Federal Court  Cour fédérale

Date: 20160713

Docket: IMM-5005-15

Citation: 2016 FC 803

Ottawa, Ontario, July 13, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

FILOMENO SEBASTIAO

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review application challenging a decision of the Refugee Appeal Division [RAD] dated October 21, 2015. The RAD upheld the Refugee Protection Division's [RPD] earlier determination that the Applicant, Mr. Filomeno Sebastiao, was neither a Convention refugee nor a person in need of protection under section 96 or subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], respectively.

[2] For the following reasons, the application is dismissed.

I. FACTS

[3] Mr. Sebastiao is a citizen of Angola. In August 2013, he left Angola for Houston, Texas, where he resided for a short time before eventually arriving in Canada in April 2014. In September 2014, Mr. Sebastiao filed a claim for refugee protection, alleging fear of persecution by reason of his homosexuality and Mormon faith, to which he converted while residing in the United States.

[4] In his claim, Mr. Sebastiao alleged that homosexuals in Angola are subjected to physical and sexual abuse, and receive no protection from the police. Mr. Sebastiao claimed that he would be perceived to be a spy in Angola due to his Mormon beliefs.

[5] In support of his claim, Mr. Sebastiao recounted one specific incident from 2002. On that occasion, a group of men approached Mr. Sebastiao and his male friend and began to insult and beat them due to his friend's effeminate appearance. Mr. Sebastiao was forced to flee, escaping into a house that was under construction before ultimately injuring himself on building materials.

[6] Mr. Sebastiao's refugee claim was heard by the RPD in November 2014 and rejected in January 2015. The RPD accepted that Mr. Sebastiao was an Angolan national, Mormon and homosexual, but determined that he had failed to establish his objective risk and subjective fear of persecution. In arriving at this decision, the RPD concluded that: 1) the objective documentary evidence on record did not indicate that homosexuals were at risk in Angola; and, 2) Mr.

Sebastiao's delay in making his claim and failure to submit corroborating documentarian in support of his claim undermined his subjective fear. The RPD also determined that he would not be at risk by virtue of his Mormon faith, having failed to provide any documentation to that effect.

[7] Mr. Sebastiao appealed the decision to the RAD, alleging that the RPD had erred by disregarding key evidence in support of his claim that he faced a risk of persecution as a homosexual in Angola.

[8] The RAD revisited the record before the RPD and completed a detailed review of the thirteen pieces of evidence presented by Mr. Sebastiao in support of his claim. Without explicitly addressing the discrete elements of objective risk and subjective fear, as the RPD had done, the RAD concluded that there was some evidence as to a lack of social acceptance of homosexuality in Angola, but found that the evidence did not suggest that homosexuals would suffer persecution in Angola. Having reached this conclusion, the RAD confirmed the decision that Mr. Sebastiao was neither a Convention refugee nor a person in need of protection, and dismissed the appeal.

II. ISSUES

[9] Mr. Sebastiao raised the following three issues before the Court:

A. Did the RAD apply the wrong legal test to determine whether the Applicant faces a reasonable chance of persecution by overlooking the impact of laws criminalizing homosexuality?

B. Did the RAD err in increasing the standard of proof to establish a reasonable chance of persecution?

C. Did the Board Member err by providing inadequate reasons?

[10] I have considered these issues below; however, in my view the determinative issue is whether the RAD reasonably concluded that the documentary evidence does not present a case that homosexuals face a reasonable chance of persecution in Angola.

III. ANALYSIS

A. *The Legal Test*

[11] The test for establishing a fear of persecution was laid down by the Supreme Court of Canada in *Ward v Canada (Minister of Employment and Immigration)*, [1993] 2 SCR 689 [*Ward*] at para 54, and is bi-partite in nature: (1) the claimant must subjectively fear persecution; and, (2) this fear must be well-founded in an objective sense.

[12] The subjective component of this bi-partite test relates to the existence of the fear of persecution in the mind of the refugee claimant; the claimant must be a credible witness with consistent testimony. The objective component requires the applicant to lay an evidentiary foundation that the fear is well-founded, having regard to the objective situation (*Rajudeen v Canada (Minister of Employment and Immigration)*, [1984] FCJ No 601(FCA) at para 14: *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 [*Chan*] at paras 128, 133-134).

