

Federal Court



Cour fédérale

Date: 20180207

**Dockets: IMM-831-17
IMM-538-17**

Citation: 2018 FC 142

Ottawa, Ontario, February 7, 2018

PRESENT: THE CHIEF JUSTICE

BETWEEN:

RUSHIYANTHI JESUTHASAN

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Ms. Jesuthasan is a young Tamil woman from Sri Lanka. After her application for refugee protection in this country was rejected, she made an application under s. 112 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for a pre-removal risk assessment. She also sought authorization, pursuant to s. 25 of the IRPA, to apply for permanent

residence from within Canada, based on humanitarian and compassionate grounds. Both of those requests were also rejected.

[2] Ms. Jesuthasan now seeks to have the latter two adverse determinations set aside.

[3] For the reasons that follow, Ms. Jesuthasan's applications will be granted.

II. **Background**

[4] According to her affidavit, Ms. Jesuthasan's father passed away during Sri Lanka's civil war, when she was three years old. Her mother then attempted to keep the family together in the midst of heavy shelling and violence. However, approximately two years later, her mother left her and her sister in an orphanage.

[5] After she lost contact with her siblings, Ms. Jesuthasan was reunited with one of her brothers and lived with him until he disappeared. Prior to disappearing, he was taken by the police and severely beaten by them.

[6] She was then placed with a foster family and claims to have been sexually assaulted by both her foster father and his son. She further claims to have been physically and sexually abused by police officers and armed men on more than one occasion. On one of those occasions, the armed men kidnapped and repeatedly raped her.

III. **The Pre-Removal Risk Assessment [PRRA] (IMM-831-17)**

[7] Ms. Jesuthasan based her PRRA application on the risks that she claimed she would likely face in Sri Lanka as a young Tamil woman who has no family network in that country and who is a failed asylum-seeker. Based on that personal profile, she claimed that she would likely be subjected to detention and violence, including sexual assault, upon her return to Sri Lanka.

A. *The decision under review [the PRRA Decision]*

[8] Ms. Jesuthasan's PRRA application was rejected after a Senior Immigration Officer [**the Officer**] concluded that she had simply restated the same risks that had been rejected on credibility grounds by the Refugee Protection Division [**RPD**] and the Refugee Appeal Division [**RAD**] of the Immigration and Refugee Board of Canada.

[9] The Officer added that the objective evidence did not demonstrate that Ms. Jesuthasan would be at risk of harm in Sri Lanka due to being a failed asylum seeker. After briefly discussing that evidence, the Officer found that the documentation she had provided in support of her application was "generalized" and "does not address the material elements of the applicant's personal circumstances." In addition, the Officer noted that Ms. Jesuthasan had not provided sufficient objective evidence to establish that she has been or is currently threatened by anyone.

[10] Finally, the Officer dismissed a psychologist's report that Ms. Jesuthasan had provided, on the basis that it did not overcome "the significant credibility findings of the Board with

respect to [Ms. Jesuthasan's] contradictions and explanations" regarding the events that she claimed had taken place. The Officer also stated that Ms. Jesuthasan had failed to explain why that report could not have been presented to the RPD during her hearing.

B. *Issue and Standard of Review*

[11] The sole issue that Ms. Jesuthasan has raised in respect of the PRRA Decision is whether it was unreasonable.

[12] In reviewing a decision on a reasonableness standard of review, the focus of the Court is upon whether the decision falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). In this regard, the Court will assess whether the decision is appropriately justified, transparent and intelligible.

C. *Assessment*

[13] Ms. Jesuthasan submits that the PRRA Decision is unreasonable for three reasons. First, she asserts that the Officer's consideration of the psychologist's report was unreasonable. Second, she states that the Officer unreasonably assessed the risk that she would face upon re-entering Sri Lanka as a failed asylum seeker. Third, she maintains that the Officer failed to consider the risk she faced based on her particular profile as a single Tamil woman with no family in Sri Lanka, who is also a failed asylum seeker.

