Refugees and Natural Justice
The High Court Decisions in
Muin & Lie v Refugee Review Tribunal:
Procedural and Substantive Aspects

(A Case Note for the Administrative Law Section of the
NSW Bar Association on 13 September 2002 by Mark Robinson)

This case note sets out some of the procedural and substantive aspects of the two High Court decisions in *Muin v Refugee Review Tribunal*; and *Lie v Refugee Review Tribunal* (2002) 76 ALJR 966 (190 ALR 601, or [2002] HCA 30) that were handed down by the Full Court on 8 August 2002.

The Factual Background

As noted in the decision of Gleeson CJ (at [3]), these cases were part of a very large class action before the High Court of Australia, but argument was confined to the individual cases of Mr Muin and Ms Lie. They are both persons of Indonesian nationality and Chinese ethnicity who arrived in Australia. They each sought refugee status and claimed that if they returned to Indonesia, they would be persecuted on racial grounds. In each case, the Minister's delegate was required to consider circumstances in Indonesia relating to the treatment of ethnic Chinese, including the willingness and ability of the Indonesian authorities to prevent ill-treatment. In each case the plaintiffs appealed to the Refugee Review Tribunal ("**the Tribunal**").

In essence, both plaintiffs contended that the Tribunal failed to receive or consider relevant material known as the "Part B" country material that contained information favourable to the plaintiffs' respective cases. Had the Tribunal member properly received and considered this information, the plaintiffs would have had better prospects of obtaining a favourable decision. This failure was said by the plaintiffs to constitute a breach of procedural fairness. This failure, in the circumstances, was also said to constitute a breach of ss 418(3) and 424(1) of the *Migration Act* 1958 (Cth), making the decision procedurally ultra vires, or, at least, unlawful.

The "Part B documents" was a short-hand expression used in the proceedings to describe the country information used by the Minister's delegate when making his or her initial decision on the plaintiffs' respective refugee applications. In each case, the list of such country information was set out under "Part B – Evidence Before Me" of the delegate's written decision in accordance with the standard decision-making form.

In the *Muin case* alone, the plaintiff contended that the Tribunal took into account material adverse to Mr Muin's case in the making of its decision without his knowledge. This deprived him of the opportunity to counter that adverse material by evidence and submissions. This failure to give the Mr Muin an opportunity to answer the adverse material was said to constitute a breach of procedural fairness.

It was alleged by both plaintiffs that the breaches of procedural fairness constituted jurisdictional error and the procedural failings rendered the adverse refugee status decisions

invalid. Constitutional writ relief was sought pursuant to section 75(v) of the *Constitution*. Declarations and an injunction were also sought in the alternative.

In the proceedings, the expression “adverse material" was used to describe “relevant and significant material which is or may be adverse to Mr Muin’s case”. Similarly, “favourable material” was material that was or may have been favourable to the plaintiffs' case. The material with which the Court was concerned was not material personal to either plaintiff, or information about some particular circumstance relevant to either plaintiff as an individual. It consisted largely of “country background” material, being information concerning political and social circumstances in Indonesia at the relevant time.

It is significant to note that the Tribunal’s decision in relation to Mr Muin was made on 25 November 1998. The Tribunal's decision in the case of Ms Lie was made on 6 January 1998. The Act was substantially amended in significant respects on a number of occasions after these dates.

Proceedings were commenced in the High Court of Australia’s original jurisdiction under Chapter III of the Constitution by the plaintiffs against the Tribunal, the Secretary of the Department of Immigration and Multicultural Affairs (“**the Secretary**”), and the Commonwealth of Australia. The Tribunal filed a submitting appearance and the second and third defendants were the active defendants.

The facts in **the *Muin case*** were as follows.

On 8 June 1996, the plaintiff arrived in Australia. He was an Indonesian national of Chinese ethnicity. On 26 August 1996 the Plaintiff applied for a protection visa within the class of visas identified by s. 36 of the Act. By virtue of s 65 of the Act, he was entitled to such a visa if the Minister for Immigration and Multicultural Affairs (the "**Minister**") was satisfied that the criteria for such a visa had been satisfied. The relevant criterion was whether the plaintiff was a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together referred to as "**the Convention**"). On 9 March 1998 a delegate of the Minister was not satisfied that the plaintiff was a person to whom Australia owed protection obligations under the Convention and refused to grant the visa.

