Federal Court  Cour fédérale

Date: 20180705

Docket: IMM-5018-17

Citation: 2018 FC 691

Toronto, Ontario, July 5, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

VERONIKA HAVLIKOVA

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Veronika Havlikova, a Canadian citizen, seeks judicial review of the denial of the spousal sponsorship of her husband, Pavel Istok. Mr. Istok conceded in his permanent residence application to the Vienna Visa Office [Visa Office] that he had been convicted of a number of offences in the Czech Republic, but argued that he was nevertheless not inadmissible to Canada, as a result of paragraph 36(3)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA], due to the expungement of his criminal record in the Czech Republic. Alternatively, he submitted that he should be exempted on humanitarian and compassionate [H&C] grounds. The visa officer [Officer] disagreed with Mr. Istok on both counts and denied his application. Ms. Havlikova seeks to have the decision set aside, but I have not been persuaded to do so for the following reasons.

II. **Background**

[2] Mr. Istok is a citizen of the Czech Republic of Roma ethnicity who arrived in Canada in 2007. Ms. Havlikova came to Canada in 1997 from the Czech Republic. She obtained refugee status here on the basis of her Roma ethnicity and was later granted Canadian citizenship. The couple married in April of 2010 and had a daughter together later that year, who is also a Canadian citizen.

[3] Mr. Istok made a refugee claim that was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on March 7, 2012. The RPD determined that Mr. Istok was excluded from refugee protection under section 98 of IRPA and Article 1(F)(b) of the Convention, as there were serious grounds for considering that he had committed non-political crimes in the Czech Republic.

[4] In October 2012, Ms. Havlikova sponsored Mr. Istok's permanent residence application with the assistance of an immigration consultant. However, this application was rejected in February 2014 on the basis that Mr. Istok was inadmissible to Canada for serious criminality.

[5] Sometime in 2014, Mr. Istok applied to have his criminal convictions expunged in the Czech Republic. A certificate of the Bruntal County Court dated November 3, 2014 expunged the convictions.

[6] In August, 2015, Mr. Istok submitted a second application for a permanent resident visa as a member of the family class, sponsored by Ms. Havlikova. This application was again prepared by an immigration consultant.

[7] On December 23, 2015, the Visa Office wrote to Mr. Istok requesting that he provide, among other things, a copy of all judgments against him, along with the pardon (expungement) decision. Mr. Istok's immigration consultant wrote back on January 25, 2016, making the following submissions with respect to Mr. Istok's pardon:

> I would submit that Mr. Pavel Istok has applied for a Pardon on April 3, 2014 (please see attached) and that he obtained his pardon by the Government of the Czech Republic which is functioning, parliamentary democracy with free and fair election. As he was pardoned by the Government of the Czech Republic all of his convictions were removed from the Police data base. I would submit that Mr. Pavel Istok is no longer inadmissible to Canada…

[8] A reminder was sent to Mr. Istok in March 2016 requesting all judgments made against him. On April 14, 2016, Mr. Istok's representative provided the Visa Office with further materials concerning the expungement of his convictions in the Czech Republic.

[9] On August 1, 2016, the Visa Office wrote a procedural fairness letter to Mr. Istok, advising him that while he had not provided a copy of all judgements concerning his convictions,

a preliminary assessment indicated that his expungement in the Czech Republic should not be recognized in Canada, as follows:

> I have considered the fact your record was expunged in 2014 should not render you inadmissible as per paragraph 36(3)(c) of the Act. However, after consulting paragraph 105(1)(c) of the Criminal Code of the Czech Republic (the new code, which I have found online in English […]) under which your record was expunged, I am not satisfied that his process is the same as a record suspension in Canada. Specifically, I am not satisfied that the automatic removal of convictions based on the passage of time and the absence of further criminal convictions is similar to the process of a record suspension, as this process exists in Canada.

[10] Mr. Istok then retained his current counsel, who responded with further submissions and materials on September 29, 2016. The couple, together with children from previous relationships, are living together as a family in the United Kingdom.

[11] Mr. Istok's application was ultimately rejected. The decision under review [Decision] is comprised of both the Visa Office's letter, dated February 16, 2017, advising Mr. Istok that his application had been refused, as well as the Global Case Management System [GCMS] notes, written between August 2015 and February 2017. Ms. Havlikova brings this judicial review of the Decision under section 72(1) of IRPA.

