

Federal Court



Cour fédérale

Date: 20181123

Docket: IMM-1985-18

Citation: 2018 FC 1178

Ottawa, Ontario, November 23, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

RAHAT ALI

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicant seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act* [IRPA] of a decision rendered by the Refugee Protection Division [RPD]. On March 26, 2018, the refugee claim filed by the Applicant under paragraphs 97(1)(a) and (b) of the IRPA was rejected because he was deemed to not be credible.

[2] This was the second time the RPD rejected his claim for lack of credibility. The first decision was quashed by Justice Sylvie E. Roussel on November 18, 2015.

II. Facts and Judicial History

[3] The Applicant, son of Muhammad Azeem Khan, is 33 years old; and, is from the Swat Valley administrative district, Khyber Pakhtunkhwa Province, of Pakistan.

A. *Facts related to the fear of persecution from the Taliban*

[4] The Applicant alleges that the main reason for which he fled Pakistan was because he feared persecution from the Taliban due to his liberal views against Islam.

[5] The Applicant describes his family as liberal and political. In 2006, his brother, Liaqat Ali, former general secretary of Pakistan Tehreek-e-Insaf [PTI], was captured and beaten by the Taliban on account of his opposition to Islam, but he managed to escape with two bullet wounds. He was granted asylum in the United States in August 2016.

[6] Although the Applicant was also a member of the PTI, he “kept away from the party” after 2006. His alleged fear of persecution does not stem from his involvement with the PTI.

[7] Over the following years, the Taliban caused problems in the Swat Valley. For this reason, the Applicant hid in Peshawar from 2006 to 2009. Nonetheless, the Taliban found him

and threatened him. The Applicant's asylum claim is not specifically founded on this issue either.

[8] By 2012, the Taliban were suppressed by the army. On August 31 of that year, the Applicant alleges he publicly confronted a reformed Taliban, Mullah Bahadur, preaching in favor of the peaceful application of Islamic Shariat law at a mosque. The Applicant denounced Islam as an unsuitable system to address the needs of the 21st century.

[9] According to the Applicant, one week later, his home was raided by the Taliban who swore he would be killed if found. Other Taliban opponents were killed by the Taliban during this time. The August 2012 incident allegedly prompted the Applicant to seek asylum in Canada. He arrived in Canada in November 2012.

[10] The Applicant reports that, in mid-November 2012, his family told him the police were looking for him. He also claims that, in the beginning of January 2013, a fatwa (edict) of committing blasphemy was issued against him because of the August 2012 incident. Later that month, the local Imam is said to have submitted a written application against the Applicant for blasphemy.

[11] On January 26, 2016, some unidentified individuals shot the Applicant's family in their home, killing both his parents and seriously injuring his brother, Rahmat Ali. Rahmat believes the individuals were Taliban. He reported to the police that they wore Taliban clothing; and, that

he also suspects the Taliban, given that his brothers have “enmity with the Taliban”. In addition, the murderers are said to have pronounced death threats against him and his brother, Liaqat Ali.

B. *Facts related to the fear of persecution for bisexuality*

[12] One week before the first hearing, the Applicant’s Basis of Claim form was amended to include his bisexuality as a second reason for fearing persecution in Pakistan. Bisexuality is a sin and an offense punishable by death in Pakistan.

[13] The Applicant says his affinity towards both men and women started at a young age, but he was secretive about it. The Applicant was forced into marriage five months before he left Pakistan. After he arrived in Canada, a child was born from this union. He explains his family situation as follows:

If I continue to describe myself as bisexual, it is because I am married to a woman in Pakistan. I am not divorced and I do hope to be reunited with my family one day. One of the [reasons] I never told my wife of my homosexuality in Canada, is that I do not want her to divorce me and I will never see my child.

(Applicant’s Affidavit, at para 48.)

[14] Since 2014, the Applicant resides with Kafeel Ahmed, who was accepted as a Convention refugee based on his homosexuality. The Applicant describes Kafeel Ahmed as his “common-law partner” and his “sex partner” (Applicant’s Affidavit, at paras 20 and 31).

