

Federal Court



Cour fédérale

**Date: 20230815**

**Docket: IMM-8499-22  
IMM-9763-22**

**Citation: 2023 FC 1109**

**Ottawa, Ontario, August 15, 2023**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**CHIRANJEEWA MALAKA SAMARAWEERA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This decision addresses two related applications for judicial review.

[2] The first application, bearing Court File No. IMM-8499-22, is an application for judicial review of a decision of a member of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB], dated August 5, 2022 [the Main Decision]. In the Main Decision, the

RAD upheld the decision of the Refugee Protection Division [RPD] of the IRB, which found that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The second application, bearing Court File No. IMM-9763-22, is an application for judicial review of a decision of a member of the RAD, dated September 21, 2022, wherein the RAD refused the Applicant's application to re-open his appeal file underlying the Main Decision [the Re-Opening Decision].

[4] The application in Court File No. IMM-8499-22 is allowed, and the Main Decision is set aside. As explained in greater detail below, the RAD's treatment of the Applicant's proposed new evidence from his brother-in-law was unreasonable, and the RAD failed to consider the stability and probability of continuation of the change in country conditions which resulted in its finding of a lack of risk. In light of that result, it is unnecessary to adjudicate the application in Court File No. IMM-9763-22, and that application is dismissed.

## II. Background

[5] The Applicant is a citizen of Sri Lanka. In his Basis of Claim [BOC] form, he claims that during the 2019 Sri Lankan presidential election he campaigned on behalf of the United National Party [UNP]. He asserts that as a result of this political activity he was harassed by supporters of the Sri Lanka Podujana PeramUNP [SLPP] and, on the day of the election, was detained by local police who prevented him from driving UNP supporters to the polls or voting himself. The SLPP candidate won the 2019 presidential election.

[6] The Applicant further alleges that he was arrested a month after the election, was accused of forcing people to vote for the UNP, and was only released after his father paid a sizeable bribe. He claims to have fled the country after learning that an order had been circulated by the local SLPP Member of Parliament to eliminate frontline UNP supporters.

[7] The RPD heard the Applicant's claim but found that he was neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the IRPA. While the RPD found that the Applicant was credible and disclosed credible evidence that established his profile as a campaign worker for the UNP, it also found that his political profile was relatively low level and local. It further found that, while the Applicant's testimony regarding his own harassment by SLPP supporters and by local police was credible, he had failed to establish his allegations that a broader and ongoing crackdown on UNP supporters of his profile had taken place. Ultimately, the RPD concluded that the Applicant had failed to establish that he would face persecution upon return to Sri Lanka.

[8] The Applicant appealed to the RAD.

### III. Decisions under Review

[9] In the Main Decision, addressing the Applicant's appeal, the RAD first considered the Applicant's request to introduce the following new evidence: (a) a letter from "A.K.", dated April 27, 2022 [AK Letter]; (b) an affidavit from the Applicant's brother-in-law, dated March 28, 2022 [Brother-in-Law's Affidavit]; (c) the Applicant's UNP identification badge issued in January 2002; and (d) three articles pertaining to the increased power of the alleged agent of

persecution [AOP], the local SLPP Member of Parliament who was at the time the Minister of Security and Chief Government Whip.

[10] The RAD admitted the three articles, finding they were new, credible, and relevant. It also admitted the Applicant's identification badge, accepting the Applicant's narrative of how he believed that he had lost the badge prior to leaving Sri Lanka and how he came to re-possess it following the RPD hearing.

[11] The RAD did not admit the AK Letter or the Brother-in-Law's Affidavit, finding that the Applicant could have reasonably been expected to have brought this evidence before the RPD. The RAD noted that the Applicant's brother-in-law stated in his affidavit that he and the Applicant's family had deliberately concealed from the Applicant the fact that people in Sri Lanka were searching for him, despite his presence in Canada, in a naïve attempt to protect him from further stress. The RAD reasoned that the Applicant was expected to put his best case forward to the RPD and concluded it was his responsibility to canvass and assemble the best possible evidence for his hearing.

[12] The RAD next explained that it had provided the Applicant an *Alazar* notice (a term derived from this Court's decision in *Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637), outlining its intention to consider the recent arrest and conviction in Sri Lanka of the AOP, and invited the Applicant to make submission on this issue [First *Alazar* Notice]. The RAD noted that the Applicant had responded to the First *Alazar* Notice and disclosed an excerpt from a webpage of an American law school defining the meaning, in the United States, of a suspended sentence and two articles from Sri Lankan media concerning the conviction and sentence of the

AOP. The RAD admitted the media articles as new, credible, and relevant, but did not admit the American webpage, as it did not find it relevant to a decision of a Sri Lankan court.

