Federal Court  Cour fédérale

Date: 20161006

Docket: IMM-3296-15

Citation: 2016 FC 1119

Ottawa, Ontario, October 6, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CARMELO BRUZZESE

Applicant

and

MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS, and MINISTER OF CITIZENSHIP & IMMIGRATION

Respondents

JUDGMENT AND REASONS

[1] This application for judicial review challenges a decision of the Immigration Division of the Immigration and Refugee Board [the Board] by which the Applicant, Carmelo Bruzzese, was found inadmissible to Canada under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and ordered deported to Italy. The basis for the Board's

decision was its finding that Mr. Bruzzese was a member of an organized crime group, namely the Calabrian organization known as the "Ndrangheta".

I. Background

[2] Mr. Bruzzese is a citizen of Italy. He acquired Canadian permanent residency in 1974 and is married to a Canadian citizen. Between 1977 and 1990 Mr. Bruzzese mostly lived in Italy, returning on an occasional basis to Canada.

[3] In 2008, Mr. Bruzzese was prosecuted in Italy for being associated with a Sicilian criminal organization. He was ultimately acquitted of that charge. However, in 2010 a warrant for Mr. Bruzzese's arrest was issued by the Italian authorities alleging that he was wanted in relation to his alleged association with the Ndrangheta. That warrant made up a significant part of the Minister of Public Safety and Emergency Preparedness' case in the hearing before the Board. The English translation of the warrant came to 910 pages. It contained sixteen intercepted conversations referring to Mr. Bruzzese's association with the Ndrangheta, including several verbatim discussions. Those intercepts are summarized at pages 87 to 90 of the Board's decision. Other matters covered in the warrant included surveillance evidence depicting Mr. Bruzzese's attendance at meetings with other known members of the Ndrangheta. The Board characterized the evidence implicating Mr. Bruzzese in the following way:

> [345] In essence, then, the evidence does not depict a depthless or superficial affiliation with the 'Ndrangheta. It is rather revealing and discloses that Mr. Bruzzese is a high ranking member of the 'Ndrangheta, the Capo, managing the Grotteria Locale, and making the most important decisions.
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> [346] He participates in important events of the group, like attending meetings to receive updates, to maintain coordination

> and to understand the current state of the 'Ndrangheta, attending functions where ranks are conferred, and deliberating on the strategic steps to take to open new Locali or to set up control bodies. He fosters relationships with the other branches of the organization, and is involved in conflict resolution and mediation.
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> [347] Although Mr. Bruzzese testified that he was not a part of the 'Ndrangheta, that he did not know what it means, and that he did not know about its existence prior to his detention, only hearing about it from the Minister when he was detained, the Tribunal is satisfied that this is simply an expedient detachment for him.
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> [348] In reality, he possesses the requisite *mens rea* for membership. The evidence shows that he is part of the organizational structure of the 'Ndrangheta and knows of its criminal nature and criminal activities; at the very least, he must be deemed to know or imputed with that knowledge, given his leadership role in the organization, and the overwhelming criminal history of the group.
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> [Footnotes omitted.]

[4] The Board's reliance on the Italian arrest warrant was based in large measure on the testimony given by Major Giuseppe De Felice. Major De Felice is a high-ranking member of the Carabinieri. He has a law degree and considerable expertise in the workings of Italian organized crime. He was directly involved in the investigation of the Ndrangheta between 2008 and 2010, and, in that capacity, he was privy to the evidence that concerned Mr. Bruzzese.

[5] Major De Felice testified that in 2008 the Carabinieri obtained judicial authorization to intercept the communications referenced in the arrest warrant. He also described the surveillance that was applied to Mr. Bruzzese and to other persons of interest. The Board summarized the process that was followed for the judicial grant of the arrest warrant, describing it as "thorough", "circumspect", "well-considered", "insightful" and "reliable". On that basis the Board found the

warrant to be a trustworthy description of the Italian criminal case against Mr. Bruzzese and afforded the warrant "significant weight". In considering the contents of the warrant the Board drew the following conclusions:

> [335] That said, the common thread running through the intercepted conversations and the surveillance records is that they reasonably project Mr. Bruzzese as a central figure in the 'Ndrangheta ranks and at the centre of its operations. Although the length of time he has been in the group is rather unclear, the nature of his involvement and the degree of his establishment in the group is well established by evidence.
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> ...
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> [349] All of the information considered demonstrates that Mr. Bruzzese integrally belongs to the 'Ndrangheta. That connection would satisfy that "institutional link" or "knowing participation" in the group's activities required for a finding of membership, that was endorsed in Sinnajah v. Canada (M.C.I.). Consequently, the Tribunal is satisfied that Mr. Bruzzese unreservedly meets the broad and unrestricted test for membership in the organized crime group 'Ndrangheta.
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> [Footnotes omitted.]

II. Issues and Standard of Review

[6] Mr. Bruzzese argues that he was deprived of a fair hearing because the Board was biased and because some of its interlocutory rulings left him unable to challenge and test the case against him. In addition, Mr. Bruzzese contends that the Board erred by giving undue weight to certain evidence and by making an unreasonable determination of inadmissibility.