C. *Judicial review by the Federal Court (IMM-620-15)*

[15] Justice Roussel found that the RPD's overall assessment of the credibility of the Applicant at the first hearing was tainted by certain stereotypical remarks in respect of the evidence related to the Applicant's sexual orientation. Namely, the decision included perplexing comments "on the absence of photos of the Applicant with a boyfriend at a gay venue or event in order to prove his bisexuality, as well as its question on why the Applicant was not active on gay sites" (at para 16).

[16] The second reason offered by Justice Roussel for accepting the application for judicial review is that "the RPD erred in giving no probative value to the sworn declaration provided by the Applicant's partner" (at para 20).

III. Issues

[17] The Applicant raises three issues. The first concerns procedural fairness. The other two center on the Board's appreciation of the evidence regarding each of the grounds on which the Applicant is claiming asylum.

[18] The Applicant submits that all three issues should be reviewed according to the correctness standard, whereas the Respondent argues that the reasonableness standard should be applied to the last two issues. Although the correctness standard is appropriate for review of procedural fairness issues (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para

43), the two issues related to the appreciation of the evidence are reviewed according to the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53).

IV. Relevant Provisions

[19] The following provisions of the law are relevant:

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

Définition de « réfugié »

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

- | | |
|--|--|
| <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or</p> <p>(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if</p> | <p>a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;</p> <p>b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :</p> |
| <p>(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,</p> | <p>(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,</p> |
| <p>(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,</p> | <p>(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,</p> |
| <p>(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and</p> | <p>(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,</p> |
| <p>(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.</p> | <p>(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.</p> |
| <p>(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.</p> | <p>(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.</p> |

V. Submissions of the Parties

A. *Did the Board breach procedural fairness?*

[20] The Applicant claims that the Board's treatment of the American decision granting asylum to Liaqat breached procedural fairness. The Board repeatedly expressed a desire to obtain a copy of the decision. The Applicant submits that by doing so the Board created a legitimate expectation that the claim would be accepted if the decision was provided. Although a copy of the decision was subsequently provided, this document was dismissed as either irrelevant or not binding.

[21] On the other hand, the Respondent submits that the doctrine of legitimate expectation creates procedural rights, but not substantive rights (*Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 [*Canada Assistance Plan*]; *Yoon v Canada (Citizenship and Immigration)*, 2009 FC 359 [*Yoon*]). The Board cannot fetter its discretion to an American decision-maker. As a result, the Board did not breach procedural fairness.

B. *Did the Board err in its appreciation of the evidence regarding the Applicant's alleged fear of persecution by the Taliban?*

[22] The Board concludes that, on a balance of probabilities, it is unlikely that the Taliban are after the Applicant. It identifies irregularities in the Applicant's testimony and in a letter submitted by the Applicant's lawyer in Pakistan. These problems lead the Board to draw negative inferences in respect of the alleged fear of persecution by the Taliban. More specifically, the Board does not believe that the August 31, 2012 incident occurred or that a

fatwa (edict) was issued for blasphemy. Although the Board acknowledges that the Applicant's parents were killed tragically, the Board is not convinced that a link exists between the murder and the Applicant or Liaqat.

- (1) No mention of the August 2012 incident in the POE document

[23] The Applicant argues that it is established in jurisprudence that omissions in the POE notes are not sufficient to question the credibility of a sworn testimony (*Sawyer v Canada (Minister of Citizenship and Immigration)*, 2004 FC 935 at paras 5-7; *Argueta v Canada (Citizenship and Immigration)*, 2011 FC 1146 at paras 14 and 35).

[24] According to the Respondent, there is a distinction between the omission of mere minor details, and the absence of facts that are critical to the claim. The Applicant's omissions fall within the latter category. Such omissions in the POE notes can lead to a negative credibility finding (*Garay Moscol v Canada (Citizenship and Immigration)*, 2008 FC 657 at para 21), because "a person's first story is usually the most genuine, and therefore the one to be believed" (*Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 15). The Respondent considers that the following excerpt supports his position and that the decision warrants particular consideration because it shares similar facts to the Applicant's case:

The Board is entitled to rely on discrepancies between the POE notes and the later testimony. The omission of the events that precipitate a claimant's flight from his country, if not determinative on its own of the issue before the tribunal, certainly raises the question of whether subsequently-added events were included to bolster a refugee claim rather than because they are true. The Board did not err in taking the omission into account.

