

The constitutional tree: rendering the branches

by Craig Barlow

A report on the first civil tort claim for “extraordinary rendition” to reach the US courts.

INTRODUCTION

The decision of the US Court of Appeals for the Fourth Circuit in *El-Masri v United States*, March 2, 2007, excited little press attention in the UK. This is peculiar given the earlier coverage of the case in the British press, and Lord Steyn’s view (expressed in *The Guardian*, April 22, 2006) that extraordinary rendition is a “fancy phrase for kidnapping” in serious violation of international law.

In *El-Masri* the US Federal Courts have been squarely confronted by a complaint asserting constitutional (in UK terms Human Rights) abuses and torts against the US Government. In essence a German national alleged that he was kidnapped from Macedonia in 2003, transported to Afghanistan, detained and tortured by the servants or agents of the Central Intelligence Agency for about five months before being released in Albania. El-Masri (“EM”) sued the CIA for compensation. However, the US Executive intervened, asserted “state secret privilege” (“SSP”) and applied for dismissal of EM’s claim without either pleaded defence, disclosure or trial – curious outcome you may think in “the land of the brave and home of the free.” The Federal District Court acceded to that application. The Fourth Circuit has affirmed the dismissal of EM’s claim on the grounds of SSP.

In this article I propose to analyse the *El-Masri* approach to SSP, scrutinise the jurisprudence underlying it, subject it to a comparative analysis against the English court’s approach to public interest immunity (“PII”) and consider what its potential impact on claims brought by the alleged victims of extra-ordinary rendition might be in English courts.

THE FACTS OF EL-MASRI

On December 6, 2005 EM commenced civil proceedings in the US Federal Court for the Eastern District of Virginia against the director of the CIA and 10 un-named CIA agents. He advanced three causes of action:

- That the CIA had exerted federal power against him in breach of the restraints of the Fifth Amendment to the

US Constitution, which provides that “no person shall... be deprived of... liberty... without due process of law”.

- That he had been arbitrarily detained by the CIA, contrary to international law, which constituted an actionable tort by virtue of the Aliens Tort Statute, 28 U.S.C. § 1350, a federal law that states, in relevant part: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”
- In tortious violation of international law (Art 3 of the Geneva Convention (III) 1949, to which the US is a signatory, he had been subjected to cruel, degrading or inhuman treatment by the CIA, its servants or agents.

EM asserted that he would at trial rely on at least three evidentiary matters:

- his own personal knowledge and experience of what had happened to him;
- the press coverage and journalistic investigations into his case and also “similar” rendition cases;
- the results of the European Commission’s investigations into his and similar cases.

STATE SECRET PRIVILEGE (“SSP”)

The US Government raised “state secret privilege”, applied for “dismissal” of El-Masri’s claim and filed evidence in support of that application. The Fourth Circuit summarised the evidence thus (the underlining is mine):

“The CIA... submitted two sworn declarations ... in support of the state secrets privilege claim. The first... was unclassified, and explained in general terms the reasons for the... assertion of privilege. The other... was classified; it detailed the information that the United States sought to protect, explained why further court proceedings would unreasonably risk that information’s disclosure, and spelled out why such disclosure would be detrimental to the national security...”

THE LEGAL ISSUES

El-Masri purports to apply the legal exposition of SSP said to be derived from *US v Reynolds* (1953) 345 US 1. Accordingly, the Circuit stated the issue thus:

“To summarize, our analysis of the executive’s interposition of the state secrets privilege is governed primarily by two standards. First, evidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military... or intelligence matters which, in the interest of national security, should not be divulged... Second, a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure.”

Whether that is the “correct” formulation of the true legal issue engaged either in accordance with the *Reynolds* test or otherwise is seriously open to debate. (In fairness to the Fourth Circuit, the court carefully recorded that its approach to the formulation of the issue and the applicable law was not seriously challenged by *El-Masri* and that the controversy was the application of those principles to the facts. It will be contended in this article that the Fourth Circuit’s error was somewhat more fundamental and that it has misdirected itself). What is perhaps noteworthy is the absence in the Fourth Circuit’s identification of the relevant competing interests, let alone its failure to perform a “weighing and balancing” of the competing interests. *El-Masri* does not undertake a balancing exercise between:

1. The public interest in the administration of justice;
2. The public interest in the maintenance of national security;
3. The claimant’s interest in having access to the court and a fair determination of alleged Governmental violations of his civil rights;
4. The court’s constitutional interest in operating as a sufficient “check and balance” on abuse of executive power;
5. The international public law dimension to allegations that the US Government has willfully and deliberately violated its treaty obligations;
6. The executive’s constitutional interest in freedom to execute and discharge its obligations to protect and defend the nation against its enemies, be they foreign or domestic.