(1) The psychologist's report

[14] Ms. Jesuthasan submits that the Officer's treatment of the psychologist's report was unreasonable because the Officer made no attempt to explain why that report did not "overcome the significant credibility findings" that were made by the RPD and the RAD. Ms. Jesuthasan maintains that this was particularly unreasonable given that the Officer did not address the very serious mental health issues that were identified in the report.

[15] I agree that the Officer's treatment of the psychologist's report was unreasonable in this regard.

[16] The Officer's treatment of the psychologist's report consisted of the following single paragraph:

The applicant has provided a report from Blake Psychology dated 16 October 2015. In this report it states that she attended this psychological evaluation session to assess her emotional functioning within the context of her experiences in Sri Lanka, so that another application may be filed for her to remain in Canada. I find this does not overcome the significant credibility findings of the Board with respect to her contradictions and explanations which did not satisfy the Board as to those events having happened. Furthermore, the applicant does not explain why this psychological report such as this [*sic*], could not reasonably have been presented to the Board during her hearing. I do not accept it as evidence with new risk developments.

[17] The foregoing brief assessment did not address the psychologist's hypothesis that Ms. Jesuthasan's difficulty in remembering the details of certain events from her past, and in

recounting them, could be attributable to the traumatic nature of those events. In this regard, the psychologist postulated that this difficulty is a manifestation of how Ms. Jesuthasan has learnt to cope with her life stressors.

[18] To the extent that the psychologist's report provided a potential explanation for the inconsistencies and other problems in Ms. Jesuthasan's evidence that led the RPD and the RAD to reject her application for refugee protection on credibility grounds, it should have been addressed by the Officer.

[19] Given that the psychologist's assessment was largely based on events that were rejected by the RPD and the RAD on credibility grounds, it would have been reasonably open to the Officer to place little weight on that assessment (*Avagyan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1003, at paras 59-61 [*Avagyan*]). However, the Officer needed to engage with it in a meaningful way. The Officer's failure to do so was unreasonable. In light of the psychologist's above-mentioned hypothesis and postulation, the bald statement by the Officer that the report did not "overcome the significant credibility findings of the Board with respect to [Ms. Jesuthasan's] contradictions and explanations" was not intelligible.

[20] Nevertheless, the Officer gave a second, and independent, reason for dismissing the psychologist's report. That was Ms. Jesuthasan's failure to explain why the report could not reasonably have been presented to the RPD during her hearing. In her representations to the Court, Ms. Jesuthasan explained that it was not possible for her to find a female Tamil speaking psychologist within the short time that she had to prepare for that hearing. In the written

submissions provided in support of her request for a PRRA, it was simply indicated that it took time to locate such a psychologist. In any event, even if the explanation that was given to the Court had been provided to the Officer, it would not have been unreasonable for the Officer to have rejected it. Stated differently, it would have been reasonably open to the Officer to conclude that this was evidence that Ms. Jesuthasan could reasonably have been expected in the circumstances to have provided to the RPD, as contemplated by paragraph 113(a) of the IRPA (*Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, at para 13). In my view, this would have been well “within the range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir*, above).

[21] Accordingly, the Officer’s dismissal of the psychologist’s report on this second ground was not unreasonable.

- (2) The Officer’s assessment of the risk that Ms. Jesuthasan claimed she would face upon re-entering Sri Lanka as a failed asylum seeker

[22] Ms. Jesuthasan submits that the Officer’s treatment of the objective evidence of the risk that she would face upon re-entering Sri Lanka as a failed asylum seeker was unreasonable. I agree.

[23] In this regard, Ms. Jesuthasan notes that the Officer quoted a passage from a document in the record that specifically stated that persons who are deported or “returned” subsequent to a failed asylum claim are almost always taken out of immigration queues, detained and questioned, sometimes for months. The quoted passage also stated that, in cases where no family member is

available, the detention can be indefinite. The passage in question was from a document that was written in 2011.