[13] In considering whether a refugee claimant's fear is well-founded, it must be established, on a balance of probabilities, that there is a "reasonable chance" or "serious possibility" of persecution (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA) at paras 5-6, 8 [*Adjei*]).

[14] This evidentiary standard was usefully explained by Justice James O'Reilly in *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 [*Alam*] at paragraph 8:

> 8 The lesson to be taken from *Adjei* is that the applicable standard of proof combines both the usual civil standard and a special threshold unique to the refugee protection context. Obviously, claimants must prove the facts on which they rely, and the civil standard of proof is the appropriate means by which to measure the evidence supporting their factual contentions. Similarly, claimants must ultimately persuade the Board that they are at risk of persecution. This again connotes a civil standard of proof. However, since claimants need only demonstrate a risk of persecution, it is inappropriate to require them to prove that persecution is probable. Accordingly, they must merely prove that there is a "reasonable chance", "more than a mere possibility" or "good grounds for believing" that they will face persecution.
>
> [Emphasis added]

[15] Practically speaking, this requires the RAD to consider, on the balance of probabilities, the evidence adduced by the claimant for purposes of making its factual findings, then assess whether those facts place the claimant at risk of persecution (*Ye v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1221 at para 19; *Avagyan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1004 at para 37; *Pararajasingham v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1416 at para 49). This entails an objective assessment as to the level of risk faced by the claimant, as well as consideration of whether the harm that the claimant allegedly fears meets the definition for persecution. In considering this issue, it is

important to remember that, as the Federal Court of Appeal explained in *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at paragraphs 10-14, the standard of proof on a balance of probabilities should not be confused with the legal threshold used to establish a risk of persecution.

[16] It is worth noting that concept of persecution as set out in section 96 is not defined in the IRPA, but the jurisprudence of this Court has broadly established the term to mean the serious interference with a basic human right (*Warner v Canada (Minister of Citizenship and Immigration)*, 2011 FC 363 at para 7, citing *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at para 29). Relying on the Supreme Court of Canada's decisions in *Ward* and *Chan*, above, Justice Bédard, then of the Federal Court, determined that an assessment of persecution requires a determination as to whether a basic right was violated and then verification as to whether the violation was repetitive or systematic (*Vasallo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 673 at para 15 [*Vasallo*]).

B. *Standard of Review*

[17] The standard of review applied by the RAD to the decision of the RPD was not challenged by Mr. Sebastiao in this application. It should be mentioned, however, that in the time between the granting of leave and the judicial review hearing, the Federal Court of Appeal released the decision in *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], a judgment which is materially relevant to this issue. I canvassed the matter at the hearing and both parties agreed that the RAD had properly employed the correctness standard of review in considering the RPD's decision (*Huruglica*, above, at para 103).

[18] To the extent that the jurisprudence can be said to have established a clear test for what constitutes persecution within the meaning of section 96, the question of whether the RAD erred in understanding or articulating that test is reviewable on a standard of correctness; however, where an applicant challenges how the test for persecution was applied to the facts, that is a question of mixed law and fact which is reviewable on the reasonableness standard (*Dawidowicz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 115 at para 23; citing *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paras 20-22; *Gur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 992 at para 17).

[19] Whether the RAD erred in increasing the standard of proof to establish a reasonable chance or serious possibility of persecution is a question law, reviewable on the correctness standard (*Rajadurai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 532 at para 22; *Ospina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 681 at para 20; *Alam*, above, at paras 9-10).

[20] The adequacy of reasons is not a stand-alone basis for quashing a decision. The reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. It follows that any challenge to the reasoning/result of the decision is assessed on the reasonableness standard (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses'*] at paras 14, 21-22).

C. *Did the RAD Apply the Wrong Legal Test to Determine Whether the Applicant Faces a Reasonable Chance of Persecution by Overlooking the Impact of Laws Criminalizing Homosexuality?*

[21] Mr. Sebastiao contends that the RAD applied the wrong legal test in considering whether he faces a reasonable chance of persecution. However, his submissions do not attack the RAD's formulation of the test for persecution; rather, the argument focuses on the RAD's application of the test to the facts at hand. Specifically, Mr. Sebastiao challenges the RAD's finding that the objective documentary evidence did not present a case that homosexuals would suffer persecution in Angola, despite the panel's ostensible acknowledgment of Angolan penal code provisions that appear to criminalize homosexual behaviour.