It is strongly arguable that the Fourth Circuit’s reasoning is thereby fundamentally flawed on basic tenets of internationally recognized administrative law: it has failed to identify all of the relevant factors and balance them in the exercise of what was, in truth, the exercise of a judicial discretion. It can be said with some force that the Fourth Circuit’s decision proceeds on the erroneous footing that the mechanistic operation of the so called *Reynolds* test, produces

the correct analytical result. It will be argued below that this was jurisprudentially lazy and ultimately fallacious.

THE FOURTH CIRCUIT DECISION

The gravamen of the court’s decision is:

*“The controlling inquiry is not whether the general subject matter of an action can be described without resort to state secrets. Rather, we must ascertain whether an action can be litigated without threatening the disclosure of such state secrets. Thus, for purposes of the state secrets analysis, the ‘central facts’ and ‘very subject matter’ of an action are those facts that are essential to prosecuting the action or defending against it. *El-Masri* is therefore incorrect in contending that the central facts of this proceeding are his allegations that he was detained and interrogated under abusive conditions, or that the CIA conducted the rendition program that has been acknowledged by United States officials... If *El-Masri*’s civil action were to proceed, the facts central to its resolution would be the roles, if any, that the defendants played in the events he alleges. To establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations.”*

THE JURISPRUDENCE

No government exists in a vacuum. If there are those who govern there are those who are governed. In a democracy, the relationship between these two estates is regulated by the power of the one to exert control over the other. The triple advantages of cooperation, coordination and cohesion lend themselves to the consensual agreement of the population to submit to governance by a selected few. But the concentration of such control in the hands of the few brings with it the risk that the people might become enslaved to the rule of that minority. To prevent such “tyranny” the modern democratic model recognises and by one mechanism or another enshrines the importance of the constitutional concept of the “separation of powers.” This is because humanity’s experience has tended to demonstrate that “all power tends to corrupt and absolute power tends to corrupt absolutely”. Thus, for the protection of society, no one body is permitted to enjoy the unrestrained freedom to create and vest power, determine how to best wield that power and decide whether it has exceeded its powers. For if the people “elect” such a body to possess all these powers, nothing prevents such a body from thereafter abolishing the people’s right to remove it and doing at its whim what it pleases.

Traditionally the “powers” are shared out surrendering “efficiency” to “safety.” This entails the division of government into discrete bodies: the executive, the legislature and the judiciary. Conceptually, the executive

stands seized and able to exercise all those powers the law grants to it. By the same token, the legislature is the originator of those powers and possesses the right to bestow or remove them. The judiciary determines what powers have been granted, withheld or abused. But as any law student will tell you, in truth the functions of each limb are not so neatly compartmentalised. For example, the executive must in times of urgency or crisis have the power “effectively” to legislate –in the USA by Presidential Executive Order and in the UK by the exercise of prerogative power. The judiciary in a common law jurisdiction can “adjust” its own case law and develop its doctrines to meet the needs of a modern dynamic society and thereby “create” its own powers.

But the conceptual purpose of each of these three limbs of government is that between them none is ultimately supreme over the other. In other words within this triumvirate, each constituent possesses sufficient authority to suppress, prevent or expose an abuse of power by one of the other components. It is thus an uneasy balance of power between the three.

A CRITIQUE OF *EL-MASRI*

In the author’s opinion the Fourth Circuit in *El-Masri* misstated, misunderstood and misapplied the Supreme Court’s *ratio* in *Reynolds*. What is quite terrifying is that the *El-Masri* decision casually collapses the rule of law, potentially introduces “blanket immunity” for the executive, and thereby puts state-sponsored extraordinary rendition beyond judicial scrutiny. The decision is the subject of fierce academic debate in the US – see for example <http://jurist.law.pitt.edu/forumy/2007/03/dangerous-discretion-state-secrets-and.php>