[24] However, the Officer then relied upon another document written in 2011, in which the Canadian High Commission in Sri Lanka reported that it was only aware of four cases of persons having been detained upon their arrival back in Sri Lanka. The document added that each of these cases involved outstanding criminal charges and that the detentions were not related to the individuals' overseas asylum claims or their ethnicity.

[25] In so doing, the Officer ignored more recent documents, written in 2015 and 2016, that reported upon persons of Tamil ethnicity being "detained, tortured and/or sexually abused" upon their return to Sri Lanka. The Officer's failure to meaningfully engage with that more recent information, which directly contradicted his conclusions, rendered unreasonable his assessment of the risks that Ms. Jesuthasan alleged she would face if required to return to that country (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, at para 17).

- (3) The alleged failure to consider the risk Ms. Jesuthasan faced based on her particular profile

[26] In discussing the documentation that Ms. Jesuthasan provided in support of her application, the Officer stated the following:

In find that this material is generalized and while I have considered it in the context of assessing country conditions, I do not find it to be evidence of any risk developments which are personalized to the applicant and does not address the material elements of the

applicant's personal circumstances. This material does not support the applicant's allegation that she is at risk in Sri Lanka. Moreover, the applicant does not provide sufficient objective evidence that she has been or is currently being threatened by anyone.

[27] Ms. Jesuthasan submits that the documentary evidence demonstrates that single Tamil women in Sri Lanka are particularly vulnerable to sexual assault and are seen as "easy targets," particularly when they lack a family network. She further maintains that she is not required to demonstrate risks that are specifically personal to her. Instead, it will suffice if she demonstrates that she is likely to be subjected to a risk to her life or a risk of cruel and unusual treatment or punishment, because she belongs to a group of persons who are subjected to such risks.

[28] I agree. In brief, it was unreasonable for the Officer to have required "sufficient objective evidence" that Ms. Jesuthasan has been or is currently being personally threatened by anyone. It was also unreasonable for the Officer to have failed to meaningfully engage with the documentation provided by Ms. Jesuthasan in support of her claim that, as a single Tamil woman without a family network in Sri Lanka, she would be exposed to a significantly greater risk of physical harm than the general population in Sri Lanka (*Salibian v Canada (Moniser of Employment and Immigration)*, [1990] FCJ No 454 at para 17; *Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 244, at para 12). In making this finding, I should not be taken as implying that the Officer ought to have found that Ms. Jesuthasan would in fact likely face the risks that she described, based on her particular profile. I am simply stating that it was unreasonable for the Officer to have failed to meaningfully engage with the documentation that she provided in support of her claims.

[29] Ms. Jesuthasan specifically underscored the fact that she is a single Tamil woman without a family network in Sri Lanka. She also provided country documentation evidence in support of her claim that she was therefore at greater risk of being harmed in that country. This distinguishes her situation from the cases relied upon by the Respondent, which stand for the proposition that “[t]he documentary evidence on record, in itself, cannot supplement the lack of evidence related to the applicant’s particular case” (*Ayikeze v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1395, at para 22).

(4) Summary

[30] The Officer’s treatment of the evidence pertaining to the risk that Ms. Jesuthasan alleged she would face upon re-entering Sri Lanka as a failed asylum seeker was unreasonable. The same is true with respect to the Officer’s treatment of the risk that Ms. Jesuthasan alleged she would face as a single Tamil woman with no family connections in Sri Lanka. In my view, these shortcomings rendered the PRRA Decision as a whole unreasonable. In brief, it did not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. It will therefore be set aside and remitted to a different decision-maker for redetermination in accordance with these reasons.