III. **Analysis**

[12] Ms. Havlikova raises two issues, which I will address in turn. First, she contends that the Officer committed reviewable errors of fact and law in the analysis of paragraph 36(3)(b) of IRPA and that the Decision's reasons on this point are inadequate. Second, Ms. Havlikova

submits that the Officer erred in law in failing to consider the best interests of her Canadian-born child.

A. *The Officer's Analysis of Mr. Istok's Foreign Expungement*

(1) Standard of Review

[13] Ms. Havlikova submitted in her memorandum that the Officer erred in fact by failing to consider the evidence, and consequently erred in law by failing to apply paragraph 36(3)(b) of IRPA to preclude a finding of inadmissibility against Mr. Istok. Ms. Havlikova further argued that the Officer erred in law by failing to provide meaningful or cogent reasons.

[14] The Respondent, on the other hand, relied on *SA v Canada (Minister of Citizenship and Immigration)*, 2006 FC 515 [*SA*] in support of its position that a reasonableness standard of review applies to an officer's analysis under paragraph 36(3)(b) of IRPA. While *SA* predates *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], post-*Dunsmuir* jurisprudence also supports a reasonableness review: *Asad v Canada (Citizenship and Immigration)*, 2015 FCA 141 [*Asad*]). In *Asad*, the Federal Court of Appeal [FCA] noted that findings of foreign law made by administrative decision-makers are treated as questions of fact, attracting "considerable deference" in reasonableness review (at para 16). Although *Asad* involved interpretation of different foreign law than the matter before me, its principles regarding reasonableness review apply:

> [25] …it is trite to note that an officer posted overseas will have developed a significant degree of expertise in the field as well as expertise in assessing foreign law. Here, factual interpretation and specialized understanding predominate. I accordingly have no

> difficulty finding that an officer's expertise in this context is greater than that of the courts. Again, this attracts deference and hence the standard of reasonableness.

[15] Further, I do not agree with Ms. Havlikova's initial position that the Officer's non-application of paragraph 36(3)(b) of IRPA raises an error of law. As I explain further below, the Officer identified the correct three-part test governing the analysis, as set out by the FCA in *Canada (Minister of Citizenship and Immigration) v Saini*, 2001 FCA 311, leave to appeal ref'd [2001] SCCA No 622 (QL) [*Saini*]. The Officer's application of that legal test to the facts is a question of mixed fact and law reviewable on a standard of reasonableness (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 12, citing *Dunsmuir* at para 53). Reasonableness review also applies to officers' interpretation of the relevant provisions of IRPA, their home statute (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 27-28).

[16] Finally, Ms. Havlikova is wrong in her memorandum's assertion that the adequacy of the Officer's reasons raises an issue of law. Adequacy of reasons is not a stand-alone basis for setting aside a decision but is rather subsumed within the overall reasonableness analysis (*Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 22). Reasons will withstand scrutiny if they permit the reviewing court to determine why the tribunal made its decision, and whether the conclusion falls within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 16 [*Newfoundland Nurses*]).

[17] Therefore, the Officer's findings on the law of the Czech Republic, the application of the *Saini* test to those findings, the ultimate determination that paragraph 36(3)(b) of IRPA did not preclude Mr. Istok's inadmissibility, and the reasons offered for that conclusion, are all subject to a reasonableness review: I must be satisfied that the Decision is justified, transparent, and intelligible, and that it falls within the range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47).

(2) Legal Framework

[18] Before examining the reasonableness of the Officer's analysis, I will first set out the governing legal framework. In short, paragraph 36(3)(b) of IRPA provides that "serious criminality" inadmissibility may not be based on an offence for which a record suspension has been granted under the *Criminal Records Act*, RSC, 1985, c C-47 [CRA]. However, our jurisprudence has also established that a foreign pardon granted in respect of offences committed outside of Canada may be recognized as a Canadian pardon for the purposes of paragraph 36(3)(b), where the tripartite test in *Saini* is satisfied, as explained further below.