(*Ratnavelu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 938 at para 8.)

(2) Rahmat's affidavit and his statement to the police about the murder

[25] The Applicant relates to the Court that both Rahmat's affidavit and his statement to the police in regard to the murder indicate that the assailants looked like Taliban. Both indicate that the Taliban threatened to kill Liaqat and the Applicant. The Applicant submits that the Board ignored these two documents without providing reasons for discrediting them. The Applicant refers to a decision in which Justice Luc Martineau establishes that the RPD has an obligation to address important evidence "that directly contradicts its findings of fact" (*Sivapathasuntharam v Canada (Citizenship and Immigration)*, 2012 FC 486 at para 24).

[26] The Respondent replies that the Board did indeed acknowledge Rahmat's statements. In fact, these documents are specifically referred to in footnotes 12 to 14 of the Board's decision. The Board provided explanations for rejecting the evidence.

C. *Did the Board err in its appreciation of the evidence regarding the sexual orientation of the Applicant?*

[27] The Board did not find the Applicant to be credible in regard to his claim to be bisexual. The photos of the Applicant with his partner, his membership card to a homosexual group and his partner's affidavit were each awarded little or no probative value. Also, the Board lists five reasons supporting its negative credibility finding in regard to the Applicant's alleged bisexuality.

(1) Declaration of sexual orientation one week before hearing

[28] The Applicant submits that the Board erred by failing to consider the Federal Court's factual findings. The Federal Court found that the Applicant did not lie or provide an inconsistent answer at the first hearing upon explaining why his bisexuality is not mentioned in his POE form (IMM-620-16, at para 19).

(2) Explanation for the absence of the Applicant's partner at the hearing

[29] The Applicant submits that the Board speculated about what his counsel would have said to him. A witness should not be contradicted based on a confidential conversation protected by attorney-client privilege.

[30] The Respondent replies that the Board did not speculate, but rather found it implausible that counsel would not have told his client to bring his partner to the hearing. The lawyer is very experienced with the Board. As a result, he is expected to understand why the best evidence rule would require that he ask his client to bring his partner. It is surprising that counsel would not ask the person with whom the Applicant resided for the past four years to testify, recognizing that the hearing gave the opportunity for the Applicant to establish his sexual orientation. In addition, the partner lives in Montreal so he would have been readily available. Furthermore, it is open to the Board to assess a claimant's credibility according to human behaviour (*Hernandez Utrera v Canada (Citizenship and Immigration)*, 2007 FC 1212 at para 61), plausibility, rationality and common sense (*Shahamati v Canada (Minister of Employment and Immigration)*),

[1994] FCJ No 415 (QL) (FCA); *Ye v Canada (Citizenship and Immigration)*, 2014 FC 1221 at para 29).

(3) Affidavits of the Applicant's partner

[31] The Applicant submits that it is an error to attribute little weight to the affidavit of the Applicant's partner simply because he could not be cross-examined.

[32] The Applicant also argues that the Board could have adjourned the proceedings and requested that the Applicant bring his partner to testify.

[33] Moreover, the Applicant pleads that it is an error for the RPD to give no probative value to the partner's sworn declaration, according to the Federal Court (*IMM-620-15*, at para 19).

[34] On a more general note, the Respondent reminds the Court that the evaluation of the probative value, the weight, the relevancy or the sufficiency of evidence is within the Board's purview, as a specialized tribunal. Moreover, credibility findings are specific to the expertise of the Board because it benefits from observing and hearing claimants first-hand. Therefore, the Court owes the highest level of deference to the Board's credibility findings (*Trejos v Canada (Citizenship and Immigration)*, 2011 FC 170 at para 51).

[35] The Respondent pleads that the Board's decision does not rest solely on the finding that the sworn declaration of the Applicant's partner bears little probative value. Instead, numerous irregularities, cumulatively, support the Board's negative credibility finding in regard to the

Applicant's alleged bisexuality. It is not necessary for every irregularity to support the Board's decision to "independently pass a test for reasonableness" (*Corona v Canada (Citizenship and Immigration)*, 2012 FC 174 at para 30 [*Corona*], citing Justice Iacobucci in *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 56). If the overall negative credibility finding is supported by other reasonable factual findings, the decision should be maintained (*Corona*, above, at para 31).