IV. **The Assessment of the Humanitarian and Compassionate [H&C] Application (IMM-538-17)**

[31] Ms. Jesuthasan based her H&C application on the following three grounds: (i) health considerations, primarily related to her depressive disorder and Post-Traumatic Stress Disorder, (ii) her establishment in Canada, and (iii) the adverse conditions in Sri Lanka.

[32] Ms. Jesuthasan requested that her H&C application be assessed in parallel with her PRRA application. Ultimately, the two applications, which were supported by essentially the same affidavit, were assessed by the same Officer.

A. *The decision under review [the H&C Decision]*

[33] After reviewing the grounds upon which Ms. Jesuthasan based her application, the Officer found that those grounds did not support the granting of the H&C exemption from the requirement to apply for permanent residence from abroad.

[34] With respect to Ms. Jesuthasan's health considerations, the Officer briefly reviewed the psychologist's report, which was the same report discussed at paragraphs 14-21 of these reasons above. After addressing the report very briefly, the Officer rejected it on the basis that it noted that Ms. Jesuthasan required treatment by a mental health professional, yet no evidence had been tendered by her to indicate that there had been any such follow-up treatment. The Officer observed: "I find that evidence of continuing treatment would have been disclosed by the applicant if she believed she required this support."

[35] Regarding Ms. Jesuthasan's establishment in Canada, the Officer stated that Ms. Jesuthasan had failed to establish that severing the various ties that she had made in this country would have a significant adverse impact on her, particularly given that she had lived most of her life in Sri Lanka. Stated differently, the Officer was not satisfied that Ms. Jesuthasan's establishment in Canada was so significant that her departure from this country would result in difficulties.

[36] With respect to the adverse conditions in Sri Lanka, the Officer addressed (i) the harm that she alleged she would suffer at the hands of persons who would specifically target her in light of her past history, and (ii) the hardship and discrimination that she alleged she would suffer as a Tamil woman. Regarding the former, the Officer gave “considerable weight” to the adverse credibility findings made by the RPD and the RAD, and stated that Ms. Jesuthasan had not overcome those findings. Turning to the hardship and discrimination described above, the Officer concluded that Ms. Jesuthasan had not provided sufficient objective evidence to establish that she would face harm or discrimination “because of her minority race and/or her gender.” While acknowledging that living standards and conditions in Sri Lanka are not as favourable as those in Canada, the Officer stated: “[T]he purpose of section 25 of the Act is to give the Minister the flexibility to deal with extraordinary situations which are unforeseen by IRPA where [H&C] grounds compel the Minister to act.”

B. Issue and Standard of Review

[37] As with the PRRA Decision, the sole issue that Ms. Jesuthasan has raised in respect of the H&C Decision is whether it was unreasonable. As explained at paragraph 12 above, the Court’s review of this issue will focus upon whether the decision is appropriately justified, transparent and intelligible.

C. Assessment

[38] Ms. Jesuthasan submits that the H&C Decision is unreasonable with respect to (i) the assessment of her mental health, (ii) the treatment of her alleged risks of hardship and

discrimination given her particular profile, and (iii) the general legal test that the Officer applied in considering her application as a whole.

(1) The Officer's assessment of Ms. Jesuthasan's mental health

[39] The Officer's assessment of Ms. Jesuthasan's mental health was somewhat different than the treatment given to this issue in the PRRA Decision. This time, the Officer stated the following:

The applicant has submitted a medical report dated 16 October 2015 from Blake Psychology indicating that she attended 2 sessions in September 2015. The report states that the applicant expresses intense fear about the possibility of returning to Sri Lanka and reports anxiety. The report states that the applicant's responses suggest that she is experiencing significant psychological distress from the traumas that she encountered in her life and it is highly recommended that she pursue individual therapy to get treatment for her mental health problems. Although the report noted that the applicant required treatment by a mental health professional, no evidence was tendered indicating that there was any follow-up treatment. I find that evidence of continuing treatment would have been disclosed by the applicant if she believed she required this support.