[19] The relevant provisions of IRPA read as follows:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
[…]	[…]
(b) having been convicted of an offence outside Canada	**b)** être déclaré coupable, à l'extérieur du Canada, d'une

that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
[…]	[…]
Application	**Application**
(3) The following provisions govern subsections (1) and (2):	**(3)** Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
[…]	[…]
(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal…	**b)** la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;

[20] Subsection 3(1) of the CRA provides that a person who has been convicted of an offence under an Act of Parliament may apply to the Parole Board of Canada for a record suspension in respect of that offence. However, subsection 4(1) restricts a person from applying for a record

suspension until five or ten years has passed following the expiry of any penalty imposed for the offence, as follows:

Restrictions on application for record suspension	**Restrictions relatives aux demandes de suspension du casier**
4 (1) A person is ineligible to apply for a record suspension until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:	**4 (1)** Nul n'est admissible à présenter une demande de suspension du casier avant que la période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, énoncée ci-après ne soit écoulée :
(a) 10 years, in the case of an offence that is prosecuted by indictment or is a service offence for which the offender was punished by a fine of more than five thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of the *National Defence Act*; or	**a)** dix ans pour l'infraction qui a fait l'objet d'une poursuite par voie de mise en accusation ou qui est une infraction d'ordre militaire en cas de condamnation à une amende de plus de cinq mille dollars, à une peine de détention de plus de six mois, à la destitution du service de Sa Majesté, à l'emprisonnement de plus de six mois ou à une peine plus lourde que l'emprisonnement pour moins de deux ans selon l'échelle des peines établie au paragraphe 139(1) de la *Loi sur la défense nationale*;
(b) five years, in the case of an offence that is punishable on summary conviction or is a service offence other than a service offence referred to in paragraph (a).	**b)** cinq ans pour l'infraction qui est punissable sur déclaration de culpabilité par procédure sommaire ou qui est une infraction d'ordre militaire autre que celle visée à l'alinéa a).

[21] Subsection 4.1(1) then sets out the circumstances under which the Parole Board may order a record suspension:

Record suspension	**Suspension du casier**
4.1 (1) The Board may order that an applicant's record in respect of an offence be suspended if the Board is satisfied that	**4.1 (1)** La Commission peut ordonner que le casier judiciaire du demandeur soit suspendu à l'égard d'une infraction lorsqu'elle est convaincue :
(a) the applicant, during the applicable period referred to in subsection 4(1), has been of good conduct and has not been convicted of an offence under an Act of Parliament; and	**a)** que le demandeur s'est bien conduit pendant la période applicable mentionnée au paragraphe 4(1) et qu'aucune condamnation, au titre d'une loi du Parlement, n'est intervenue pendant cette période;
(b) in the case of an offence referred to in paragraph 4(1)(a), ordering the record suspension at that time would provide a measurable benefit to the applicant, would sustain his or her rehabilitation in society as a law-abiding citizen and would not bring the administration of justice into disrepute.	**b)** dans le cas d'une infraction visée à l'alinéa 4(1)a), que le fait d'ordonner à ce moment la suspension du casier apporterait au demandeur un bénéfice mesurable, soutiendrait sa réadaptation en tant que citoyen respectueux des lois au sein de la société et ne serait pas susceptible de déconsidérer l'administration de la justice.
Onus on applicant	**Fardeau du demandeur**
(2) In the case of an offence referred to in paragraph 4(1)(a), the applicant has the onus of satisfying the Board that the record suspension would provide a measurable benefit to the applicant and would sustain his or her rehabilitation in society as a	**(2)** Dans le cas d'une infraction visée à l'alinéa 4(1)a), le demandeur a le fardeau de convaincre la Commission que la suspension du casier lui apporterait un bénéfice mesurable et soutiendrait sa réadaptation en tant que citoyen respectueux

law-abiding citizen.	des lois au sein de la société.
Factors	**Critères**
(3) In determining whether ordering the record suspension would bring the administration of justice into disrepute, the Board may consider	**(3)** Afin de déterminer si le fait d'ordonner la suspension du casier serait susceptible de déconsidérer l'administration de la justice, la Commission peut tenir compte des critères suivants :
(a) the nature, gravity and duration of the offence;	**a)** la nature et la gravité de l'infraction ainsi que la durée de sa perpétration;
(b) the circumstances surrounding the commission of the offence;	**b)** les circonstances entourant la perpétration de l'infraction;
(c) information relating to the applicant's criminal history and, in the case of a service offence, to any service offence history of the applicant that is relevant to the application; and	**c)** les renseignements concernant les antécédents criminels du demandeur et, dans le cas d'une infraction d'ordre militaire, concernant ses antécédents à l'égard d'infractions d'ordre militaire qui sont pertinents au regard de la demande;
(d) any factor that is prescribed by regulation.	**d)** tout critère prévu par règlement.