[22] In support of his position, Mr. Sebastiao relies on the Office of the United Nations High Commissioner for Refugees' [UNHCR] *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity* [the Guidelines]. He submits that the Guidelines support the notion that persecution should be assessed on the premise that refugees must to be able to live openly without concealing their sexual identity, and further argues that this principle of non-concealment has found favour in the jurisprudence of the Federal Court, citing the decisions in *Fosu v Canada (Citizenship and Immigration)*, 2008 FC 1135 at paragraph 17 [*Fosu*], and *V.S. v Canada (Citizenship and Immigration)*, 2015 FC 1150 at paragraph 12. While Mr. Sebastiao acknowledges that the RAD did not state that he needed to conceal his sexual identity in order to avoid persecution, he argues that the RAD should have assessed his well-founded fear of persecution on the basis that he is entitled to live openly and

without the need to conceal his gay identity – something, he argues, sections 70 and 71 prevent him from doing.

[23] A further impassioned argument was presented to me that Mr. Sebastiao need not prove that these laws are actually enforced. He takes the position that the mere existence of a law that prescribes punishment and discriminates on a protected Convention ground amounts to a well-founded fear of persecution. Relying on the decisions *Zolfagharkhani v Canada (Minister of Employment and Immigration)*, [1993] 3 FC 540 (FCA) [*Zolfagharkhani*] at paragraphs 18-22, and *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420 [*Hinzman*] at paragraph 80, Mr. Sebastiao argues that the it is well-established that the existence of laws that prescribe punishment amounting to persecution or that discriminate on a protected Convention ground will constitute a well-founded fear of persecution and that the jurisprudence has never established that refugee claimants must prove that the legal provisions to which they fear being subjected are actually enforced.

[24] Counsel for Mr. Sebastiao filed a number of decisions from foreign jurisdictions, including courts in Italy and Australia, as well as the European Court of Human Rights, in support of his position. I note that these cases were not before the RAD or the RPD, and mostly arose in the context of human rights claims, as opposed to asylum appeals.

[25] On the contrary, the Minister submits that Mr. Sebastiao is incorrect in stating that the enforcement of a law is irrelevant to determining a well-founded fear of persecution. The Minister points to a number of decisions from this Court to argue that it is open for the RAD to

find that a claimant does not face persecution where a potentially persecutory law is not enforced (*Birsan v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1861 [*Birsan*] at para 4; *Afolabi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 468 at para 14; *Aire v Canada (Minister of Citizenship and Immigration)*, 2004 FC 41 at paras 13-15; *Best v Canada (Minister of Citizenship and Immigration)*, 2014 FC 214 [*Best*] at paras 10, 23; *Bowen v Canada (Minister of Citizenship and Immigration)*, 2008 FC 112 at paras 23-24, 27; *Gillani v Canada (Minister of Citizenship and Immigration)*, 2012 FC 533 [*Gillani*] at para 37; *Mamoon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 578; *Nnemeka v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1130 at paras 6, 14-15).

[26] In light of this line of jurisprudence, the Minister submits that the decision of the RAD is reasonable and points to the evidence on record, specifically a United States Department of State report [the US DOS report] on human rights practices in Angola, which states there are no reported cases of articles 70 and 71 being enforced to criminalize same-sex activity. Moreover, the Minister observes that the rest of the evidence submitted by Mr. Sebastiao was inconclusive insofar as it did not pertain specifically to either the conditions in Angola or Mr. Sebastiao's personal circumstances. As a result, the Minister takes the position that it was reasonable for the RAD to conclude that, while there was some evidence as to a lack of social acceptance of homosexuality in Angola, there were no reports of the persecutory law at issue being enforced.

[27] The Minister also points out that the decision in *Fosu*, above, is distinguishable on the basis that the RAD did not suggest, or find it necessary, that Mr. Sebastiao conceal his sexual identity in order to avoid persecution in Angola.