[13] The RAD then explained that it had provided the Applicant a second *Alazar* notice outlining its intention to consider (a) the recent appointment of the head of the UNP as the Sri Lankan Prime Minister and (b) the viability of Colombo as an internal flight alternative [Second *Alazar* Notice]. It also noted that the Applicant did not respond to the Second *Alazar* Notice.

[14] Turning to its substantive analysis, the RAD considered whether the Applicant had established his political profile and whether he had a forward-facing fear due to his political activity.

[15] Based on the new evidence accepted by the RAD, it found that the Applicant had established his political profile, which was more than that of a low-level campaign worker.

[16] However, the RAD found that, because the circumstances under which the Applicant originally filed his claim for protection no longer pertained in Sri Lanka, he had failed to establish that he has a forward-facing fear due to his political activity. Specifically, the RAD found that a change in government had taken place in Sri Lanka, where the leader of the UNP, the party for which the Applicant campaigned, was sworn in as Prime Minister of Sri Lanka. The RAD noted that the Applicant had not disclosed any evidence nor made any argument that he would be at any risk now that the leader of the UNP had become the leader of the Sri Lankan government.

[17] In light of the above, the RAD found that the Applicant had not established either a serious possibility of persecution on a Convention ground or that, on the balance of probabilities,

he would personally be subjected to a danger of torture or face a risk of cruel and unusual punishment or treatment should he return to Sri Lanka.

[18] After the RAD issued its Main Decision on August 5, 2022, the Applicant applied on August 31, 2022, to re-open his appeal. In support of the application, the Applicant's former counsel explained that she was on holidays when the Second *Alazar* Notice was sent and mistakenly believed that the Second *Alazar* Notice was a second copy of the First *Alazar* Notice, given its proximity to the First *Alazar* Notice. As such, and having already responded to the First *Alazar* Notice, she did not respond.

[19] In the Re-Opening Decision, the RAD began its analysis by noting that Rule 49(6) of the *Refugee Appeal Division Rules*, SOR/2012-257 [Rules] clearly states that an application to re-open must not be allowed unless it is established that there was a failure to observe a principle of natural justice. In its view, the failure of counsel to respond to the Second *Alazar* Notice did not result in a breach of natural justice. It reasoned that although the Applicant's appeal was perfected on April 28, 2022, which was prior to the change in government taking place in Sri Lanka, it was open to the Applicant or his counsel to provide documents or written submissions at any point following the perfection of the application pursuant to Rule 29. It also noted that, while the Applicant's response to the First *Alazar* Notice was limited to the specific question raised in that notice, this could also have been an opportunity for the Applicant or his counsel to provide submissions on the political situation in Sri Lanka. As such, the RAD found that there was no breach of natural justice when the Main Decision was rendered.

#### IV. Issues and Standard of Review

[20] Based on the parties' submissions, these two applications for judicial review together raise the following issues for the Court's consideration:

- A. Did the RAD err in the Main Decision in its consideration of the new evidence?
- B. Did the RAD err in the Main Decision in its determination that the Applicant had not established that he has a forward-facing fear?
- C. Was there a denial of natural justice or procedural fairness resulting from the failure of counsel to respond to the Second Alazar Notice?
- D. Did the RAD violate the Applicant's procedural fairness right in the Main Decision by considering a new and determinative fact by virtue of an *Alazar* notice?

[21] The parties agree (and I concur) on the applicable standards of review. The procedural fairness issues are subject to judicial scrutiny to ensure that a fair and just process was followed, an exercise best reflected in the correctness standard even though, strictly speaking, no standard of review is being applied (see *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47). The remaining issues are reviewable on the standard of reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

- A. *Did the RAD err in the Main Decision in its consideration of the new evidence?*

[22] As noted above, the RAD's decision not to admit the Brother-in-Law's Affidavit turned on the RAD's conclusion that the Applicant could reasonably have been expected in the circumstances to have brought this evidence to the RPD before the RPD rendered its decision. The RAD so concluded notwithstanding its consideration of the brother-in-law's evidence that the Applicant's family had deliberately (albeit misguidedly) concealed from the Applicant the ongoing harassment and efforts to search for him. The RAD reasoned that that the Applicant was expected to put his best case forward to the RPD and canvass and assemble the best possible evidence for the RPD hearing.