[22] As mentioned above, the test which now governs analyses under paragraph 36(3)(b) of IRPA was established in *Saini*, where the applicant was a citizen of India who had been convicted in Pakistan of hijacking an Indian airliner. He served ten years in prison, and then came to Canada. A deportation order was issued against him, following which the applicant applied for and was granted a pardon from the Pakistani government.

[23] In *Saini*, the FCA clarified that there is a two-step process to determining whether a foreign pardon should be recognized in Canada with respect to applicants who would otherwise be inadmissible under Canada's immigration laws.

[24] First, the decision-maker must consider the effect of the foreign pardon in the country where it was granted. The applicant must prove the content of the foreign law to the satisfaction of the decision-maker as a question of fact (*Saini* at para 26).

[25] Second, the decision-maker must determine whether the foreign pardon should be treated as a Canadian record suspension (formerly called a pardon) to save an applicant who would otherwise be inadmissible. To make this determination, the FCA set out a three-part test: (1) the foreign legal system as a whole must be similar to that of Canada, (2) the aim, content, and effect of the specific foreign law must be similar to Canadian law, and (3) there must be no valid reason not to recognize the effect of the foreign law (*Saini* at para 28).

[26] With respect to the first requirement of the *Saini* test, the FCA held that the two legal systems must be "based on similar foundations and share similar values" (*Saini* at para 29, citing *Canada (Minister of Employment and Immigration) v Burgon*, [1991] 3 FC 44 (Federal Court of Canada – Appeal Division) at para 39). The legal systems need not be identical, but there must be "a strong resemblance in the structure, history, philosophy and operation of the two systems before [the foreign] law will be given recognition in this context" (*Saini* at para 29). Moreover, the applicant must normally prove such a similarity with evidence (*Saini* at paras 30, 45). Further, evidence must also be adduced to demonstrate the second requirement — namely, a

similarity between the aim, content, and effect of the specific legislative provisions being compared (*Saini* at paras 31-40). On the third requirement, that there be no valid reason not to recognize the foreign pardon, the FCA indicated that:

> [41] …non-citizens do not have an unqualified right to enter or remain in Canada. I must emphasize that Canadian immigration law cannot be bound by the laws of another country, even where that foreign country's laws mirror our own. There will still be situations where Canadian immigration law must refuse to recognize the laws of close counterparts.
>
> […]
>
> [47] …Foreign pardons should only be recognized in rare situations […] where it would be unjust not to give effect to a similar country's similar laws that fully forgive individuals for the crimes they have committed. The final branch of our test ensures that, if there is any valid basis upon which to deny recognition to a foreign pardon, then a potential immigrant can and should still be considered "convicted"…

In particular, the FCA recognized that the "gravity of the offence" should be considered as a factor under the third branch of the test (*Saini* at para 44).

[27] The issue of whether a foreign pardon should be recognized to prevent the operation of paragraphs 36(1)(b) or (c) of IRPA arises infrequently in this Court. It was considered in *Sicuro v Canada (Minister of Citizenship and Immigration)*, 2004 FC 461 [*Sicuro*], *Magtibay v Canada (Minister of Citizenship and Immigration)*, 2005 FC 397, and *SA*, mentioned above in my analysis on standard of review. These three cases are all factually distinguishable from the matter before me. However, of particular note in *Sicuro*, Justice Mosley held, relying on *Saini*, that there is "no automatic or absolute right" to have a foreign pardon recognized as a Canadian pardon (at para 28).

(3) Analysis under Review

[28] As is evident from the GCMS notes and procedural fairness letter of August 1, 2016, the Officer conducted a preliminary review of Mr. Istok's application in August 2016, finding that it appeared that there were reasonable grounds to believe that Mr. Istok was inadmissible to Canada under paragraphs 36(1)(b) or 36(2)(b) of IRPA. The Officer then turned to the three *Saini* factors.

