enforcement of the arbitral awards, was thus one which would have to proceed to trial.

Finally, what about the decision of the Dutch courts, refusing to recognise the Russian judicial proceedings on the grounds that they were "partial and dependent"? Would it give rise to a decisive issue estoppel which would eliminate the need for any decision by the English courts on this issue? At first instance, Hamblen J. had held that the decision of the Dutch courts did in fact give rise to such an estoppel, precluding Rosneft from contesting the argument that the decision of the Russian courts was "partial and dependent". The conclusion of the Court of Appeal, however, was that the decision of the Dutch courts should be denied any issue estoppel effect, because the issue before the Dutch courts was not the same issue which was before the English courts. The Dutch courts had decided that recognition of the Russian proceedings was contrary to Dutch public policy; the English courts would have to decide whether recognition of those proceedings would be contrary to English public policy. While the decisions would be analogous, each national court would be applying distinct national standards, and thus no estoppel could arise. Although this approach is readily understandable, it perhaps glossed over some difficulties. It is, for instance, somewhat in tension with the earlier conclusion of the Court that one reason the act of state doctrine presented no obstacle to evaluating the conduct of foreign courts was because there were well established *global* standards by which to judge that conduct. And the judgment did not fully explore the possibility that, even if the *legal conclusion* reached by the Dutch courts did not have an issue estoppel effect, the decisions of *fact* made by the Dutch courts in reaching that determination might still do so.

These points aside, this is a judgment which brings welcome clarity to at least some aspects of important issues whose complexity has long troubled courts across the globe. While it is unlikely to be viewed as conclusive internationally, its influence is certain to be significant.

ALEX MILLS

THE IMMIGRATION RULES, THE RULE OF LAW AND THE SEPARATION OF POWERS

SOME constitutional systems (at least in theory) begin with principles and require everything else to fit around them. But the British constitution arguably adopts the opposite starting-point, accommodating principles in a way, and to an extent, that is feasible in the light of other features of the system. Thus Dicey's concern about the compatibility of

"wide discretionary authority" with the rule of law finds expression not in hard constitutional restrictions upon the extent of such power, but in other, more subtle ways, including the structuring of executive discretion through the adoption of administrative rules coupled with court-enforced adherence to them. Equally, separation-of-powers objections to the executive's legislative authority are addressed not by absolute constitutional limits upon the extent of such authority, but through reliance upon (among other things) Parliament's supposed capacity to supervise its use.

Such constitutional matters were of central, if implicit, importance in *R. (Munir) v Secretary of State for the Home Department* [2012] UKSC 32, [2012] 1 W.L.R. 2192 and *R. (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 W.L.R. 2208. In *Munir*, the claimants sought to resist adverse immigration decisions that had been taken without reference to a concessionary policy which, they claimed, had been unlawfully withdrawn. The claimants asserted that if the policy had been applied to them, the Immigration Rules might have been relaxed in an advantageous manner. In *Alvi*, the claimant argued that an adverse decision had been reached by applying criteria that existed outwith the Rules – and which, it was said, should therefore never have entered into play. For reasons explained below, the claimants in *Munir* failed in their challenges, while the claimant in *Alvi* succeeded.

Key to each case was section 3(2) of the Immigration Act 1971, which provides that the "Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act". In both cases, the claimants sought to establish that the measures which had been applied to their detriment – the withdrawal of the concessionary policy in *Munir* and the additional criteria in *Alvi* – constituted "rules" or "changes in the rules" within the meaning of section 3(2). Since it was common ground that the relevant measures had not been laid before Parliament, they could not, said the claimants, lawfully be invoked against them. But this presupposed that the relevant measures were ones to which the section 3(2) requirement attached in the first place: a view that the Secretary of State questioned on two grounds.

First, she argued that the relevant measures could be treated as having been made under the royal prerogative, rather than under the Act. As such, there had been no legal obligation to lay the measures before Parliament, because that obligation attached only to Immigration Rules made under the Act. Rejecting that view, Lord Dyson in *Munir* observed that while section 33(5) of the Immigration Act preserves the prerogative power to control immigration in respect of

"aliens", the Act is silent concerning the prerogative as it may apply to Commonwealth citizens (such as were involved in the present proceedings). This suggested, said Lord Dyson, that Parliament must have considered that the prerogative power to control immigration did not in the first place extend to such individuals. And in any event, his Lordship concluded, even if the prerogative had, prior to the 1971 Act, been exercisable in respect of Commonwealth citizens, such power was "implicitly abrogated or, at least, suspended by the Act" pursuant to the principle in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] A.C. 508. Reaching the same conclusion, Lord Hope, in *Alvi*, said that the 1971 Act was a "constitutional landmark": it formed a "complete and exhaustive code" which excluded the prerogative except to the limited extent provided for by section 33(5). Moreover, as Lord Dyson said in *Munir*, the plain policy of the Act was that Parliament should have an opportunity to scrutinise the rules pertaining to immigration. A parallel prerogative power to prescribe such rules, free from any obligation to lay them before Parliament, would frustrate that policy.

