and understands the Admin Court like the back of his hand." (Legal 500 2021)
- "He really knows his stuff; he's a fighter and he's incredibly bright." "His preparation was beyond the beyond: he was all over the case." "He's very responsive and very clear, and his analysis and his drafting were good under significant time pressures. He's very knowledgeable about the court and its processes." (Chambers & Partners 2020)
- "Malcolm Birdling is a pleasure to work with and staggeringly competent." "Everyone thinks he's marvellous. He's a really clever lawyer." (Chambers & Partners 2020)
- "His strongest feature is his ability to track down relevant case law that is less well known." (Legal 500 2020)
- "A very practical, sensible advocate." "Very, very intelligent," he is "approachable and user-friendly." (Chambers & Partners 2019)
- "His academic background shows through in the innovative nature of his thinking in public law." "His written work is clear and engaging." (Chambers & Partners 2019)
- "He provides advice with a confidence and clarity that belies his year of call." (Legal 500 2018-19)
- "He is clever, a good advocate, charming and brilliant." "He is very sharp and personable. He is my go-to person for complex public law questions." (Chambers & Partners 2018)
- "Malcolm Birdling is very clever, very nice and someone who cuts to the chase." (Chambers & Partners 2018)

- "A highly skilled, highly experienced, tenacious advocate." (Legal 500 2017)
- "He can hit the ground running and really get his head around a case at top speed." (Chambers & Partners 2017)
- "He's always a pleasure to deal with and judges are highly receptive to his advocacy style." (Chambers & Partners 2017)
- "Has a very good legal mind and is extremely easy to get along with. He is also particularly well informed. He is always easy to reach and prompt with his responses." (Chambers & Partners 2017)
- "An exceptional talent." (Legal 500 2016)
- "His availability, knowledge and experience are invaluable and, on a personal level, his demeanour and approachability ensure excellent teamwork." (Chambers & Partners 2016)
- "Offers extensive advocacy experience and is particularly adept at handling complex human rights and administrative and public law cases." (Chambers & Partners 2016)
- "An exceptional talent." (Legal 500 2016)
- "On top of both the factual evidence and the law." (Legal 500 2015)