On 26 March 1998 the plaintiff made an application for review of the decision of the delegate to the Refugee Review Tribunal. On 30 March 1998 the Tribunal wrote to the plaintiff and said the Tribunal would ask the Department to send a copy of its documents about his case and the Tribunal would look at them on receipt for the purposes of a "review on the papers". A Tribunal member was then allocated to constitute the Tribunal. On 13 October 1998, a review on the papers was completed by the Tribunal member pursuant to s. 424(1) of the Act. A letter was written to the plaintiff dated 13 October 1998 advising him that the Tribunal member was not prepared to make the decision most favourable to the plaintiff on the review on the papers.

On 18 November 1998 the plaintiff attended a hearing before the Tribunal at which he was unrepresented. At no time in these Tribunal proceedings did the Tribunal accord the plaintiff the opportunity to respond to certain adverse material. On 25 November 1998 the Tribunal

decided to affirm the decision of the delegate of the Minister refusing to grant the protection visa. On 22 March 1999 the plaintiff commenced the High Court proceedings.

The “adverse material” that was not ever put to Mr Muin by the Tribunal largely comprised country information and DFAT (Department of Foreign Affairs & Trade) cables. It was agreed by the parties that the adverse material contained information capable of supporting a conclusion that the Indonesian authorities were willing and able to provide protection for Indonesians of ethnic Chinese background. Mr Muin contended against this conclusion before the Tribunal.

Mr Muin’s case concerning the “Part B documents” was cast in the same fashion as was put in Ms Lie’s case and is set out below.

The facts in **the *Lie case*** were as follows.

On 3 January 1997, the plaintiff arrived in Australia. She was an Indonesian national of Chinese ethnicity. On 5 March 1997 the plaintiff applied for a protection visa. On 13 March 1997 a delegate of the Minister refused to grant her a refugee visa. On 15 April 1997 the plaintiff made an application for review of the decision to the Tribunal. On 17 April 1997 the Tribunal wrote to the plaintiff and said the Tribunal would ask the Department to send a copy of its documents about her case. The plaintiff believed the Tribunal would look at them on receipt for the purposes of a "review on the papers". A Tribunal member was allocated to the case. On 12 November 1997 a review on the papers was completed by the Tribunal member. A letter was written to the plaintiff dated 12 November 1997 advising her that the Tribunal “had looked at all the papers relating to your application” but was not prepared to make the decision most favourable to the plaintiff on the review on the papers.

On 16 December 1997 the plaintiff attended a hearing before the Tribunal at which she was unrepresented. On 6 January 1998 the Tribunal decided to affirm the decision of the delegate of the Minister refusing to grant the protection visa. On 10 June 1999 the plaintiff commenced the High Court proceedings.

As to both Mr Muin and Ms Lie’s case concerning the Part B documents, section 418(3) of the Act provided that upon an application for review being commenced by an applicant, the Secretary must “give” to the Registrar of the Tribunal documents or parts of documents then in the Secretary’s possession or control considered by the Secretary to be relevant to the Tribunal’s review of the Minister’s delegate’s decision. An issue arose as to whether the Secretary did "give" the Part B material to the Registrar in the present cases.

A further issue arose as to the “review on the papers” procedure then adopted by the Tribunal when assessing refugee applications. Section 424(1) of the Act as it was at the time described the process known as “review on the papers” and provided that as a first step, the Tribunal should consider the material contained in the documents given to the Registrar under sections 418 (the reasons for decision and the relevant documents) and 423 (documents provided by an applicant for review). If the Tribunal was prepared to make the decision or recommendation on the review that is most favourable to the applicant, the Tribunal may make that decision or recommendation without taking oral evidence.

A factual issue was also raised as to whether the Tribunal failed to receive and consider the

Part B material at all. It was agreed by the parties that the Part B documents were relevant to the position in Indonesia of Indonesian nationals of ethnic Chinese background and, also, to the ability and willingness of the Indonesian authorities to provide for their protection and that some of them were favourable to the plaintiff's case. It was also agreed that the documents were not physically kept on the Departmental file concerning the plaintiffs and that only that file was physically sent to the Registrar (notwithstanding the documents were individually capable of being copied, printed and sent in hard copy or on computer floppy disk). Accordingly, the Part B documents were not sent in hard copy to the Tribunal (although some of them were contained in a large computer database or in libraries to which the Tribunal members had access).