[40] Relying on *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], Ms. Jesuthasan asserts that the foregoing assessment was unreasonable for two reasons. First, she maintains that the lack of follow-up treatment in Canada did not detract from the diagnosis that she had a "major depressive disorder." Second, she submits that it was unreasonable for the Officer to have ignored the psychologist's assessment that "it appears that she will have difficulty transitioning back to life in Sri Lanka and that [her return to that country] may further negatively impact her psychological well-being."

[41] In *Kanthisamy*, above, a majority of the Supreme Court stated as follows:

[47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required Jeyakannan Kanthisamy to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.

[48] Moreover, in her exclusive focus on whether treatment was available in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. As the Guidelines indicate, health considerations *in addition to* medical inadequacies in the country of origin, may be relevant: *Inland Processing*, s. 5.11. As a result, the very fact that Jeyakannan Kanthisamy's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help treat his condition: *Davis v. Canada (Minister of Citizenship and Immigration)* (2011), 96 Imm. L.R. (3d) 267 (F.C.); *Martinez v. Canada (Minister of Citizenship and Immigration)* (2012), 14 Imm. L.R. (4th) 66 (F.C.). As previously noted, Jeyakannan Kanthisamy was arrested, detained and beaten by the Sri Lankan police which left psychological scars. Yet despite the clear and uncontradicted evidence of such harm in the psychological report, in applying the "unusual and undeserved or disproportionate hardship" standard to the individual factor of the availability of medical care in Sri Lanka — and finding that seeking such care would not meet that threshold — the Officer discounted Jeyakannan Kanthisamy's health problems in her analysis.

[Emphasis in original.]

[42] Based on the foregoing, I agree that the Officer erred by (i) appearing to reject the psychologist's report solely on the basis that Ms. Jesuthasan did not adduce any evidence to demonstrate that she had sought any follow-up treatment; and (ii) ignoring the psychologist's assessment that Ms. Jesuthasan's return to Sri Lanka "may further negatively impact her

psychological well-being.” Discounting the assessment in this manner was unreasonable (*Kanhasamy*, above, at para 60).

[43] Just as in *Kanhasamy*, above, the Officer was not bound to grant Ms. Jesuthasan’s request for an H&C exemption on the basis of the psychologist’s report. There “will inevitably be some hardship associated with being required to leave Canada” (*Kanhasamy*, above, at para 23). In this regard, unsuccessful applicants for an H&C exemption can be expected to be very disappointed or even depressed at the prospect of having to leave Canada and return to their country of origin. However, the H&C exemption was not “intended to be an alternative immigration scheme” (*Kanhasamy*, above at para 23). Rather, it is exceptional in nature (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, at para 15; *Kanhasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, at para 40; *Gonzalo v Canada (Minister of Citizenship and Immigration)*, 2015 FC 526, at para 16; *Pervaiz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 680, at para 40; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2012 FC 918, at para 22; *Obeng v Canada (Minister of Citizenship and Immigration)*, 2009 FC 61, at paras 39-40). I do not read anything in the majority decision in *Kanhasamy* to state otherwise. Accordingly, applicants are required to demonstrate why an adverse impact on their psychological well-being would be exceptional, relative to others who apply for the discretionary exemption, and having regard to all of the other relevant facts and factors (*Kanhasamy*, above, at para 25).

[44] Although the Officer was not bound to accept the psychologist’s assessment of Ms. Jesuthasan, the fact that her mental health might worsen if she were to be removed to Sri

Lanka “is a relevant consideration that [had to] be identified and weighed” (*Kanhasamy*, above, at para 48). Yet, the Officer failed to do these things. It was this failure, rather than the Officer’s rejection of the psychologist’s assessment in and of itself, that rendered the treatment of that assessment unreasonable.