[28] In light of the evidentiary record, the reasons of the RAD and the arguments advanced by Mr. Sebastiao, it is apparent that the crux of the issue before me is the RAD's treatment of articles 70 and 71 of the Angolan penal code. The panel's decision focused on the objective element of the bi-partite test set out in *Ward*, above, and it was decided that the documentary evidence on record did not indicate that homosexuals would suffer persecution in Angola.

[29] Mr. Sebastiao's submissions challenge this finding, making specific reference to objective documentary evidence that indicates that articles 70 and 71 of the Angolan penal code impose sanction on those who commit acts "against the order of nature." He argues that the existence of laws that criminalize consensual same sex-relationships alone amount to persecution and argues that the RAD's finding is erroneous for that reason. This is a matter which goes to the panel's application of the test for persecution to a given set of facts, and is a question of mixed law and fact, reviewable on the reasonableness standard.

[30] Although the provisions in question are seemingly of general application, the RAD acknowledged that the evidence on record indicates that "homosexuality is viewed as an affront to the laws of nature" in Angola, contrary to articles 70 and 71 which impose criminal sanctions on those who practice acts "against the order of nature." However, the RAD also made reference to documentary evidence, namely the US DOS report, that suggested "The law criminalizes same-sex activity, although there were no reported cases of this law being enforced. A draft penal code to replace the existing code (which was adopted in 1886 and, with several amendments, was valid at year's end) was passed in 2011, but was waiting approval by the national assembly. Nevertheless, the draft code was used intermittently by the justice system and

recognizes the right to same-sex relationships. The constitution defines marriage as between a man and a woman…" (US DOS report, found at pages 313-353 of the CTR at pages 347-348).

[31] In light of this contradictory evidence, the RAD determined that the country documentation did not suggest persecution. This finding obviously implicated the ability of Mr. Sebastiao to lay an objective evidentiary foundation to support his claim. In my view, this was the determining factor that ultimately proved fatal to his appeal.

[32] As noted above, when considering whether a refugee claimant's fear is well-founded, it must be established, on a balance of probabilities, that there is a reasonable chance or serious possibility of persecution (*Adjei*, above, at para 8). This is an exercise which entails an objective assessment as to the level of risk faced by the claimant, as well as consideration of whether the harm that the claimant allegedly fears meets the definition for persecution.

[33] In my view, it is not enough, as Mr. Sebastiao contends, to demonstrate that the intent behind a law of general application is persecutory. While this evidence may be used to determine whether the harm which a claimant fears amounts to persecution, it says nothing as to whether that fear is well-founded insofar as it pertains to the level of risk faced by the claimant; the claimant must still establish that they face more than a mere possibility of persecution (*Chan* at para 20). In this respect, I do not agree that the decisions in *Zolfagharkani* and *Hinzman*, above, stand for the proposition that Mr. Sebastiao argues they do.

[34] Although not explicitly stated in the impugned decision, from reading the reasons provided and reviewing the accompanying record, it is apparent that the RAD took the view that the existence of articles 70 and 71 of the Angolan penal code, absent further evidence enforcement, does not amount to persecution. In my view, even if the RAD was satisfied that sections 70 and 71 of the Angolan penal code are persecutory on their face, the lack of evidence of enforcement and introduction of new penal provisions, which are accepting of same-sex relationships, meant that it was open for the panel to conclude that Mr. Sebastiao did not face more than the mere possibility of facing persecution.

[35] In arriving at this decision, I find that the panel properly reflected on the country conditions as depicted by the objective documentary evidence, and, in my view, there is little doubt that the application of laws that are seemingly persecutory on their face is a relevant consideration (*Chan,* at paras 133-134). Moreover, such a consideration is contemplated at paragraph 42 of the UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Guidelines*. Therefore, based on the evidence on record, I believe that the RAD reasonably applied the test for persecution to the facts before it.