[29] With respect to the first *Saini* requirement, the Officer accepted that the Czech Republic is a democracy, noting however that the Czech Republic had been ranked 37th on the "Corruption Perceptions Index" published by Transparency International, while Canada was ranked 9th. While the Officer recognized that the Index measured factors that went beyond the Czech Republic's judicial system, the Officer also found that that there were significant differences between the efficiency and effectiveness of the two countries' legal systems.

[30] As per the second *Saini* requirement, the Officer then considered the aim, content, and effect of the relevant provisions of the Czech *Criminal Code*, which are:

> **CHAPTER VI**
>
> **EXPUNGEMENT OF CONVICTIONS**
>
> Section 105 Conditions for Expungement
>
> (1) The court shall expunge a conviction, if after execution or waiver of punishment or after expiration of the limitation period for execution of punishment the convict has lead an upright life continuously for at least
>
> a) fifteen years, if conviction to an exceptional sentence is concerned,

b) ten years, if conviction to a sentence of imprisonment not exceeding five years is concerned,

c) five years, if conviction to a sentence of imprisonment not exceeding one year is concerned,

d) three years if conviction to a sentence of imprisonment not exceeding one years or a sentence of banishment is concerned,

e) one year, if conviction to a sentence of home confinement, forfeiture of property, forfeiture of a thing or other asset value, prohibition of stay, prohibition of entering sport, cultural and other social events or a pecuniary penalty for an intentional criminal offence is concerned.

…

(3) If the convict proved after execution or waiver of punishment or after expiration of punishment by his/her very good behaviour that he/she has been corrected, the court may, with regard to the interests protected by the Criminal Code, expunge the conviction on the basis of a request of the convict or a person entitled to offer a guarantee for completing correction of the convict, also before the period referred to in Sub-section (1) lapses.

…

(5) In case more sentences were imposed in parallel to an offender, the conviction may not be expunged, unless the period for expungement of the sentence, for which the Criminal Code sets the longest period for expungement, has lapsed.

…

Section 106 Effects of Expungement

If a conviction was expunged, the offender shall be regarded as if he/she was never convicted.

[Emphasis added]

[31] The Officer observed that, under these provisions, a court of the Czech Republic could not refuse to expunge a conviction where the prescribed period had elapsed and an applicant had had no further convictions, due to the word “shall” in subsection 105(1).

[32] The Officer then considered the document of the Bruntal Court dated November 3, 2014, expunging Mr. Istok’s convictions, and noted that the Court considered only (a) the passage of five years, (b) the fact that Mr. Istok was convicted of no further offences during those years, and (c) a police report dated October 13, 2014, indicating that Mr. Istok had no record of criminal activity. The Officer concluded that the Bruntal Court had had no choice but to expunge Mr. Istok’s convictions since the conditions of paragraph 105(1)(c) were met.

[33] The Officer contrasted paragraph 105(1)(c) of the Czech *Criminal Code* to the record suspension provisions under the CRA. The Officer consulted the Decision-Making Policy Manual for members of the Parole Board, noting that members considered multiple factors when considering “good conduct” under paragraph 4.1(1)(a) of the CRA.

[34] Further, the Officer observed that a Parole Board member’s analysis under the CRA is not limited to assessing “good conduct”, but also the “measurable benefit” of a record suspension, the applicant’s rehabilitation, and whether the granting of a record suspension would bring the administration of justice into disrepute. Significantly, the Officer concluded that the Parole Board may refuse to grant a record suspension even if the prescribed period has elapsed and the applicant has not been convicted of any further offences, and that a record suspension

may be revoked. In the Officer's view, these all constituted significant distinctions from the Bruntal Court's expungement considerations in Mr. Istok's case.

[35] Consequently, the Officer found that there were reasonable grounds not to recognize the Czech expungement of Mr. Istok's offences under Canadian law. However, the Officer, as a matter of further fairness, decided to solicit submissions from Mr. Istok. After reviewing Mr. Istok's further submissions and materials, the Officer resumed the analysis of Mr. Istok's application, undertaking a further lengthy analysis of Mr. Istok's convictions in the Czech Republic, which I need not summarize here as they are not disputed. Suffice it to say that, according to the GCMS notes, Mr. Istok was convicted of at least eight criminal offences in the Czech Republic, five of which were equivalent offences for the purposes of IRPA's "serious criminality" provisions, and that his prison sentences were, in total, approximately five years in length.