[45] In contrast to *Kanhasamy*, where the officer in question explicitly stated that she “[did] not dispute the psychological report” (at para 46), and where there were “no adverse credibility findings” (*Kanhasamy v Canada (Citizenship and Immigration)*, 2013 FC 802, at para 52), there were serious adverse credibility findings that went to the heart of Ms. Jesuthasan’s application in respect of this issue. Indeed, as noted at paragraph 19 above, the psychologist’s assessment was largely based on events that were rejected by the RPD and the RAD on credibility grounds. As the RAD noted, some of the important inconsistencies that formed the basis for the adverse credibility findings were in written materials provided by Ms. Jesuthasan herself. When confronted with those inconsistencies, she acknowledged that they were wrong. Moreover, the psychologist simply suggested at the very end of her report that Ms. Jesuthasan’s psychological well-being might worsen if she were to be removed to Sri Lanka.

[46] Considering the foregoing, it would have been reasonably open for the Officer to place little weight on this aspect of the psychologist’s assessment, after having addressed it. But it was unreasonable to completely ignore that “diagnosis.” I do not accept the Respondent’s position that the Officer implicitly addressed this issue. The failure of the Officer to engage with this issue was then compounded by the Officer’s rejection of the assessment on the sole basis that there had been no follow-up treatment in Canada.

[47] I am sympathetic to the Respondent's position that individuals such as Ms. Jesuthasan should not be able to overcome adverse credibility determinations by simply finding a psychologist who is willing to write a report suggesting that (i) the inconsistencies that formed the basis of those determinations were or may have been attributable to the very traumas the RPD or the RAD determined likely did not occur; or (ii) the applicant's removal from Canada is likely to negatively impact upon his or her psychological well-being. Such reports cannot serve as a "cure-all for any and all deficiencies" in an applicant's case (*Avagyan*, above; *Khatun v Canada (Minister of Citizenship and Immigration)*, 2012 FC 159, at para 94; *Mahari v Canada (Minister of Citizenship and Immigration)*, 2012 FC 999, at para 25).

[48] Immigration officers, like the RPD and the RAD, are not obliged to accept such assessments at face value or to accord them significant weight. However, if they choose to give them little or no weight, they must explain why.

[49] For example, an immigration officer may note the conjectural or speculative nature of a particular assessment, such as that the applicant's removal from Canada "may" negatively impact upon his or her psychological well-being. Alternatively, an officer may explain why a psychological assessment does not satisfactorily address the credibility determinations with respect to the events that form the principal basis for assessment. An officer may also explain why a diagnosed negative impact on the applicant's psychological well-being does not rise to the level of being exceptional, relative to others who apply for an H&C exemption from the requirement to apply for permanent residence from outside Canada. These examples are not meant to be exhaustive.

(2) The Officer's treatment of Ms. Jesuthasan's alleged risks

[50] Ms. Jesuthasan submits that the Officer's assessment of her particular personal profile was unreasonable for three reasons.

[51] First, she states that the Officer failed to address an important aspect of that profile, namely, that she would not have any family support in Sri Lanka. In the written submissions that she provided in support of her request for an H&C exemption, she stated that this fact would likely exacerbate the risks she alleged she would likely face as a single Tamil woman who is a returning failed asylum seeker.

[52] Second, she asserts that the Officer ignored important evidence in the country documentation and other evidence she adduced, which directly contradicted the Officer's finding that there was insufficient objective evidence to establish that Ms. Jesuthasan "will face harm or be discriminated against because of her minority race and/or gender."

[53] Third, she stated that the Officer erred by requiring that the evidence demonstrate that she will face harm or be discriminated against, rather than it simply demonstrate that she would likely face such risks.

[54] I agree that the Officer's assessment was faulty in each of these three respects, and therefore was unreasonable.