(4) Membership card and photos

[36] Given that the membership card to Centre communautaire des gais et lesbiennes de Montréal and the photos of the Applicant with a "sex partner" are not contradicted, the Applicant argues that the Board erred by not giving them any probative value.

[37] In addition, the Applicant claims that the Board dismissed these documents as well as the declarations by the Applicant's partner on the grounds that the Applicant's testimony was not considered credible. This is reverse logic and constitutes a reviewable error. As explained in *Chen*: "It is impermissible to reach a conclusion based on certain evidence and dismiss the remaining evidence as inconsistent with that conclusion" (*Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at para 20).

[38] Finally, the Applicant also submits that the Board failed to consider documentary evidence, such as country conditions, that show that those in Pakistan who oppose the Taliban may be persecuted by them.

VI. Analysis

A. *Did the Board breach procedural fairness?*

[39] The doctrine of legitimate expectation creates procedural rights, not substantive rights (*Canada Assistance Plan* and *Yoon*, above). As a result, the Board did not breach procedural fairness by rejecting the Applicant's claim, even though the American decision concerning his brother's asylum request was filed.

[40] In addition, the Panel is not bound by the result of another claim, even if that claim involves a relative (*Bakary v Canada (Citizenship and Immigration)*, 2006 FC 1111 at para 10).

B. *Did the Board err in its appreciation of the evidence regarding the Applicant's alleged fear of persecution by the Taliban?*

[41] The Board's appreciation of the evidence regarding the Applicant's alleged fear of persecution by the Taliban was not reasonable. Thus, its conclusions were not reasonable thereon.

(1) Letters from a lawyer in Pakistan

[42] The Court agrees that the irregularities in the letters from the Applicant's lawyer in Pakistan render the documents unreliable; however, it is a reviewable error to infer a negative credibility finding in respect of a claimant simply because a third party lacks credibility. The

credibility or the reliability of a lawyer who wrote the letters supporting the Applicant's claim can be unrelated to the Applicant's credibility.

(2) Behavior regarding fear of reprisal

[43] The Board also erred by inferring a negative credibility finding in respect of the Applicant based on what it considers to be incompatible attitudes in regard to his sexual orientation ("careful and timorous attitude") and to the August 2012 incident ("very courageous attitude").

[44] The Board member believes the Applicant was lying about his sexual orientation. If he is indeed lying about his sexual orientation, there is no contradiction in behaviours. Moreover, that lie would be characteristic of a risk-taker and all the more consistent with the August 2012 incident. In this way, the Board's decision is not coherent in itself.

[45] The Applicant's whole family is political and liberal. He grew up within a social circle where anti-Taliban views are accepted, if not encouraged; however, homosexuality and bisexuality are not accepted in the Applicant's family. He was pressured into marriage. It is easy to understand why the Applicant's confidence about his political views would be stronger than his confidence about his sexual orientation.

[46] Whether it is assumed the Applicant lied about his sexual orientation or not, the Board erred by drawing a negative credibility inference in respect of the Applicant because he is not as publicly assertive about his sexual orientation as he is about his opinion of the Taliban.

(3) No mention of the August 2012 incident in the POE document

[47] Given that the August 2012 incident is central to the Applicant's claim, the Board drew a negative credibility inference from the absence of any mention of the August 2012 incident in the Applicant's POE documents; however, the Court does not find that the August 2012 is indeed absent from the POE notes. The pattern of conflict the Applicant experienced is described. At the time the POE notes were written, nothing indicated that the August 2012 incident was any different than the Applicant's other confrontations with the Taliban.

[48] The POE notes indicate that, in 2006, the Taliban came after the Applicant and threatened him. He then moved, but the Taliban found him and threatened him again. This cycle of being threatened by the Taliban, fleeing, being found by the Taliban and being threatened once again, repeated itself several times. The words used by the Officer attest to the repetition of this cycle: "I moved **multiple times**, but they would **always** find me and **continue** their threats" [emphasis added].