The Decided Issues

Not all the issues that were raised by the plaintiffs were determined by the Court. Kirby J perhaps sets out (at [192]) the best formulation of the three critical issues that were ultimately considered and determined by the Court in favour of the plaintiffs. He said the issues were:

"(1) Whether the plaintiffs, and each of them, were denied natural justice (procedural fairness) because they were misled by official communications into believing that the Part B documents that had been before the delegate would be given to the Tribunal whereas it is now shown that they were not so given. (**The procedural fairness - misleading communication issue**).

(2) Whether, in each case, the Secretary and the Tribunal have been shown to have failed to comply with ss 418(3) and 424(1) of the Act. (**The statutory procedures issue**).

(3) Whether, in relying upon new materials adverse to the plaintiffs relating to the country situation in Indonesia, without first disclosing those materials for rebutting evidence and submission, the Tribunal was, in Mr Muin's case, in breach of the rules of natural justice (procedural fairness) on that ground. (**The procedural fairness - adverse materials issue**)."

The Decision

Seven individual judgments were published by the Court, some 327 paragraphs. I consider the leading judgments to be those of Gaudron J and Kirby J.

As to the first issue, the procedural fairness - misleading communication issue, that was successful for both plaintiffs (by a majority of four justices (Gaudron, Gummow, Kirby & Hayne JJ) to three (Gleeson CJ, McHugh & Callinan JJ)). The issue as stated by Kirby J above is a good statement of the determination of the majority and the reasons for it.

The said determination was largely dependant on a finding of fact that the Tribunal or its officers had in fact misled the plaintiffs by way of making certain communications regarding receipt and consideration of the Part B documents. The majority found as a fact the Tribunal did not receive or read the Part B documents (Gaudron J at [60] and [65]; Gummow J at [171]; Hayne J at [250], [257], and [256]; Kirby J at [200]. Callinan J also found that the fact, but held that Ms Lie was not misled by Tribunal communications (at [298], [302] and [305]). Gleeson CJ (at [23]) and McHugh J (at [114]) in dissent on this point found that the

Tribunal had read and considered the Part B documents.

As to the second issue, the statutory procedures issue, the Court did not formally answer the questions referred. Only Kirby J (at [219] and [225]) firmly found that the Secretary failed to comply with the provisions of the Act and the decisions of the Tribunal should be invalid for that reason. Callinan J considered (at [307]) in relation to *Muin* that he would likely have found for the plaintiff on this issue if he found it necessary to answer (which he did not). Positive findings on this issue were made against the plaintiffs by Gleeson CJ (at [20]) and McHugh J (at [180], [110] & [112]). The other judges chose not to answer the issue formally at all. However, in doing so, they indicated strongly that they were not minded to find in favour of the plaintiffs on this issue (Gaudron J at [43] & [55]; Gummow J at [181]; Hayne J at [251]; and Callinan J (on *Lie* alone) at [326])).

As to the third issue (only raised in *Muin's case*), the procedural fairness - adverse materials issue, the Court found by a different majority (of four justices (Gleeson CJ, Gaudron, McHugh & Kirby JJ) to two (Gummow & Hayne JJ) with one justice not deciding) that Mr Muin was denied procedural fairness in relation to the adverse materials. The majority was Gleeson CJ (at [31]); Gaudron J (at [64]); McHugh J (at [139]); and Kirby J (at [236]). The minority found against Mr Muin and held that there was no denial of procedural fairness on this ground, Gummow J (at 171]) and Hayne J (at [276]). Callinan J did not consider the issue at all, having already decided that there was a denial of procedural fairness in the *Muin case* in any event in relation to the misleading communications issue.

In the final analysis, notwithstanding the differing majority rulings on individual issues, Mr Muin's proceedings were successful by unanimous judgment and the Court ordered constitutional writs be issued and awarded him costs.

Ms Lie's proceedings were successful by majority judgment (four to three) and the Court ordered constitutional writs be issued and awarded her costs.

Discussion

This case primarily considered common law procedural fairness or natural justice in two main senses, a decision-maker actively misleading an applicant, and, a decision-maker taking into account adverse material without the applicant's knowledge.

The concept of procedural ultra vires, or the proper adherence to procedural rules fixed by statute, is also a significant common law ground of judicial review (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355).