D. *Did The RAD Err in Increasing the Standard of Proof to Establish a Reasonable Chance of Persecution?*

[36] Mr. Sebastiao submits that the RAD imposed an excessively high standard of proof in determining whether he faces a reasonable chance of persecution in returning to Angola. He argues that it was unreasonable for the RAD to expect him to provide probative evidence of

homophobic persecution in the form of supporting documentation for 3 reasons: 1) it may be dangerous for human rights advocates to accurately document this type of persecution; 2) there may be a self-inflicted stigma, shame and/or fear that hampers the ability of sexual minorities to advocate for their fundamental rights, which, in turn, leads to the underreporting of homophobic violence and abuses; and, 3) the Angolan government has repeatedly denied that it refuses to protect the fundamental human rights of sexual minorities and it is therefore not in the interest of the Angolan government to document the prosecution of those who engage in same sex relations, or to document the homophobic attacks that non-state agents commit.

[37] While Mr. Sebastiao argues that the RAD imposed an elevated standard of proof, he points to nothing in the RAD's decision to indicate that the panel relied on anything other than the civil standard when considering whether he had provided the necessary factual basis to establish that there was a serious possibility that he would face persecution. Rather, the substance of Mr. Sebastiao's argument, as I understand it, is that it was unreasonable for the RAD to rely on a lack of probative evidence, particularly with respect to the enforcement of sections 70 and 71 of the Angolan penal code, to find that he was not at risk of persecution. Mr. Sebastiao suggests that the RAD should have been satisfied with the evidence that he presented. Namely, that he is homosexual, that homosexuality is not culturally acceptable in Angolan society and that Angola has laws in place to persecute sexual minorities. He argues the RAD should have been cognizant of the reasons why other probative evidence establishing persecution may not have been available. In my view, Mr. Sebastiao's argument in this respect essentially takes issue with the weight that the RAD assigned to the evidence on record.

[38] I recognize that there are evidentiary challenges that lie in demonstrating that the harm which a claimant fears amounts to persecution as opposed to discrimination or harassment. The academic research in this area, including the work of Professor Nicole LaViolette, is both substantial and insightful. However, the jurisprudence is clear that in the context of a refugee claim, it is the role of the RAD to draw conclusions in a particular factual context by proceeding with a careful analysis of the evidence adduced and a proper balancing of the various elements contained therein (*Sagharichi v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 796 (FCA) at para 3).

[39] The RAD is presumed to have to have weighed and considered all the evidence presented to it (*Florea v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 598 (FCA)). In reviewing the RAD's decision, this Court must show deference to the RAD's findings and only intervene where they were made in a perverse or capricious manner or without regard for the material before it (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 72*; Idony v Canada (Minister of Citizenship and Immigration)*, 2010 FC 970 at para 13). In other words, the issue is not whether a reassessment of the evidence could lead to a different result, but whether not having given predominant weight to certain evidence affected the reasonableness of the RAD's decision (*Mondragon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 603 at para 18.)

[40] While there was evidence that sections 70 and 71 may be used to persecute homosexuals, there was contradictory evidence to indicate that there were no reported instances of these laws being enforced, and further evidence that Angola had introduced a draft penal code that is used

intermittently by the courts in that country and which recognizes the right to same-sex relationships. To the extent that the RAD preferred the latter evidence over the former, I find that it was certainly open for the panel to do so and Mr. Sebastiao has not persuaded me that the panel erred in this respect. Furthermore, there can be no argument that the RAD misapprehended the evidence as the panel made specific reference to every piece of evidence on record.

[41] As a result, I do not accept Mr. Sebastiao's argument that the RAD elevated the standard of proof, nor do I believe that the panel's findings were made in a perverse or capricious manner or without regard for the material before it.

E. *Did the Board Member Err in Providing Inadequate Reasons?*

[42] Mr. Sebastiao submits that the RAD erred by providing inadequate reasons. Specifically, he argues that the RAD did not explain why it gave probative weight to the US DOS report while giving little weight to the evidence addressing the impact of articles 70 and 71 on homosexuals in Angola. He also argues that the panel failed to properly address Professor's LaViolette's research explaining why the absence of evidence detailing homophobic persecution should not be seen as being indicative of a lack of persecution. Mr. Sebastiao takes the position that the failure of the panel in this regard is contrary to subsection 50(2) of the *Refugee Appeal Division Rules* (SOR/2012-257) and the jurisprudence of this Court.

[43] Moreover, Mr. Sebastiao submits that the RAD did not address his argument that he would have to live his life discreetly if he returned to Angola and posits that not assessing the evidence from the perspective of a gay refugee applicant is a reviewable error.