[36] In considering whether Mr. Istok's Czech expungement should be recognized in Canada, the Officer dealt first with the specific evidence tendered by Mr. Istok, and found that his materials had not addressed the concerns previously raised. The Officer confirmed the earlier conclusion that a Czech court must expunge a criminal conviction if the conditions of paragraph 105(1)(c) of the Czech *Criminal Code* are met, which is a very different process than the highly discretionary one undertaken by the Parole Board under the CRA in deciding whether to grant a record suspension. The Officer further observed that the provisions of the CRA are more severe than those in the Czech *Criminal Code*, since the CRA provided for only two time categories — five or ten years — with the fact of indictment resulting in a waiting period of ten years. Further,

the Officer noted that certain offences in Canada's regime are ineligible for a record suspension altogether.

[37] To underline this distinction, the Officer pointed to the CRA's Decision-Making Policy Manual, which directs the Parole Board to consider numerous factors when deciding whether or not to grant a record suspension. By contrast, the Bruntal Court document, being short in length with a single page of analysis, did not demonstrate the same "rigour" that one would expect from the Parole Board. Thus, the Officer concluded that the second *Saini* factor had not been satisfied on the facts of Mr. Istok's application.

[38] With respect to the last *Saini* factor — namely, whether any valid reason exists not to recognize a foreign pardon — the Officer observed that the severity of Mr. Istok's criminal history constituted a valid reason not to recognize his expungement. The Officer noted that some of the judgments in respect of his convictions pointed to Mr. Istok's lack of repentance, and that his lengthy prison stays did not seem to have reduced his risk of re-offending. The Officer further noted that, on the facts of his case, Mr. Istok would not be able to satisfy the Minister of his rehabilitation under paragraph 36(3)(c) of IRPA, and that there was reason to doubt that he would have received a record suspension in Canada.

(4) Reasonableness of the Officer's Analysis

[39] In this application for judicial review, Ms. Havlikova submits that, in the Czech Republic, a conviction is not "automatically" expunged after the passage of time and the absence of further criminal convictions. Ms. Havlikova refers to paragraph 105(1), of the Czech *Criminal*

Code which states that a Czech court "shall expunge a conviction, if […] the convict has lead an upright life continuously…[sic]" for one of the prescribed periods (in Mr. Istok's case, five years), and paragraph 105(3), which states:

> If the convict proved after execution or waiver of punishment or after expiration of punishment by his/her very good behaviour that he/she has been corrected, the court may, with regard to the interests protected by the Criminal Code, expunge the conviction on the basis of a request of the convict or a person entitled to offer a guarantee for completing correction of the convict, also before the period referred to in Sub-section (1) lapses.

[40] Thus, Ms. Havlikova argues that the wording of subsection 105(3) makes it clear that the Czech *Criminal Code* "demands considerably more than the mere passage of time and non-recidivism" before a criminal record will be expunged.

[41] Ms. Havlikova made this same argument before the Officer, which was addressed, in the conclusion that subsection 105(3) refers to situations where an individual would like to expunge their convictions at a time prior to that identified in subsection 105(1). The Officer observed it was thus understandable that particularly exemplary behaviour would be required under subsection 105(3), since the individual would be seeking to persuade the court that expungement was justified prior to expiry of the normal time periods.

[42] I agree in full with the Officer's analysis. As there is no indication in the record that Mr. Istok applied for expungement under subsection 105(3) of the Czech *Criminal Code*, that provision is of no assistance to him when considering whether his expungement should be recognized in Canada.

[43] Ms. Havlikova refers this Court to two pieces of evidence that were before the Officer. The first is the following extract from a 2011 paper authored by the Institute of Criminology and Social Prevention, which Ms. Havlikova submits is a division of the Czech Ministry of Justice, titled "Criminal Justice System in the Czech Republic":

> A court may discharge an offender if he or she committed a transgression (přečin) which he or she regrets and convincingly demonstrates an effort to reform himself/herself, and if in view of the nature and seriousness of the transgression and the previous behaviour of the offender, it may be reasonably expected that the mere hearing of the case before a court will be sufficient for his or her reform as well as the protection of society.