The court found that breaches of the principles of natural justice had occurred in both senses described. The majority found that both applicants were positively mislead by the Tribunal into believing that it had read and considered favourable country information that was not personal to them but which assisted their refugee case. In fact, the Tribunal had not seen the material. In the *Muin case* alone, natural justice <u>in an extended sense</u> was applied to country information that was taken into account by the Tribunal that was adverse to the refugee applicant's case (and which was not merely personal to that applicant) and was not first shown or put to the applicant.

The basic principle with respect to procedural fairness is that a person should have an opportunity to put his or her case to a statutory decision-maker and to meet the case that is put against him or her (*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [99] and the cases cited at fn 42). Another way of putting it is that a person whose interests are likely to be affected by an exercise of statutory power must be given an opportunity to deal with relevant matters adverse to his or her interests that the repository of the power proposes to take into account in deciding upon its exercise (*ibid*, [140] and the cases cited at fn 69, per McHugh J). Few legal principles are more important than that the obligation to give those affected an opportunity to be heard before an adverse result is reached in a significant decision on the basis of undisclosed materials. It is a significant principle deeply embedded in our legal system (*ibid*, [192] per Kirby J). Whether founded in the common law or in the Act itself, denial of procedural fairness is a fetter upon the lawful exercise of power (*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [169] per Hayne J).

In this regard, the decision was not unlike that of the High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. The principles concerning procedural fairness set out in that case and in other recent cases such as *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 and *Abebe v Commonwealth* (1999) 197 CLR 510 were not extended in this decision.

I consider that the most significant aspect of the *Muin & Lie* decision is that the "extended" concept of natural justice I mentioned has now become firmly entrenched in the High Court. Since *Kioa v West* (1985) 159 CLR 550, in cases where information was considered and not disclosed to an applicant, courts have applied natural justice principles only to cases where that information was prejudicial to an applicant personally and it had been considered by the decision-maker without the knowledge of the applicant. Mason J's judgment in that case supports that proposition (esp at 587.5).

However, in *Kioa's case*, Brennan J expressed the proposition more broadly (at 629.3) arguably expanding it to include consideration of "***adverse information that is credible, relevant and significant to the decision to be made***" and not merely personal to the particular applicant (although it was said in the context of a discussion on that point). The High Court embraced the Brennan J formulation in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [140], per McHugh J and at [191] per Kirby J and this has been cited with approval again in the *Muin & Lie* decision (at [123] per McHugh J; and at [227] per Kirby J).

In the *Muin & Lie* decision, Gaudron J speaks of an applicant being given "a reasonable opportunity to present his case" (at [62]); of not being "misled" by the conduct of the Tribunal (at [63]) and an applicant being given a "reasonable opportunity to answer any material in the possession of the Tribunal which suggests that he or she is not a refugee…" (at [64]). This last concept is the extended concept I mentioned and it relates to a decision-maker taking into account adverse information about a person's case without informing that person. Similar observations are made in the decision by Kirby J (at [236]). The question of "extended" procedural fairness was assumed by Gleeson CJ (at [30]) who accepted and applied the majority decision in *Miah's case* (even though he was in dissent in that case).

In addition, as an alternative submission in the *Muin case*, the plaintiff argued that the

existence of the Tribunal's Practice Direction created an legitimate expectation that any adverse material held by the Tribunal would be shown to or be made known to the plaintiff. The Practice Direction, set out in the decision at [124], stated to the effect that an applicant before the Tribunal would "*be given an opportunity to respond to any relevant and significant material which is or may be adverse to his or her case*". The Direction was not limited merely to personal information.

A number of the justices considered that the alternative argument of the plaintiff should not be entertained as there was no need. It was said the Practice Direction correctly set out the common law position on natural justice in Australia after the *Miah* decision (see: Gleeson CJ at [30]; McHugh J at [124]-[125] "*It merely paraphrases the common law duty.*"; Kirby J at [230]-[231] & [236]; Hayne J at [259] & [269] (with Gummow J agreeing (at [171]).

Accordingly there is no longer a requirement in Australia that information received by a decision-maker needs to be personal to an applicant before the principles of natural justice can come into play. It must merely be information that is adverse information to an applicant's case or an applicant's interests (that is credible, relevant and significant).

The impact of the substantive aspects of the *Muin & Lie* decision is limited due to the passing of a raft of Commonwealth legislation since the proceedings were commenced.

The decision also raised some other issues capable of broad application.

The Nature of Judicial Immunity

For example, the Court considered in some detail the decision-making powers of the Tribunal and the nature of judicial immunities (Tribunal members have the same immunities as have Justices of the High Court).

