

Felix Walter Rohner & Anor v Linda Scanlan and The Minister for Immigration and Multicultural Affairs
[<<1998] 1006 FCA (24 August 1998>>)

Last Updated: 27 <<August 1998>>

<<FEDERAL COURT OF AUSTRALIA>>

DISCRIMINATION - regulations to Migration Act 1958 (Cth) - spouse defined not to include same sex partner - whether contravene Sex Discrimination Act 1984 (Cth) - whether circumstances "the same or not materially different"

Migration Act 1958 (Cth), s 504(1), 31(1), 40

Migration Regulations, Division 2.1 Part 2, 1.15A

Sex Discrimination Act 1984 (Cth), s 5(1), 26(1), 3

Commonwealth of <<Australia>> v Human Rights and Equal Opportunity Commission (1997) 147 ALR 469 Appl

Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd (1993) 46 FCR 301, Appl

De Santis v Pacific Telephone and Telegraph Co Inc 608 F2d, 327, Refd

Felix Walter Rohner and Bruno Angelo Biondi Tineo v Linda Scanlan and The Minister for Immigration and Multicultural Affairs

QG 186 of 1997

Drummond, Kiefel and Finkelstein JJ

Brisbane

<<24 August 1998>>

IN THE <<FEDERAL COURT OF AUSTRALIA>>

QUEENSLAND DISTRICT REGISTRY

QG 186 of 1997

on appeal from a judge of the <<federal Court of australia>>

BETWEEN:

and:

FELIX WALTER ROHNER

first appellant

BRUNO ANGELO BIONDI TINEO

second appellant

AND:

LINDA SCANLAN

First Respondent

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Second Respondent

JUDGES:

DRUMMOND, KIEFEL AND FINKELSTEIN JJ

DATE OF ORDER:

<<24 August 1998>>

WHERE MADE:

BRISBANE

THE COURT ORDERS THAT:

1. The Appeal be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the <<Federal>> Court Rules.

IN THE <<FEDERAL COURT OF AUSTRALIA>>

QUEENSLAND DISTRICT REGISTRY

QG 186 of 1997

on appeal from a judge of the <<federal court of australia>>

BETWEEN:

FELIX WALTER ROHNER AND BRUNO ANGELO BIONDI TINEO

Appellants

AND:

LINDA SCANLAN

First Respondent

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Second Respondent

JUDGES:

DRUMMOND, KIEFEL AND FINKELSTEIN JJ

DATE:

<<24 AUGUST 1998>>

PLACE:

BRISBANE

REASONS FOR JUDGMENT

DRUMMOND J

I agree with the reasons of Kiefel J, which I have had the advantage of reading. The result is the same even if, in the context of s 5(1) the Sex Discrimination Act 1984 (Cth), the circumstances by reference to which the question whether a female would be more favourably treated than the appellant are confined to each

being an applicant for a visa of the kind here in question. The regulation affects both a male and a female visa applicant equally by restricting each to having a partner of the opposite sex: it can never operate to treat a female applicant more favourably than a male applicant, or vice versa.

I certify that this page is a true copy of the Reasons for Judgment herein of the Honourable Justice Drummond.

Associate:

Dated: <<24 August 1998>>

IN THE <<FEDERAL COURT OF AUSTRALIA>>

QUEENSLAND DISTRICT REGISTRY
QG 186 of 1997

on appeal from a judge of the <<federal Court of australia>>

BETWEEN:

and:

FELIX WALTER ROHNER

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BRUNO ANGELO BIONDI TINEO

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MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

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JUDGES:

DRUMMOND, KIEFEL AND finkelstein JJ

DATE:

<<24 August 1998>>

PLACE:

BRISBANE

REASONS FOR JUDGMENT

KIEFEL J:

Mr Rohner is a citizen of Switzerland and applied for a Retirement (Temporary) Visa, which is a sub-class 410 Visa. One of the criteria for the grant of such a visa is that an applicant's family unit must not include anyone who is dependant on the applicant, other than the applicant's spouse. Mr Rohner's application included the second appellant, Mr Tineo, as a family unit member. It is not in dispute that the appellants have lived together for over eighteen years and have, as his Honour the primary Judge said "developed a

mutual commitment to a shared life to the exclusion of any other person". The first respondent, an authorised officer under the Migration Act 1958 (Cth), refused the grant of a Retirement Visa to the applicant "as the applicant fails to meet schedule 2 criteria by including another family member in the application other than a spouse". The effect of the relevant regulation is that a "spouse" is a person of the opposite sex.

Statutory Provisions

Regulations may be made "prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act ...": Section 504(1) Migration Act 1984 . Sub-section 31(1) relevantly provides that there are to be prescribed classes of visas and that s 31(3) provides that the regulations may prescribe criteria for visas of a specified class. Regulations may also provide that visas of a specified class may only be granted in certain circumstances: s 40. Division 2.1 of Part 2 of the Migration Regulations prescribes the conditions applicable to visas and classes of visas and the circumstances in which they may be granted, by reference to Schedules 1 and 2. The visa in question is of a class which appears as item 1217 in Schedule 1 and as sub-class 410 in Schedule 2. The primary criteria to be met includes the following:

"410.222

(1) If the applicant intends to settle in <<Australia>> with his or her spouse;

(a) the family unit of the applicant does not include any other person dependent on the applicant or the applicant's spouse; and

...