The Secretary of State's second argument was that even if the measures had been adopted under authority conferred by the 1971 Act, they were not "rules", such that the requirement to lay them before Parliament was not triggered. That contention was rejected in *Alvi*. Because the claimant's job was deemed to be below a given skill level, he was unable to establish sufficient credit under the so-called points-based immigration system. However, the skill level of the claimant's job was prescribed not by the Immigration Rules themselves but by an Appendix – which had not been laid before Parliament. The Supreme Court rejected the Secretary of State's contention that the provision made by the Appendix concerning skill levels merely constituted guidance as to how the points-based system should be operated. Rather, held the Court, it was a "rule" within the meaning of section 3(2) because, as Lord Dyson put it, it amounted to a "requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused". Applying the same principle in *Munir*, however, the Court concluded that the concessionary policy at stake in that case did not itself constitute a rule, since it merely provided that a (true) rule could be – but did not have to be – relaxed in certain circumstances.

In one sense, the matters addressed in *Alvi* and *Munir* are somewhat arid. But underlying these superficially technical questions lie some much bigger constitutional ones. As Lord Hope put it in *Alvi*, when it enacted section 3(2), Parliament was requiring the Secretary of State to "lay her cards on the table so that the rules that she proposed to apply, and any changes that were made to them, would be open to scrutiny". If the Supreme Court had permitted the immigration system – whether

by allowing the prerogative to be invoked or massaging the definition of "rule" – to be operated by reference to criteria not open to such scrutiny, that policy would plainly have been subverted. It is possible, then, to view *Alvi* and *Munir* as a reassertion of – a victory, of sorts, for – fundamental constitutional principles. The Immigration Rules themselves must now incorporate the type of detailed provisions that previously found expression only in supplementary instruments. Indeed, within days of the judgments, the Rules had been amended accordingly, absorbing large amounts of new material. This, it might be thought, can only be a good thing, in that it yields a more transparently prescriptive regime for the structuring of administrative discretion, thereby promoting legal certainty and so the rule of law. Equally, the ascription to the executive, in the first place, of the authority to enact the quasi-legislative Immigration Rules is rendered more acceptable in separation of powers terms, the Secretary of State's attempts to evade parliamentary oversight having been frustrated by the Supreme Court.

Such an assessment would, however, be unduly optimistic. In *Alvi*, Lord Wilson said that the Immigration Rules – even before their subsequent augmentation – constituted an "astonishingly prescriptive system". This was not intended as a compliment. To suppose that such prescriptiveness purchases legal certainty in a way that addresses Dicey's rule-of-law concerns would be to elevate form over substance, bearing in mind the byzantine nature of the resulting Rules and (as Longmore L.J. put it in *DP (USA) v Secretary of State for the Home Department* [2012] EWCA Civ 365) the "whirlwind" "speed with which the law, practice and policy change in this field". Meanwhile, it would be naïve to assume that requiring far more material to be laid before Parliament will necessarily yield enhanced scrutiny, thereby upholding the separation of powers by ensuring effective oversight of administrative rule-making. Indeed, given the limited time and resources available to Parliament, the risk arises that it might be overwhelmed by the scale of the task, thereby (as Lord Hope acknowledged in *Alvi*) "defeat[ing] the object of section 3(2)".

None of this is to suggest that the decisions in *Alvi* and *Munir* are insignificant. The Supreme Court required the immigration regime to be operated in a manner that better conforms with basic demands of constitutionalism by insisting upon administrative adherence to the scheme of the legislation, affirming the precedence of the Immigration Act over the contended-for prerogative power, and enhancing at least the opportunity for parliamentary oversight. But it is important, too, not to overestimate the implications of these cases. Indeed, they serve as useful reminders of an elementary fact of British constitutional life: that because the British system is not (as suggested at the beginning of this note) a constitution of absolutes, the extent to which

fundamental principles can be upheld by courts is necessarily a function of the legislative and institutional circumstances with which they are confronted.

MARK ELLIOTT

KETTLING COMES TO THE BOIL BEFORE THE STRASBOURG COURT: IS IT A DEPRIVATION OF LIBERTY TO CONTAIN PROTESTERS *EN MASSE*?

RECENT years have seen novel forms and targets of dissent and protest, which have become more newsworthy for that very reason. Recent years too have seen an increasing role for the courts, asked to adjudicate between competing claims – those of police and protesters, landowners and protesters, companies and protesters – in a way that has not tended to occur before. This is not surprising now that protesters can claim their human rights of free speech and of peaceful assembly (under Articles 10 and 11 of the ECHR) have been breached. For those interested in how law regulates protest, it has been rather like buses: nothing for ages, then several at once. One of those cases decided earlier this year, by the Grand Chamber of the European Court of Human Rights, is *Austin v UK* (2012) 55 E.H.R.R. 14, a decision that is likely to have profound effects on the exercise of those key democratic rights.

About 3,000 people were caught up in a two kilometre square police cordon for about seven hours at Oxford Circus during the mass rally against capitalism and globalisation in central London on May Day 2001. This was a strategy known colloquially as "kettling". Many were innocent shoppers, students or those on business in the capital. The cordon was imposed at short notice in response to information, and past history, indicating that serious and violent disorder was likely. The conditions for those trapped quickly became unpleasant – and worsened during the afternoon and early evening. The applicant in the case, Lois Austin, was a demonstrator who continued to use a loudhailer to make speeches from within the cordon. There was no evidence that her conduct was anything but peaceful and lawful throughout. She brought proceedings claiming damages at common law for false imprisonment and under section 8 of the Human Rights Act1988 ("HRA") for deprivation of liberty contrary to Article 5. She lost before all three domestic courts and so took her case to Strasbourg.

The only issue for the House of Lords ([2009] UKHL 5, [2009] 1 A.C. 564) was whether her containment in those conditions for that length of time constituted a deprivation of liberty so as to engage Article 5. Unanimously the House held it did not. This meant the