Drawing Inferences of Fact

In addition, the proper basis for a court making inferences of fact was considered – see, eg, Gaurdon J at [60], where her Honour considered that a powerful factor in drawing an inference that the Tribunal had not read the Part B documents was the fact that the said documents were not mentioned in the Tribunal's decision. This is consistent with other recent High Court decisions – see: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69] (per McHugh, Gummow & Hayne JJ); *Miah's case* at [200](per Kirby J); and *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at [196] (per Gummow and Hayne JJ).

Inquisitorial Proceedings

Another broad issue discussed was the non-adversarial nature of the Tribunal proceedings and its impact of the content of procedural fairness in the two cases. Although it did not form part of a majority finding, there was an interesting discussion of the question by Hayne J at [263]-[268] (Gummow J agreeing at [171]).

The "may" vs "shall" Issue

The Court also held that there was no requirement for the Tribunal to make a preliminary decision on the papers because the power to do so was conditioned in the Act by the word "may" and not "shall" (see Gaudron J at [55]-[56]; Gleeson CJ at [21]; Gummow J at [180]-[181], and Hayne J at [251]). Further, because there was no such "obligation", the Court considered that declaratory or prerogative relief was therefore not appropriate. In my view, this conclusion does not follow from the premises as there might well be a duty for the Tribunal to consider whether to exercise that power; or whether to consider an application for it to exercise that power. That limited duty has been held to be sufficient to attract the writ of mandamus by the High Court – see, for example *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 17-18 (per Mason J); see also – *Hicks v Aboriginal Legal Service of Western Australia (Inc)* (2001) 108 FCR 589 at [11] (per Lee, Lindgren & Katz JJ) and *Pfizer Pty Ltd v Birkett* (2001) 112 FCR 305 at [34] (per Black CJ, Branson & Katz JJ).

Procedural Ultra Vires Issue

Another issue of broad application raised but not determined by the decision is the scope and operation of the ground of judicial review known as procedural ultra vires, where a statutory procedure has not been complied with that is properly seen as a necessary step to the validity of the impugned decision. Since the decision in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the issue has not yet received a full discussion by the Court. There was a divergence of views in the *Muin* decision on the issue. Gaudron J (at [45]) considered that it was "conceivable" that a failure by the Secretary to comply with s418 of the Act might "in some cases" result in a jurisdictional error. Kirby J (at [225]) decided firmly that non-compliance with statutory procedures constituted a jurisdictional error. However, Gummow J, after agreeing with Gaudron J that it was not necessary to answer the relevant question, said (at [182]) there is a difference in seeking to raise procedural ultra vires under the *Administrative Decisions (Judicial Review) Act* 1977(Cth) and raising it under s 75(v) of the *Constitution*. It may be that it will be more difficult to establish this ground in constitutional writ proceedings in the High Court, than it would otherwise be in Federal Court or State Supreme Court proceedings.

The Representative Proceedings

There were originally three related representative proceedings commenced in the original jurisdiction of the High Court of Australia, *Herijanto, Muin & Lie*. The *Herijanto* proceedings were commenced on 31 July 1998, some eight months before the *Muin* proceedings were commenced. Each of the three proceedings were commenced under section 75 of the *Constitution* on each plaintiff's behalf and as a representative party under Order 16 rule 12 of the *High Court Rules* 1952 for, on behalf of, or for the benefit of the named represented parties set out in a Schedule to the pleadings in each proceedings.

The originating process in each matter was by way of specially endorsed writ of summons and a statement of claim.

Interlocutory proceedings regarding discovery, interrogatories, immunity of judicial officers, preliminary findings of facts and the formulation of agreed facts and questions to be referred were heard and determined over a number of years. Some of these determinations were published as decisions of the Court -

- *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 698 (Gaudron J) - On judicial and tribunal member immunities and interrogatories.

- *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 703 (Gaudron J) - On the scope of discovery against the Crown in representative proceedings.

- *Herijanto v Refugee Review Tribunal* (2000) 21(11) Leg Rep SL4b (26 May 2000) (McHugh, Gummow and Kirby JJ) - The special leave application from the above two decisions.

- *Herijanto v Refugee Review Tribunal* (2000) 74 ALJR 1398 (Gaudron J) – On findings of facts and the referral of questions to be determined by a Full Bench.