[23] I agree with the Applicant that this reasoning is not intelligible. As the Applicant submits, it is unclear how he could reasonably have been expected to provide this information to the RPD, given that his family deliberately declined to share the information with him. I therefore conclude that the RAD erred in its consideration of whether to admit the Brother-in-Law's Affidavit as new evidence.

B. *Did the RAD err in the Main Decision in its determination that the Applicant had not established that he has a forward-facing fear?*

[24] The RAD based its determination in the Main Decision, that the Applicant had not established that he has a forward-facing fear, entirely on the fact that the government in Sri Lanka had changed and his political party was currently in power. However, the Applicant references country condition evidence in the IRB's National Documentation Package for Sri Lanka, indicating that the country has a long history of its democracy has being marred by electoral violence and periodic misuse of government power to suppress political dissent, as



political power has alternated between the two main political parties. The Applicant argues that, even if he is not under threat as a UNP supporter under the current government, the RAD erred by failing to assess risk he could face, as a result of his political profile, during future elections or a further change in government.

[25] I agree with this submission. As held in *Chowdhury v Canada (Citizenship and Immigration)*, 2008 FC 290 [*Chowdhury*], if the IRB considers a change in the political situation in a claimant's country of origin in assessing the risk of future persecution, it must consider the stability of that change in country conditions. In the context of a claim arising from the politics of Bangladesh, Justice Mosley explained the required analysis as follows (at paras 14-15):

14. When coming to that decision, the RPD member must, however, have a view as to the stability and probability of continuation of the change in country conditions which resulted in the finding of a lack of risk. To do otherwise would put into harm's way those who flee the persecution of one side of an ongoing dispute. While the period in which their group is in the ascendance might be safe, the fragility of that safety is one issue which the RPD must consider in coming to their decisions. It does not appear from the decision that the member in the instant case directed her mind to that question.

15. At the time of the hearing, the stability of the coalition government headed by the BNP was questionable and it was faced with a requirement for mandatory elections in the year following the decision. The political history of Bangladesh since independence indicates that its governments are not long-lasting and that power has passed back and forth between the two main competing parties with the periodic intervention of the army. The member should have considered what the impact would be upon Mr. Chowdhury if that pattern repeated itself within the foreseeable future.

[26] The Respondent argues that the RAD's analysis is reasonable, in light of the RPD's finding that the Applicant had not established there was ever a concerted effort to target UNP

campaign workers. The Respondent submits that, if the Applicant was not at risk when the opposing political party was in power, he faces even less risk now that the UNP holds power. I do not find this submission compelling, as the RPD conducted its risk analysis based on its finding that the Applicant had the political profile of a low-level campaign worker. Based on new evidence that the RAD admitted, as well as the Applicant's testimony, the RAD found that he had established a more significant political profile.

[27] The RAD was required to assess his forward-looking risk based on that more elevated profile. In the context of that political profile, I find that the RAD committed the same error as in *Chowdhury*, by failing to consider the Applicant's risk arising from future electoral events and possible transitions of political power.

## VI. Conclusion

[28] Based on the above analysis, the Main Decision is unreasonable. As such, the application for judicial review in Court File No. IMM-8499-22 will be granted, the Main Decision set aside, and the matter returned to a different member of the RAD for re-determination. It is therefore unnecessary for the Court to consider the Applicant's procedural fairness arguments.

[29] The application for judicial review in Court File No. IMM-9763-22 is based entirely on the procedural fairness arguments. However, as the Main Decision is being set aside, no purpose could be served by reviewing the Re-Opening Decision. As neither party has made substantive submissions on the mootness of the application in Court File No. IMM-9763-22, I will not conduct a formal mootness analysis. However, I note the Applicant's counsel's confirmation at

the hearing that, if the Main Decision is set aside, there is no need for adjudication of the application in Court File No. IMM-9763-22. My Judgment will dismiss that application.

[30] Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT IN IMM-8499-22 AND IMM-9763-22**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review in Court File No. IMM-8499-22 is allowed, the decision of a member of the Refugee Appeal Division dated August 5, 2022, is set aside, and the matter is returned to a different member for re-determination.
2. The application for judicial review in Court File No. IMM-9763-22 is dismissed.
3. No question is certified for appeal.

"Richard F. Southcott"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-8499-22  
IMM-9763-22  
**STYLE OF CAUSE:** CHIRANJEEWA MALAKA SAMARAWEERA v.  
MCI  
**PLACE OF HEARING:** TORONTO, ON  
**DATE OF HEARING:** JULY 18, 2023  
**JUDGMENT AND REASONS:** SOUTHCOTT J.  
**DATED:** AUGUST 15, 2023

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