The Fourth Circuit’s error is as basic as it is fundamental. It represents not merely a legal misdirection but a constitutional catastrophe. The Fourth Circuit was bound by section 2 of Article III of the US Constitution to assert full judicial authority in all matters of controversy involving the United States and concerning foreign states, citizens or subjects. To hold that the US Government’s talismanic invocation of SSP deprives the foreign citizen of a trial of his allegation that his internationally recognised human rights have been grossly violated by the US Government, is nothing short of an alienation by the court of its own constitutional obligations. The Fourth Circuit has, with respect, forgotten its role as a judicial “check and balance” on the executive’s abuse of powers. Further, the Fourth Circuit ignores the fact that the US Supreme Court has consistently rejected the executive’s claims to enjoy an immunity from judicial scrutiny for its actions in waging a “war on terror” (see *Rasul v Bush*, June 28, 2004 and *Hamdan v Rumsfeld*, June 29, 2006).

The reasoning of the Fourth Circuit does not turn upon EM’s status as a foreign national. It would apply to a US

citizen. Prior to the Human Rights Act 1998, the English courts recognised that it was of the gravest constitutional significance to hold that the executive was never to be assured that it was beyond the reach of the court’s powers (see *R v Secretary of State Exp Factortame* and the speech of Lord Templeman, and also Lord Steyn’s Attlee Lecture of April 11, 2006 at www.attlee.org.uk/Transcript-Steyn.doc). Axiomatically, there can be no government of the people, by the people, for the people if citizens cannot in their own courts challenge the executive’s abuses. For these purposes both the national and non-national plaintiff stands in the same shoes.

The *El-Masri* decision raises the “tension” between the executive’s need to rule, defend the nation and protect its national security interests. Under UK law the executive possess similar, if not arguably greater, powers by virtue of the prerogative powers. Be that as it may, the Fourth Circuit has unquestionably unanchored the SSP doctrine from its “evidentiary” roots and escalated it to a substantive rule that under certain circumstances the executive enjoys “immunity from suit.” The elevation of SSP into “immunity” cannot on that basis be jurisprudentially justified. The constitutional significance of the separation of powers has been ignored by the *El-Masri* decision. The court has failed to grapple with the true balance to be struck between the competing principles and fallen into serious error because it has profoundly misunderstood the *ratio* of *Totten v United States* (1875) 92 US 105.

Totten involved a suit upon a secret espionage contract. The spy sued the US government. The Supreme Court held that a suit by the spy against the state for his reward pursuant to a “confidential” agreement would in itself disclose the state secret, ie the subject matter of the contract. On those grounds the claim was dismissed without trial. But *Totten* turned upon the “confidentiality” of the evidence the spy proposed to adduce. In modern terms the state was, on grounds of confidentiality, entitled to restrain the spy’s disclosure of the contract. He had freely entered into such an arrangement with the state. It would be inherent in the spy’s claim for reward that he had performed the services under the contract and any investigation of that would disclose the secret. On analysis *Totten* declares SSP to be merely an evidential rule that excuses the state from adducing or having adduced before the court its own confidential secrets (indeed President Bush has tacitly acknowledged the “evidential” foundation of SSP in his own Executive Order 13233). In short the state is entitled to control the use made by those in whom it confides of its own secrets. It is the voluntary, intimate relationship and impressed “confidentiality” existing between the spy and the state that justified and analytically underpinned the rationale of *Totten*.

In *Reynolds* the widows of three civilian observers killed in the 1948 crash of a B-29 bomber sued the state for negligence. The purpose of the flight had been to test secret

military electronic equipment. The widows applied for disclosure of the accident reports into the crash. The state raised SSP as an objection to the disclosure request. The Supreme Court upheld the state's claim to SSP. Chief Justice Vinson gave the court's decision and repeatedly referred to SSP as an "evidentiary privilege". So the widows did not at that stage get to see the accident reports, which many years later were de-classified, revealed to the victims' offspring, and disclosed gross negligence by the USAF.

The point that the Fourth Circuit overlooks is that even in *Reynolds* the court did not dismiss the tort claim. It simply held that the plaintiffs could not acquire materials from the government when the court was satisfied that disclosure by the government of the same was contrary to the national interest. Whilst the "deference" the *Reynolds* court gave to the executive itself requires judicial reconsideration, the court did not grant the executive immunity from suit.