Joinder of Persons Named as Parties

From time to time, persons were joined so as to in effect make them parties to the three representative proceedings. Each persons' relevant details and particulars that made them fall within the applicable proceedings (*Muin* or *Lie*) were also recorded and they were joined to the proceedings by means of having their details attached to and filed with an amended statement of claim after an application for joinder was heard pursuant to Order 16 rule 14 of the *High Court Rules* 1952. By this mechanism, about 6,700 refugee applicants who had each been the subject of adverse decisions by the Tribunal and their dependant families were eventually named as parties in the representative proceedings by the time of the hearing before the Full Court in October 2002. The refugee applicants came from about 23 different countries, the main countries involved being Indonesia, India, China, Pakistan and Lebanon.

The *Herijanto* proceedings were settled and were finally determined in whole and the *Muin* proceedings were settled in part with about 20 matters being determined by constitutional writs being made by consent on 25 September 2001 in the High Court before Gaudron J, some weeks before the questions referred were argued before the Full Bench on 9 & 10 October 2001.

The Questions Referred

The decisions came about because Gaudron J referred five questions to the Full Court in both matters pursuant to section 18 of the *Judiciary Act* 1903 (Cth). The parties agreed that the way to go forward was to refer two individual matters to the Full Court for determination. The introduction to the questions stated: "*Upon the facts set out in the agreed statement of facts and the inferences, if any, to be drawn from those facts ...*" The questions referred were asked and answered in both matters in the following way:

Question Referred		*Muin* Answer	*Lie* Answer
1	*Was there a failure to accord the Plaintiff procedural fairness?*	*Yes*	*Yes*
2	*Was there a failure to comply with s418(3) of the* Migration Act *1958 (Cth)?*	*Inappropriate to answer*	*Inappropriate to answer*
3	*Was there a failure to comply with s424(1) of the* Migration Act *1958 (Cth)?*	*Inappropriate to answer*	*Inappropriate to answer*
4 (a)	*If the answer to any of questions 1 to 3 is yes,* *Was the decision of the First Defendant (the Tribunal) to affirm the refusal of the delegate to grant a protection visa for that reason invalid?*	*Yes*	*Not Answered*
4	(b) *What declaratory, injunctive or prerogative writ relief, if any, should be ordered?*	*Prohibition should issue to prevent the second and third defendants from acting on the Tribunal's decision; certiorari should issue to quash that decision; and mandamus should issue to the first defendant directing it to hear and determine the plaintiff's review application in accordance with law.*	*Prohibition should issue to prevent the second and third defendants from acting on the Tribunal's decision; certiorari should issue to quash that decision; and mandamus should issue to the first defendant directing it to hear and determine the plaintiff's review application in accordance with law.*
5	*By whom should the costs of the proceedings be borne?*	*The second and third defendants*	*The second and third defendants*

Other Procedural Aspects

This case was interesting from a procedural point of view for a number of reasons.

It is notable that constitutional writs of prohibition, certiorari and mandamus were unanimously issued by the Court *without* the plaintiffs having ever commenced their applications by way of the established prerogative writ procedure in the *High Court Rules* 1952 and without the plaintiffs having first sought orders nisi. The originating process in both matters was merely by way of specially endorsed writ of summons and a statement of claim. Declarations were sought in the alternative (cf: *Green v Daniels* (1977) 13 ALR 1 at 13 (Stephen J)).

The class action aspects of the case were not the subject of any substantive discussion by the Court. The plaintiffs contended in the proceedings that the represented parties each had a "community of interest" in the determination by the Court of substantial issues of fact and law in the respective proceedings (*Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398).

The impact of many of the various procedural and substantive aspects of the proceedings is now somewhat limited in the migration law field due to the passing of Commonwealth legislation since the proceedings were commenced.

Changes include new provisions which preclude the commencement of future class actions in any migration matters; limit or removes judicial review or access to judicial review in the High Court (or expands the powers of the Tribunal so as to permit it to make what would otherwise be jurisdictional errors); removes the "review on the papers" procedure; permits electronic transfer of information to be deemed to be "given" to the Tribunal and removes denial of natural justice or procedural fairness as an available ground of judicial review in any event.

In addition the statutory definition of what it is to be a "refugee" in Australia has since been tightened considerably.

Unless these new Acts are read down or stricken from the statute books in due course, the *Muin & Lie* decision will inspire more interest in relation to areas of executive decision-making outside of migration.

13 September 2002