[49] Although the August 2012 is not mentioned specifically, it is encompassed in the repetition of the Taliban's harassment of the Applicant. After the August 2012 incident, the Taliban invaded the Ali family home, swearing that they would kill him. The Applicant hid in a friend's home, then he went to Peshawar and finally to Canada. Fleeing after the August 2012 incident was but one of the "multiple times", the Applicant moved out of fear of the Taliban's threats.

[50] The interview with the Officer took place a couple months before the edict or fatwa was issued. It was therefore impossible for the Applicant to know that the last conflict which he had had in Pakistan was particularly important for his claim. It was also impossible for the Officer to know that the August 2012 incident would become the central aspect of the Applicant's claim. As a result, it is unreasonable for the Board to expect the POE notes to identify the August 2012 incident as such.

(4) Rahmat's affidavit and his statement to the police about the murder

[51] Although the Board accepts that the Applicant's parents were murdered and that Rahmat was seriously injured, it does not believe that the perpetrators of the attack are Taliban. More specifically, the Board does not accept that Rahmat would not have had a problem with the Taliban after this event, since he continued living in the same place where he directly witnessed the murder of his parents and where he survived a violent attack. In addition, he reported the events to the police and to the media.

[52] The Board qualifies this conclusion as an assessment of credibility. This is incorrect. It is an implausibility finding. The Court has established that an implausibility finding can only be made in cases where the factual basis is "outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant" (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7). In the Applicant's case, the Board does not rely on documentary evidence. The Court must therefore determine whether the premise that Rahmat Ali continued living in his home in these circumstances is "outside the realm of what could

reasonably be expected”, in his country of origin, under conditions, specifically, related to the Board in the particular context of the prevailing specific country conditions therein.

[53] The Court finds that this premise is not implausible for the following reasons.

[54] To begin, the Board does not explain how Rahmat’s experience after the incident lends itself to the conclusion that the perpetrator is not Taliban. The Board does not support this implausibility finding with facts or reasons.

[55] Moreover, the Board does not explain why it does not believe that the murder was orchestrated by the Taliban. There is an issue of significance for someone whose parents were murdered, who, himself, was seriously injured and whose next of kin fled the country in order to seek refuge in North America.

[56] As per the country conditions, the Taliban is a militant group that has established itself through violence. The Taliban is said to have transmitted their threats of future attacks through Rahmat Ali. After the incident, Rahmat related that which had occurred to him both to the police and to the media. In this way, his survival helped spread fear of the Taliban among its opposition, because Rahmat Ali related his situation. The Court finds that injuring but not killing Rahmat Ali is within “the realm of what could reasonably be expected” of the Taliban as per the country conditions described therein.

[57] When Rahmat Ali reported the incident to the police and to the media, he simply noted that the perpetrators were dressed in Taliban clothing; and, that his family history would lead him to conclude that the assailants must be Taliban. According to the National Documentation package for Pakistan (Tab 7.15 *Peaceworks, Terrorism prosecution in Pakistan*, page 5 of the Applicant's Further Memorandum), it is common for Taliban to have attacks executed by persons that cannot be identified:

“No matter how good the story and no matter how many witnesses are produced to support it, the identification and arrest of the accused generally remains the weakest link the chain.[citation omitted] Many suicide bombers and terrorists are young men with no prior run-ins with the authorities and no criminal records.” (Applicant's Further Affidavit, Annex “I”: Tab 7.15 *Peaceworks, Terrorism prosecution in Pakistan*, p. 186)

[58] The Board discredits Rahmat's presumption that the murderers are Taliban, without offering any reasons for doing so. In his affidavit, Rahmat asserts that the exact identity of the murderers is unknown to him, but that they wore Taliban clothing. The Board does not question the veracity of Rahmat's observation that the attackers wore Taliban clothing.

[59] Although Taliban-led terrorism and violence towards civilians remains an issue in Pakistan, particularly in the Swat region in Khyber Pakhtunkwa province (Applicant's Further Affidavit dated August 31, 2018, Annex “E”: Tab 1.24 *EASO Pakistan security situation*, p. 63), people are not fleeing the area due to this violence. In fact, according to the country conditions: “In February 2017, UN OCHA did not report any conflict-induced displacement from areas in Khyber Pakhtunkwa, which is only identified as a hosting area.” (Applicant's Further Affidavit dated August 31, 2018, Annex “E”: Tab 1.24 *EASO Pakistan security situation*, p. 64).