[44] The Officer specifically considered this extract in the GCMS notes, and found that it was irrelevant to the analysis. I agree. It is obvious when this extract is read in context that it is in respect of sections 46 and 47 of the Czech *Criminal Code*, which permit a court to waive a punishment with or without conditions. In the GCMS notes, the Officer likened this to conditional and non-conditional discharges under Canadian criminal law. In other words, this extract simply does not stand for what Ms. Havlikova proposes, and has no relevance to her husband's situation, because he did not obtain a discharge.

[45] Ms. Havlikova next extracts as follows from an undated legal opinion prepared by the Czech immigration law firm Grobelny & Skripsky:

> If after serving the sentence…the convict, by his/her good behavior, proves that he/she has rehabilitated himself/herself, the court may, in accordance with Sec. 105(3) of the CC, while considering the interests protected by the Criminal Code, expunge the conviction upon a request of the convict…

[46] The authors are referring to section 105(3) of the Czech *Criminal Code*, and the Officer properly decided that this provision did not and does not apply to Mr. Istok. In fact, at the end of the paragraph from which Ms. Havlikova excerpts, the authors of this legal opinion confirm the view taken by the Officer — namely, that a Czech court must expunge a conviction under section 105(1) (which did apply to Mr. Istok) where the conditions of that provision are met. They state in their opinion:

> …upon a request of the convict or a person authorized to offer a guarantee for completion of the convict's rehabilitation, even before the above period expiry. The court shall do so only electively, compared to when all the above conditions are fulfilled, when upon the convict's request the court is obliged to expunge the conviction.
>
> [Emphasis added.]

[47] The Officer considered the legal opinion of Grobelny & Skripsky. In addition to noting that it was undated and provided no comparison between the Canadian and Czech systems, the Officer concluded that the legal opinion did not contradict the Officer's own comparison of the two systems. I agree.

[48] Finally, although this argument was neither raised before the Officer in Mr. Istok's various written submissions, nor in the written materials submitted to this Court, Ms. Havlikova's counsel submitted at the hearing that the use of the word "also" in subsection 105(3) meant that that provision is meant to be read together with subsection 105(1), such that the pardon schemes in Canada and the Czech Republic are indeed similar.

[49] First, as I mentioned, this creative argument was not made to the Officer. In any event, I agree with the Respondent's submissions at the hearing that the use of the word "also" in subsection 105(3) is likely the result of an awkward translation of the Czech legislation.

[50] Therefore, I cannot agree with Ms. Havlikova's argument that, based on the evidence and arguments before the Officer, the "same criteria" are used under paragraph 105(1)(c) of the Czech *Criminal Code* to grant an expungement as under the CRA in Canada. Nor did the Officer fail to consider the significance of the evidence summarized above in concluding that the expungement of Mr. Istok's convictions in the Czech Republic should not be recognized in Canada for the purposes of paragraph 36(3)(b) of IRPA.

[51] As a result, I find the Officer analysis of whether Mr. Istok's expungement in the Czech Republic should be recognized in Canada to have been reasonable.

[52] Finally, I note that the parties disagreed at the hearing as to whether the Officer's findings were limited to the second branch of the *Saini* test, or whether conclusions were drawn on branches one and three as well. In my view, this debate is irrelevant as *Saini* sets out a conjunctive test. The Officer's clear findings under the second branch of the test were reasonable, and therefore fatal to Mr. Istok's case.

(5) Adequacy of the Officer's Reasons

[53] Ms. Havlikova submitted in her written materials, which she relied on by reference at the hearing, that the Officer failed to explain why the process of expungement under Czech criminal

law was not sufficiently similar to the process of granting a record suspension under the CRA in Canada. She contended that the Officer failed to provide meaningful or cogent reasons, including in the GCMS notes, to support the conclusion.

[54] There is simply no merit to this argument. As set out above, the Officer's GCMS notes are lengthy, detailed, and thorough. The relevant test was applied and each piece of evidence independently considered. I find that the standard set out in *Dunsmuir* and subsequently clarified in *Newfoundland Nurses* has been amply met — namely, the GCMS notes are intelligible, justified, and transparent, and I am able to understand the Officer's reasons, explanations, and rationale.

