Federal Court  Cour fédérale

**Date: 20111019**

**Docket: IMM-902-11**

**Citation: 2011 FC 1181**

**Toronto, Ontario, October 19, 2011**

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

**BETWEEN:**

**BONGO TRESOR BUTERWA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The Immigration and Refugee Board, Refugee Protection Division found that Mr. Bongo Tresor Buterwa is not a Convention refugee or a person in need of protection. For the reasons that follow, I find that the Board erred in failing to consider whether there were compelling reasons why Mr. Buterwa refused to avail himself of the protection of the country of his citizenship and will remit the matter for further consideration by the Board.

[2] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (hereafter IRPA) of the decision rendered by the panel member orally on January 28, 2011 and for which written reasons were provided on January 31, 2011.

[3] Mr. Buterwa is a citizen of the Democratic Republic of Congo (DRC) and of Tutsi ethnicity. When he was 8 years old he was rounded up with his family by the military following a coup. He witnessed the brutalization and rape of his mother. He was put in a prison camp where he was brutalized multiple times and raped. He was eventually released and fled to the Republic of Congo with his brother. He lived there without status for 10 years before coming to Canada to seek protection. What became of his parents is unknown.

[4] The member found the applicant to be a credible witness and believed his account of what had been alleged in support of the claim. The member was satisfied as to the subjective component of Mr. Buterwa's claim. Applying a forward-looking assessment, the member concluded that the situation for ethnic Tutsis, especially those in Kinshasa where the applicant spent his early childhood, had evolved to the point that there was no serious possibility of persecution on Convention grounds or personalized risk of harm to the applicant.

[5] The applicant has raised several issues with the Board's assessment. He contends that he was denied procedural fairness in that the Board failed to provide him with advance notice that the change of circumstances in the DRC was going to be raised and that the Board erred in law by failing to consider the "compelling reasons" exception set out in s.108(4) of the IRPA.

[6] While I doubt that notice is required with respect to changes in circumstances as the Board's assessment is forward looking, I do not consider it necessary to determine that question in this matter. I am satisfied that the application should succeed on the second ground.

[7] Paragraph 108 (1) (e) and subsection 108 (4) of the IRPA read as follows:

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| **108.** (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: | **108.** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants : |
| … | … |
| (*e*) the reasons for which the person sought refugee protection have ceased to exist. | *e*) les raisons qui lui ont fait demander l'asile n'existent plus. |
| … | … |
| (4) Paragraph (1)(*e*) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment. | (4) L'alinéa (1)*e*) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré. |

[8] This question concerns the proper interpretation of the IRPA and therefore invokes the correctness standard of review: *Decka v Canada (Minister of Citizenship & Immigration)*, 2005 FC

822 at para 5. Review of the content of the analysis, had it occurred, would have been on the reasonableness standard as it involves mixed questions of fact and law: *Suleiman v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125.

[9] The respondent contends that the panel member made no finding that the applicant had suffered "previous persecution, torture, treatment or punishment" and was thus not required to consider the exception. The respondent relies on the following passage from *Brovina v Canada (Minister of Citizenship and Immigration)* 2004 FC 635 at paragraph 5:

> … For the Board to embark on a compelling reasons analysis, it must first find that there was a valid refugee (or protected person) claim and that the reasons for the claim have ceased to exist (due to changed country conditions). It is only then that the Board should consider whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself under the protection of that state.

[10] At paragraphs 8-9, the Court in *Brovina* held that it was implicit from the Board's reasons in that case that it had found that the applicant had not experienced past persecution. In contrast to her son and daughter-in-law, who were both found to be Convention refugees, the applicant had not suffered from threats and violence. Hence it was correct for the Board to make a forward-looking analysis without considering the exception. *Brovina* does not stand for the proposition advanced by the respondent that the Board need not consider whether the exception should be applied in every case in which it does not make an express finding of past persecution.

[11] Here, there is nothing in the member's reasons that would support a finding that the Board did not accept that the applicant had experienced past persecution, as in *Brovina*. To the contrary, it is clear that the member accepted the applicant's testimony without reservation. That testimony was

capable of establishing that the applicant had been persecuted as a child in the DRC. The member side-stepped the question of past persecution and proceeded directly to review present conditions in the DRC. This did not, in my view, absolve the Board from its statutory obligation to consider whether the applicant had established compelling reasons why he should not be required to go back there. That obligation was simply ignored.

[12] I agree with the respondent that it was open to the Board to give little weight to the letter from an employee of the Canadian Centre for Victims of Torture stating that the applicant was undergoing counselling at the centre and was to be assessed by a psychologist. But that was an issue to be considered in determining whether the past persecution had reached the level of the standard set by the Federal Court of Appeal in *Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739 (CA) for the application of the exception. The Board did not consider the letter in that context but questioned, rather, whether it contributed anything to the forward-looking assessment.

[13] Psychological evidence would be important in determining whether repatriation to the DRC would cause the applicant such emotional suffering so as to constitute compelling reasons, considering all of the circumstances of the case and the gravity of the past persecution. Here there was a dispute at the hearing of the claim between the member and counsel for the applicant as to whether there had been sufficient time to obtain a proper psychological assessment. In my view, fairness would require that the applicant be permitted to submit such an assessment as fresh evidence before the matter is heard again.

**JUDGMENT**

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

1. the application is granted and the matter is remitted to be heard again by a differently constituted panel of the Refugee Protection Division in accordance with these reasons;

2. no questions are certified.

"Richard Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-902-11 |
| STYLE OF CAUSE: | *BONGO TRESOR BUTERWA* |
| | *and* |
| | *THE MINISTER OF CITIZENSHIP AND IMMIGRATION* |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 19, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MOSLEY J. |
| **DATED:** | OCTOBER 19, 2011 |

**APPEARANCES:**

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| Elyse Korman | FOR THE APPLICANT |
| Martin Anderson | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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