Therefore, Rahat Ali's decision to stay in his home is not only plausible; it is consistent with the reactions of Taliban victims, as described by the documentary evidence.

[60] The questions raised by the Court demonstrate that the Board does not provide sufficient explanations for the implausibility finding regarding the aftermath of the murder. To quote

Leung:

Findings of implausibility are inherently subjective assessments which are largely dependent on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions.

(Leung v Canada (Minister of Employment and Immigration), [1994] FCJ No 774 at para 15.)

[61] The second implausibility finding made by the Board is also a reviewable error. The Board found that the murder of the Applicant's parents could not be linked to an event that took place years prior to the August 2012 incident or those prior to Liaqat's departure for the US. It is possible that the Taliban had acted on long-standing tensions with the Ali family. In addition, the Pakistani Army carries out operations to suppress the activities of the Pakistani Taliban. It is therefore expected that the activity of the Taliban fluctuates according to the political climate. It is unreasonable to expect all of the Taliban's attacks to be carried out promptly after people oppose them. For these reasons, the lapse of time between the August 2012 incident and the murder is not "outside the realm of what could reasonably be expected", nor is there any documentary evidence to support the Board's implausibility finding.

(5) Letter from the lawyer in Pakistan

[62] It is a reviewable error to infer a negative credibility finding as to the claimant based on a third party's lack of credibility; the credibility or the reliability of a lawyer who wrote a letter supporting the Applicant's claim can be unrelated to the Applicant's credibility.

(6) Other documentary evidence (Liaqat's decision, Liaqat's medical report)

[63] The remaining evidence upon which the Board draws its conclusions on Rahmat's statements, Liaqat's decision and Liaqat's medical report does not undermine the Applicant's claim or his credibility.

C. *Did the Board err in its appreciation of the evidence regarding the sexual orientation of the Applicant?*

[64] The Board did not err in its appreciation of the evidence regarding the sexual orientation of the Applicant. The Board considered all the relevant evidence on his sexual orientation; and, articulated sound reasons to support its findings of lack of credibility in respect of his sexual orientation. Both the decision-making process and the overall conclusion drawn are reasonable, solely, in respect of the Applicant's sexual orientation.

(1) Declaration of sexual orientation one week before hearing

[65] In respect of the sexual orientation of the Applicant, the panel was reasonable in its assessment.

(2) Explanation for the absence of the Applicant's partner at the hearing

[66] The Board's finding in regard to the explanation for the absence of the Applicant's partner at the hearing is not speculative. The Board provides reasons for this conclusion based on rationality, common sense and its own understanding of human behaviour.

[67] It is open to the Board to ask questions about the evidence before it.

(3) Affidavits of the Applicant's partner

[68] The Board does not completely dismiss the affidavit of the Applicant's partner on the grounds that the partner could not be cross-examined. Rather, the Board awarded the affidavit little weight, or no reason, with reason.

[69] Where the Board establishes that cross-examination is necessary to appreciate an affidavit, it is the responsibility of the Applicant's counsel, not of the Board, to request leave to call the witness for cross-examination.

(4) Membership card and photos

[70] Although the Applicant is right that nothing contradicts the validity of the membership card or of the photos, the Board provided a rational explanation why these documents were not found to be logically relevant to the Applicant's claim to be bisexual. The Board did not commit any error in its appreciation of these documents.

VII. Conclusion

[71] The Board does not deny that the Taliban caused serious problems in the Swat Valley. Nevertheless, overall, the Court does conclude that the credibility findings of the Board are unreasonable as to the peril facing the Applicant by the Taliban. The Court distinguishes the credibility findings as to the sexual orientation of the Applicant from that of his fear of the Taliban, as per events which had unfolded, targeting his family.

[72] Therefore, the application for judicial review is granted.

JUDGMENT in IMM-1985-18

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the file be remitted to the Board for assessment anew by a different panel. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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