[55] In brief, the Officer did not address or even mention Ms. Jesuthasan's submission that the risks she identified would likely be exacerbated as a result of the fact that she would not have any family support in Sri Lanka. Ms. Jesuthasan adduced evidence in support of that specific submission, including a letter from Reverend Father Manuelpillai David and country documentation. That evidence corroborated her claim that she would likely face an elevated risk of discrimination and harm, including sexual assault, as a single Tamil woman without any family support. Given that such evidence directly contradicted the Officer's conclusion that Ms. Jesuthasan would not likely face discrimination and harm if she returned to Sri Lanka, the Officer's failure to address it was unreasonable (*Cepeda-Gutierrez*, above). Contrary to the Respondent's suggestion that this evidence simply related to generalized country conditions, it supported Ms. Jesuthasan's submission that she would face an elevated risk of harm and discrimination as a member of a particular group of similarly situated persons. That group is single Tamil women who are unsuccessful asylum seekers abroad, who have no family support in Sri Lanka.

[56] The Officer's error in this regard was compounded by the Officer's apparent belief that Ms. Jesuthasan had to establish that she "will face harm or be discriminated against because of her minority race and/or gender" (emphasis added). The Officer used similar language in subsequent passages of the H&C Decision, including where it was noted that Ms. Jesuthasan had not demonstrated that she "would be unable to re-establish herself in Sri Lanka" or that "her departure from Canada will result in difficulties" (emphasis added). As the Supreme Court observed in *Kanthasamy*, above, at para 56, "applicants need only show that they would likely be affected by adverse conditions such as discrimination" (emphasis added).

[57] I will simply add in passing that such evidence would not necessarily oblige an immigration officer to grant an exemption from the usual requirements of the IRPA on H&C grounds. It must always be kept in mind that the H&C provisions of the IRPA are exceptional and highly discretionary in nature (see citations at paragraph 43 above, and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 61). Therefore, it would remain open to an immigration officer to decline to grant an exemption based on a determination that the discrimination or other established risks did not rise to the level of being exceptional, relative to what other unsuccessful claimants would face if required to return to their country of origin.

(3) The general legal test applied by the Officer

[58] Ms. Jesuthasan submits that the Officer also erred by applying the wrong legal test to the assessment of her application. Specifically, she asserts that the Officer applied the “unusual and undeserved or disproportionate hardship” test that was rejected in *Kanthisamy*, above, at paras 21-33 and 60. There, a majority of the Supreme Court articulated a broader test that requires a weighing of all the relevant H&C considerations. Ms. Jesuthasan maintains that the Officer failed to show an appreciation of this broader approach.

[59] I disagree.

[60] I acknowledge that there are various passages in the H&C Decision where the Officer appeared to focus exclusively on the extent to which Ms. Jesuthasan would face “hardship” and

“difficulties.” However, as noted by the Respondent, the H&C Decision as a whole reflects that the Officer did indeed apply the appropriate approach.

[61] Among other things, this was made very clear in the concluding paragraph of the decision, where the Officer noted that consideration had been given to “the applicant’s personal circumstances, her establishment, risk, employment [and] hardship” and that “a global assessment of all the relevant factors put forth by the applicant” had been conducted. While the Officer may have erred in applying this test, for example by failing to address the fact that Ms. Jesuthasan would not have any family support in Sri Lanka, I am not persuaded that the Officer applied the wrong test.

V. **Conclusion**

[62] For the reasons set forth above, these applications will be granted.

JUDGMENT IN IMM-831-17 AND IMM-538-17

THIS COURT'S JUDGMENT is that

1. These applications are granted.
2. The decisions of the Immigration Officer, dated December 29, 2016, and January 18, 2017, are set aside. Ms. Jesuthasan's requests for a pre-removal risk assessment and for an exemption on Humanitarian and Compassionate grounds pursuant to s. 25 of the IRPA, are remitted to a different officer for reconsideration in accordance with these reasons.

"Paul S. Crampton"

Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: IMM-831-17
IMM-538-17

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PLACE OF HEARING: MONTREAL, QUEBEC

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DATED: FEBRUARY 7, 2018

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