The Fourth Circuit's reasoning thus on its own premises manifestly defective. It is indeed one thing to say that the defendant is "privileged" from disclosing documents or adducing evidence. There is nothing remarkable in holding SSP excuses the state from such a demand. But it is quite another to hold that the claimant is to be barred from adducing his own knowledge and evidence. Neither *Reynolds* nor *Totten* constitute authority for such a proposition. Yet *El-Masri* effectively holds to the contrary. In doing so the Circuit has emasculated the civil rights granted to him by Congress and abrogated his concomitant constitutional right to "due process".

Elementarily, the claimant must prove his case. That burden offends no concept of adversarial justice. SSP (or in English terms PII) might well hamper him and perhaps result in the practical consequence that he will be unable to discharge the burden of proof. But it is going too far to hold that the SSP doctrine justifies the dismissal of his case without a trial. It is deeply troubling for the judiciary to hold that the state can assert "confidence and secrecy" against *ex hypothesi* the personal knowledge of an unlawfully detained and tortured claimant. Indeed, it is quite absurd. For the result of such reasoning is that the state can - on grounds of national security - abduct, detain and torture whomsoever it pleases without any legal consequence. Once seen in that light the rationale of *El-Masri* is constitutionally and logically barren.

The consequence of the court's ruling is that the judiciary is stripped of its power to protect the citizen against the unlawful excesses of the executive. Such a holding turns any constitutional theory of the separation of powers on its head. It starkly amounts to the proposition that accused of torture and human rights violations, the executive can reply "we decline to answer these allegations" because if we did so, we would risk national security. Further the court ought not to hear the claim at all. Thus, it is argued in *El-Masri* that the mere assertion of the executive's SSP amounts to a legitimate ground for the dismissal of the victim's claim on the grounds that the executive cannot "defend" itself or

have a fair trial because it chooses not to engage in the dispute on grounds of national security.

It is submitted that *El-Masri* is quite astonishing in its depraved constitutional theory. What "national security" can there be in a nation when the federal judiciary effectively holds allegations that the executive unlawfully abducts, detains and tortures people are beyond the purview of the court? For carried to its logical extreme, the reasoning in *El-Masri* will mean that the state can have *habeas corpus* proceedings dismissed on the grounds of national security. If that *reductio nil absurdum* is not a classic demonstration of the collapse of the rule of law, it is difficult to know what is.

Where the legislature in a nation enacts laws protecting people be they citizens or foreign nationals from "cruel or inhuman and degrading treatment" the rule of law demands that the executive obey those threshold standards. The oath of Federal Office in the US for its judges and its executive (5 USCS § 3331) consists of the words "... I will support and defend the Constitution of the United States against all enemies foreign and domestic; that I will bear true faith and allegiance to the same..."

No provision of the US Constitution grants the executive immunity from suit for civil torts. There is by the same token no provision in the US Constitution authorising an executive claim to SSP. It is a judicially "created" rule and a creature of a common law heritage. A doctrine that prevents a victim of alleged human rights violations at the hands of the executive from litigating about that abuse in court, is anathema to any basic standard of justice. The court that propounds such a rule divorces itself from reality, invites ridicule and demolishes any claim it might have to either domestic or international respect.

Even if a claimant's own evidence engaged a "secrecy issue," there is no reason why that evidence can not be heard in camera and the material sealed. If need be the court can order a bench trial. In other words it is not beyond the wit of the judiciary to create and implement sufficient safeguards to balance "national security" against the citizen's right to justice. To dismiss outright a claim for human rights violations against the executive does not merely risk, but invites tyranny. For where can the citizen complain but to the courts?

THE UK POSITION AND PII

It is probably only a matter of time before a suit is brought in the UK accusing the UK Government of being an accomplice or conspirator in extraordinary rendition. Interesting domestic tort law issues would thereby engage. But the executive's power to assert PII would not authorise the court to dismiss such a claim. To English eyes it is an absurd notion that the executive could invoke "national security" to prevent the trial of a *prima facie* legitimate claim against the executive. It might well be able to resist disclosure and perhaps secure a trial in private. But not in

its wildest dreams could the UK executive hope to achieve the outcome in *El-Masri*.

During the Cold War, it was famously said in the USA that the Soviet Union was “the evil empire.” That was justifiable on the basis that the USSR had a written constitution with “rights” enshrined for its citizens. Those rights were frequently violated by the state and the state controlled courts would not protect the victimised citizen. Naturally we all assume it could not happen in the West? The “secret police” could not possibly abduct persons from the streets, transport and torture them in the name of national security? Surely, the courts would not stand idle and permit the same? There are “constitutional protections”, are there not? It is unthinkable that the court would not step in? If some stranger did that to you, there would be a lawsuit. It is just obvious. So why not with the government and its servants and agents? No? Well, welcome to the Western World post *El-Masri*.