[44] Respectfully, I disagree and find no error on the part of the panel in this respect. In my view the RAD properly considered the basis of Mr. Sebastiao's claim and reasonably found that while the evidence on record suggests a certain lack of social acceptance of homosexuality in Angola, it does not amount to persecution.

[45] To the extent that Mr. Sebastiao argues that the RAD failed to address his argument that he would have to live his life discreetly upon returning to Angola, the Supreme Court of Canada in *Newfoundland Nurses'*, at paragraphs 14-17, told us that the inadequacy of reasons is not a standalone basis for challenging a decision and indicated that the courts may find it necessary to look to the record to assess the reasonableness. Furthermore, the Supreme Court has made it clear that a decision maker does not have to make an explicit finding on each element of an issue:

> 14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

> 16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.), at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> 17 The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
>
> [Emphasis added]

[46] The RAD's reasons when read together with the evidentiary record are not inadequate, as they allow me to understand why the RAD confirmed the RPD's decision. Therefore, I am of the view that the decision is justifiable transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

F. *Conclusion on Determinative Question*

[47] In reviewing the RPD's decision, I am satisfied that the RAD did its own analysis of the documentary evidence and determined that the decision of the RPD was correct. The RAD found that, while there was minimal evidence as to a lack of social acceptance, indicative of harassment, the documentary evidence did not indicate that homosexuals in Angola face a

reasonable chance or serious possibility of persecution. Seemingly underpinning this finding was the fact that the same two anecdotes concerning gay persons were repeated three times in the documentary evidence, and that one of those anecdotes dated back to 2005.

[48] When I review the RAD's decision, I am satisfied that the reasons, when viewed with the record, are understandable and rational, and I believe that the RAD reached one of the possible outcomes that one could envisage legitimately being reached on the applicable facts and law. For this reason, I find the decision to be reasonable and I am dismissing this judicial review application.

IV. PROPOSED QUESTION FOR CERTIFICATION

[49] At the hearing, counsel for Mr. Sebastiao presented the following question for certification:

> "Does the criminalization of consensual same-sex conduct between adults constitute an act of persecution, regardless of evidence of enforcement?"

[50] The test for whether I should certify a question was set out by the Federal Court of Appeal in *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at paragraph 9 [*Zhang*]. The question must:

a. be dispositive of the appeal
b. transcend the interests of the immediate parties to the litigation as well as contemplate issues of broad significance or general importance.
c. not have been raised and dealt with at the court below and must not arise from the judge's reasons but from the case itself.

[51] In support of certification, counsel for Mr. Sebastiao states that "[t]here are over 75 countries where consensual same-sex relationships between adults are criminalized…[and] the Federal Court has never contemplated how laws criminalizing consensual same-sex relationships constitute persecution and why evidence of enforcement of such laws is necessary."

[52] Relying on *Zhang*, above, the Minister opposes the certification of the proposed question and submits that it is not a serious question of general importance. The Minister argues that the existence and enforcement of laws criminalizing same-sex conduct are relevant factors to be taken under consideration by the RAD when the panel is fulfilling its function of determining whether a claimant has met the test for a well-founded fear of persecution under section 96 of the IRPA. As the RAD's determination will be dependent on the factual matrix of a given case, the Minister takes the position that an answer to the question proposed for certification cannot be one of general application to all cases, as each will have its own factual scenario.

[53] I will not certify the question proposed by Mr. Sebastiao, as I do not believe that it is dispositive of the application before me. Beyond imposing criminal sanctions on those who practice acts "against the order of nature," sections 70 and 71 of the Angolan penal code do not explicitly criminalize homosexual behaviour. They are laws of general application, which the evidence on record indicates may be selectively applied and enforced against homosexual individuals in a discriminatory manner. Therefore, it is my view that the enforcement of these provisions is a necessary consideration, as it is in the application of these laws that they engender persecution.

[54] While I do not disagree that this question is ripe for consideration, the facts presented in this case do not justify the certification. In my view that is better reserved for a situation where the penal code at issue is explicit in its criminalization of consensual same-sex conduct.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5005-15
STYLE OF CAUSE:	FILOMENO SEBASTIAO v THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 4, 2016
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JULY 13, 2016

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