B. *The Officer's H&C Analysis*

(1) Standard of Review

[55] Ms. Havlikova submits that the Officer erred in law by failing to consider the best interests of her Canadian-born child in its H&C analysis. However, again, I am not persuaded that the issue raised by Ms. Havlikova warrants review on a correctness standard, and her counsel conceded same at the hearing (see, generally, *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]).

(2) Analysis under Review

[56] In his submissions to the Officer, Mr. Istok asked that he be exempted from the ordinary requirements of IRPA as a result of H&C considerations under subsection 25(1). Relying on

Kanthasamy, Mr. Istok submitted that an H&C analysis turns on an "assessment of hardship", and argued that it was clearly in the best interests of the couple's Canadian-born child for the family to reside in Canada. He indicated in his submissions that Ms. Havlikova had been found to be a Convention refugee from the Czech Republic, and that the family was currently living in the United Kingdom but having difficulty adjusting to life there as a result of "great prejudice against foreigners in general and Roma in particular". Mr. Istok referenced the "Brexit" vote, and suggested that the issue of immigration had played a large part in it.

[57] Although he did not reference it in his submissions dated September 29, 2015, Mr. Istok also provided a letter to the Visa Office dated January 27, 2015 from Dr. R. M. Gorczynski, a physician and professor in the Departments of Surgery and Immunology at the University of Toronto and Toronto Hospital. Dr. Gorczynski indicated in his letter that he had been Ms. Havlikova's physician for more than two years, that Ms. Havlikova's separation from Mr. Istok was causing "significant emotional distress for herself and her children", and that there was "no question that it [was] in the best interests of [the] family that they all be re-united in Canada".

[58] The Officer's H&C analysis is contained in the GCMS notes. The Officer began by summarizing Mr. Istok's submissions, including his claim that the family was having difficulty adjusting in the United Kingdom. However, the Officer observed that Mr. Istok had provided no specifics of the difficulties faced by the family there. The Officer noted the absence of any additional documentation evidencing that the family could not flourish in the United Kingdom, and observed that the United Kingdom is a country that shares many similarities with Canada.

Similarly, the Officer noted that Mr. Istok had provided no evidence that his family had been subject to unjust treatment in the United Kingdom as a result of their Roma ethnicity.

[59] With respect to the "Brexit" vote, the Officer found it inappropriate to speculate on whether the family would be required to leave the United Kingdom, but that such a possibility was not imminent. The Officer found that, as a spouse of a citizen of the European Union [EU], Ms. Havlikova could reside with Mr. Istok in in the EU without issue, and that there was at least one other predominately English-speaking country available to them, should they be required to leave the United Kingdom.

[60] Ultimately, the Officer concluded that even if Mr. Istok's child's best interests favoured living with both parents, Mr. Istok had not demonstrated sufficient H&C considerations to warrant an exemption under IRPA.

(3) Reasonableness of the Officer's Analysis

[61] In this application for judicial review, Ms. Havlikova contends that the Officer dealt summarily with Mr. Istok's request for H&C relief, and failed to specifically address the best interests of the couple's Canadian-born child. Ms. Havlikova submits that it is clearly in the best interests of her daughter that Mr. Istok reside with the family in Canada, her daughter's country of nationality. She relies on *Hawthorne v Canada (Minister of Citizenship and Immigration)*, [2003] 2 FC 555 (Federal Court of Canada – Appeal Division) [*Hawthorne*], in which Justice Décary held that a child's best interests typically favour non-removal of the parent (at para 5),

and that the officer must determine the degree of hardship that will be caused to the child by the parent's removal (at para 6).

[62] I am satisfied that the Officer's H&C analysis withstands scrutiny on a reasonableness review. As argued by the Respondent in this application, H&C relief is exceptional and not intended to be an alternative immigration stream (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15 [*Semana*]). I further agree with the Respondent that the onus was on Mr. Istok to provide sufficient evidence in support of his request for H&C relief (*Semana* at para 16). It is clear from the GCMS notes that each of Mr. Istok's arguments was appropriately considered. As recognized in *Hawthorne* and subsequent cases, the best interests of a child will usually favour remaining in Canada. In this case, Mr. Istok simply did not provide sufficient evidence that H&C relief was warranted.

IV. **Conclusion**

[63] This application for judicial review is dismissed. No questions for certification were argued, and I agree that none arise on the facts of this case.

JUDGMENT in IMM-5018-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and none arose.

3. There is no award as to costs.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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