(2) If the applicant intends to settle in <<Australia>> without a spouse:

(a) the family unit of the applicant does not include a person dependent on the applicant; and

..."

Mr Rohner claimed to meet this criteria. Mr Tineo sought to satisfy the secondary criteria, as an applicant who was a member of the family unit of a person satisfying the primary criteria:

"410.311 The applicant is the spouse of a person who has applied for a Retirement (Temporary) (Class TQ) Visa".

"Spouse" is defined in regulation 1.15A relevantly as follows:

"(1) For the purposes of these Regulations, a person is the spouse of another person if:

(a) the 2 persons are:

(i) ...; or

(ii) de facto spouses of each other, as set out in subregulation (2); and

(b) the Minister is satisfied that:

(i) the 2 persons have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between the 2 persons is genuine and continuing; and

(c) the Minister is satisfied that the 2 persons are:

(i) living together; or

(ii) not living separately and apart on a permanent basis.

(2) A person is the de facto spouse of another person:

(a) if the persons:

(i) are of opposite sexes; ..."

The appellants sought a declaration that regulation 1.15A(2)(a)(i) is invalid by reason of the operation of s 5(1) and s 26(1) Sex Discrimination Act (Cth) ("SDA") which provide:

"5.(1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of the sex of the aggrieved person if, by reason of:

(a) the sex of the aggrieved person;

(b) the characteristic that appertains generally to persons of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person;

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

(2) For the purposes of this Act, a person (the "discriminator") discriminates against another persons (the "aggrieved person") on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

(3) This section has effect subject to sections 7B and 7D."

26.(1) It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex, marital status, pregnancy or potential pregnancy, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.

(2) This section binds the Crown in right of a State."

Section 3 of the Act, to which his Honour the primary Judge made reference in his reasons, provides:

"3. The objects of this Act are:

(a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women; and

(b) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs; and

(ba) to eliminate, so far as possible, discrimination involving dismissal of employees on the ground of family responsibilities; and

(c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women."

The Decision Appealed From

Lehane J dismissed the application. In his Honour's view the inconsistencies alleged between the provisions of the Sex Discrimination Act and regulation 1.15A of the Migration Regulations, which would require the regulation to be held invalid to the extent that it purports to authorise conduct infringing the discrimination legislation, did not arise. It is convenient to set out his Honour's reasons at this point:

"In my view, however, the inconsistency for which the applicants contend does not arise. The matter is appropriately tested by considering the way in which the applicants' visa application was dealt with. It is not correct to say that either Mr Rohner or Mr Biondi Tineo was, by reason of his sex, treated less favourably than, in similar circumstances, a person of the opposite sex would have been treated. For a female visa applicant, as for a male, a "spouse" is a person of the opposite sex. Discrimination by reason of the sex of the person with whom one has a relationship is not discrimination on the ground of one's sex. It must be borne in mind that, for the purpose of an application for a visa in subclass 410, each of the two people concerned - the one claiming to satisfy the primary criteria and the other claiming to meet the secondary criteria - is treated as a separate applicant: see particularly 410.311. In each case, the relevant question is whether that applicant is discriminated against by reason of his or her sex, not that of the other applicant.

If the argument were - as during oral submissions it appeared at one stage to be - that a male applicant is discriminated against because, unlike a female applicant, his spouse cannot be male (with the corollary, of course, that a female applicant might equally be discriminated against because, unlike a male applicant, her spouse cannot be female), again, in my view, the argument should not succeed. It is not, in my view, discriminatory for the purposes of the Sex Discrimination Act to recognise as a spouse, in the case of an applicant of either gender, only a person of the opposite sex. It is not, after all, an object of the Sex Discrimination Act (it may be an object of other legislation not in question here) to forbid discrimination by reason of a person's sexual orientation or of a person's relationship with another person of the same sex. And for the purpose, particularly, of its provisions concerning discrimination by reason of marital status, the Sex Discrimination Act itself has, in s 4(1), a definition of "de facto spouse" as, in relation to a given person, another person of the opposite sex."

The Contentions and Reasons

Whilst there may be questions arising as to the operation of s 26, it was accepted that the threshold question involved the application of s 5(1) SDA. Section 5 defines the conditions of discrimination (Commonwealth of <<Australia>> v Human Rights and Equal Opportunity Commission (1997) 77 FCR 371, 389; Sackville J). The submission on appeal revolved around the circumstances of an applicant for the purpose of the comparison of the treatment afforded to applicants of different sexes, and the requirement that any less favourable treatment be causally connected with the sex of the applicant. It was not suggested in this case that factors other than the operation of the regulation, and the policy which may underlie it, come into play as relevant to the last mentioned enquiry.