It now appears that in a so-called democracy the state can do what it likes to whomsoever it chooses. It can exercise any arbitrary caprice in its defiance of human rights. It can abduct, detain and torture because it is held judicially unanswerable for its actions. In the author’s view, this is a kind of judicially permitted state-sanctioned terrorism. For *El Masri* means that the mere plea of “national security” takes on the status of the Monopoly™ “get out of jail free card.” The state becomes immune from the legal consequences of its actions.

El Masri eviscerates civil rights. It brutally propounds the welfare of the state over the core rights of the individual. If the *El Masri* decision is not a legal laughing stock, then – I confess – I do not know what is. How in a democracy can it be that the state “excuses” itself from judicial investigation? How can the leaders of a state morally condemn other nations for practising that which they themselves do under the veil of secrecy?

Axiomatically, there is a difficult balance to be struck between the rival interests. National security is vital. It is no small matter. But equally, it does not exist in a vacuum. It is pointless during the “defence” of democracy to start to erode the very elements of that democracy. For without urgent judicial introspection, it will not be long before the very freedoms we seek to defend against foreign “terrorists” will become lost in the fray.

CONCLUSION

I hope that after this analysis you find the *El Masri* decision both frightening and abhorrent. If you believe that all and any steps are justifiable in the “war on terrorism”, you fail to appreciate how brittle your own “liberties” become. As you take away the rights of others, be assured you reduce your own moral claim to your own freedoms. It will, in the end, become a vicious circle and downward spiral.

But there is hope of a reversal because in May 2007 the American Civil Liberties Union petitioned the US Supreme

Court for *certiorari* in relation to the Circuit’s decision in *El-Masri*. Having regard to the constitutional gravity of the matter, I presume that *certiorari* will be forthcoming. The court will probably consider that matter early next term and a ruling given sometime in 2008/09 depending on the docket. For the reasons I have given above, left unchallenged the Circuit’s reasoning represents a severe “attack” on modern US constitutional theory. In one sense the easy juridical answer is to simply reverse and remand *El-Masri* on the narrow ground that it fails to properly apply *Reynolds*. Such a solution might possess some attraction for a ‘politically’ divided court and could prove more appealing than embarking upon a root and branch reconsideration of the underlying principles articulated in *Reynolds*. For undoubtedly, *El-Masri* crystallises the constitutional tension between the executive’s ability to aggressively defend the nation on the one hand and the court’s duty to vindicate the rights of the innocent victim caught up in the maelstrom of the executive’s ‘war on terror’ on the other. If the current Supreme Court retrace the jurisprudence underlying SSP, the philosophical and intellectual schisms within it will open up and ensure a titanic clash of legal ideology. This is exactly what happened on June 25, 2007 when the Supreme Court decided *Morse v Frederick*, a case which considered whether a state school principal infringed a student’s “freedom of speech” by punishing him for unfurling a banner promoting drug use at an event attended by the school and whether, if there was a freedom violation, the school was nevertheless privileged against liability. A 5 to 4 majority held that there was no First Amendment violation whereas the minority held there that there was. The court held 8 to 1 that the school was privileged against liability. This is a demonstration that whilst the ultimate solution is evident, the justices disagree about the legal pathways that lead to it.

Similar debate can be expected in *El-Masri*. Ironically, the “conservative” elements who historically favour the theory of an “unchanging” constitution will strive to avoid judicial interventionism and will thereby either have to uphold and apply *Reynolds* or destroy SSP in favour of legislative control. Conversely, the “liberals” favouring a “modern” constitution will find *Reynolds* unsatisfactory and struggle to “replace” it with a sound doctrine hardy enough to fairly balance the relevant competing interests whilst preserving the safeguards against the executive. One can therefore reasonably predict that the problem *El-Masri* presents is likely to fashion unexpected alliances between the justices when the Supreme Court’s renders its decision. But, only when the final guardians of the US Constitution determine the role of SSP in the accountability of the executive for alleged civil tort and human rights violations, shall we learn whether the crucial nine American jurists do indeed, in the words of the Declaration of Independence, “hold these truths to be self evident...” . 🇺🇸

Craig Barlow

Barrister, Ely Place Chambers, London