The appellants' argument as to the effective discrimination may be stated shortly. They gave, as an example of favourable treatment being afforded, the position of a female applicant having a male partner. That is to say, the appellants regarded the fact of a male partner as the necessary common factor, and that which rendered the circumstances, "the same or not materially different". In that circumstance the criteria would

be satisfied. It followed, the argument proceeded, that the ineligibility of Mr Rohner was on account of his sex.

There are two elements in s 5(1) SDA: the treatment afforded to persons of the opposite sex and the enquiry within it as to whether one is treated less favourably than the other; and the reason for it, the causal relationship between the sex of the person and the less favourable treatment experienced by the aggrieved person: *Commonwealth v Human Rights and Equal Opportunity Commission*, above, at 389; *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301, 321-2. It is the latter question which appears to be the principal focus of cases dealing with the sub-section.

The enquiry as to the treatment afforded is by way of a comparison, which is undertaken by approximating the circumstances of a man and a woman, at least so far as is relevant to the area of enquiry. The appellants' argument, noted above, assesses only the position of a woman with a male partner. That approach however denies the critical factor in the appellants' circumstances, so far as they were relevant to the application of the Migration Regulations, and that is that their relationship was with a person of the same sex. It is that circumstance which the definitional regulation denies. The circumstances applicable to a female applicant, which mirrors the position of the appellants, and which therefore satisfies the description that they "are the same or not materially different", would require her partner to be female. The circumstance which mirrors the example put forward by the appellants is one where a male applicant had a female partner. In neither case does the operation of the Migration Regulations differentiate between a male and female applicant. They are treated the same.

An effect of regulation 1.15A is to discriminate, but the less favourable treatment is directed to couples of the same sex. The reason, apparent from the regulations, for that less favourable treatment is because of their relationship, which is to say the result of their decision as to their sexual practice. The regulations reflect some policy, but it is not necessary to comment upon the appropriateness of it in these times. The discrimination effected by the regulation is not, however, because of an applicant's sex. It is because of the nature of their relationship and the sex of their partner.

Relevantly it is not, as his Honour pointed out, discrimination prohibited by the SDA. That Act itself, whilst prohibiting discrimination on the ground of marital status (s 6) and family responsibilities (s 7A) in each case defines "de facto spouse" to refer to persons of the opposite sex (s 4).

Similar arguments such as that here advanced have been raised in discrimination cases in the United States of America to no avail. In this connexion the Court was referred by Senior Counsel for the respondents to *De Santis v Pacific Telephone and Telegraph Co Inc* 608 F2d 327 where the Court of Appeal, 9th circuit, held that employment policies which differentiated according to sexual preference did not involve differential decisional criteria for the sexes. An argument that the definition of "sex" in the SDA might extend to encompass sexuality (see "Exploring Approaches to Discrimination on the Basis of Same-Sex Activity" by B Gilmour-Walsh (1994) Vol 3 *The Australian Feminist Law Journal*, 117) was not suggested to overcome the requirements of the definition of "spouse".

In view of this conclusion it is not necessary to deal with arguments as to the effect of inconsistency and as to whether declaratory relief was then appropriate.

The Appeal should be dismissed.

I certify that this and the preceding six (6) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Kiefel.

Associate:

Dated:

IN THE <<FEDERAL COURT OF AUSTRALIA>>

QUEENSLAND DISTRICT REGISTRY
QG 186 of 1997

on appeal from a judge of the <<federal Court of australia>>

BETWEEN:

and:

FELIX WALTER ROHNER

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BRUNO ANGELO BIONDI TINEO

second appellant

AND:

LINDA SCANLAN

First Respondent

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Second Respondent

JUDGE(S):

DRUMMOND, KIEFEL AND finkelstein JJ

DATE:

<<24 August 1998>>

PLACE:

BRISBANE

REASONS FOR JUDGMENT

FINKELSTEIN J

I would dismiss this appeal for the reasons given by Kiefel J.

I certify that this page is a true copy of the Reasons for Judgment herein of The Honourable Justice Finkelstein.

Associate:

Dated: <<24 August 1998>>

IN THE <<FEDERAL COURT OF AUSTRALIA>>

QUEENSLAND DISTRICT REGISTRY

QG 186 of 1997

ON APPEAL FROM A JUDGE OF THE <<FEDERAL COURT OF AUSTRALIA>>

BETWEEN:

FELIX WALTER ROHNER AND BRUNO ANGELO BIONDI TINEO

APPELLANTS

AND:

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First Respondent

MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

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JUDGES:

DRUMMOND, KIEFEL AND FINKELSTEIN JJ

DATE:

<<24 august 1998>>

PLACE:

BRISBANE

REASONS FOR JUDGMENT

FINKELSTEIN J

I would dismiss this appeal for the reasons given by Kiefel J.

I certify that this page is a true copy

Of the Reasons for Judgment herein of

The Honourable Justice Finkelstein

Associate:

Dated:

Counsel for the Appellants:

Mr P A Keane QC with Mr P G Bickford

Solicitor for the Applicant:

MacDonnells

Counsel for the First and Second Respondents:

Mr J C Sheahan SC with Mr R M Derrington

Solicitor for the First and Second Respondents:

Australian Government Solicitor

Date of Hearing:

17 July <<1998

Date of Judgment:

24 August 1998>>