[7] Mr. Bruzzese contends that the Board deprived him of a fair hearing by refusing to order the production of the Italian wiretap recordings. He also argues that the Board breached the duty of fairness by compelling his testimony and by dismissing his motion to recuse in the face of

evidence of bias. He also asserts that the Board was unfair and made a jurisdictional error by refusing to entertain an argument that the inadmissibility case was, in reality, a disguised extradition (i.e. an abuse of process). Finally, Mr. Bruzzese complains that the Board unfairly made rulings without the benefit of counsel's submissions and limited counsel's ability to cross-examine the Minister's witnesses. All of these concerns, he says, are matters of jurisdiction or procedural fairness and subject to the standard of review of correctness.

[8] Given that the Board considered all of these issues and resolved them on their merits, I have serious reservations about whether correctness is the applicable standard of review. In its interlocutory rulings the Board was interpreting its home statute and applying its rules of procedure in the context of the record before it. In my view the Board is owed some deference in the exercise of its procedural jurisdiction subject, of course, to the caveat that where such a ruling renders the process unfair, the ultimate disposition is inherently unreasonable. Another way of asking the question is whether any of the Board's procedural rulings rendered the process unfair in the sense of depriving Mr. Bruzzese of the right to know and answer the case against him. If I am wrong about this, I am satisfied that the Board correctly decided these issues and afforded a fair hearing to Mr. Bruzzese.

[9] Mr. Bruzzese's evidence-based arguments are, of course, reviewable on the standard of reasonableness.

A. Did the Board err by compelling testimony from Mr. Bruzzese?

[10] Ms. Jackman argues that her client was prejudiced by being compelled to testify because his credibility was successfully impeached and then his evidence was used against him by the Board. Left to his own devices, Ms. Jackman says, Mr. Bruzzese would not have exposed himself to this risk.

[11] There is not much doubt that Mr. Bruzzese did himself no favours with some of the testimony he gave. For example, his evidence that he knew nothing about the Ndrangheta despite his established friendships with several of its high-ranking members was not believable. On several other issues, as the Board duly noted, Mr. Bruzzese was evasive or nonresponsive. The Board took particular note of Mr. Bruzzese's claim that, while he was a friend of the notorious Mafia leader, Vito Rizzuto, he knew nothing at all about Mr. Rizzuto's extensive criminal background. In the main, though, his evidence amounted only to a bare denial of the Italian criminal allegations.

[12] But whether Mr. Bruzzese's credibility was successfully impeached or not, the simple fact that he was required to testify against his interests before the Board is of no legal consequence. The very point of compelling testimony in an administrative process is to obtain relevant evidence. The process followed here is in the nature of an inquiry about admissibility, carrying no penal consequences. Any detention that follows a finding of inadmissibility will be limited to situations of perceived public danger or where a flight risk is established, and any such detention is subject to periodic administrative and judicial review.

[13] What the Board did here was in conformity with the law. Section 165 of the *IRPA* grants to the Board the powers and authority of a Commissioner appointed under Part I of the *Inquiries Act*, RSC 1985, c I-11. The Board may also do any other thing it considers necessary to provide a full and proper hearing. Section 4 of the *Inquiries Act* grants to a Commissioner the power to summons any witness and to compel the witness to testify under oath or affirmation. This statutory framework is sufficient to permit the Board to compel testimony from the subject of an admissibility hearing, at least to the extent that the predominant purpose is to advance a lawful, legitimate goal. This point was made in *Branch v British Columbia Securities Commission*, [1995] 2 SCR 3 at para 35, 123 DLR (4^{th}) 462:

> 35. Clearly, this purpose of the Act justifies inquiries of limited scope. The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally. An inquiry of this kind legitimately compels testimony as the Act is concerned with the furtherance of a goal which is of substantial public importance, namely, obtaining evidence to regulate the securities industry. Often such inquiries result in proceedings which are essentially of a civil nature. The inquiry is of the type permitted by our law as it serves an obvious social utility. Hence, the predominant purpose of the inquiry is to obtain the relevant evidence for the purpose of the instant proceedings, and <u>not</u> to incriminate Branch and Levitt. More specifically, there is nothing in the record at this stage to suggest that the purpose of the summonses in this case is to obtain incriminating evidence against Branch and Levitt. Both orders of the Commission and the summonses are in furtherance of the predominant purpose of the inquiry to which we refer above. The proposed testimony thus falls to be governed by the general rule applicable under the Charter, pursuant to which a witness is compelled to testify, yet receives evidentiary immunity in return: *S. (R.J.), supra*.

[14] In *Phillips v Nova Scotia*, [1995] 2 SCR 97, 124 DLR (4th) 129, the Court considered the issue of the compellability before a public inquiry of two persons who were simultaneously facing criminal charges. Both proceedings arose out of a coal mine explosion at the Westray Mine in Stellarton, Nova Scotia. The Court had no difficulty in holding that the two accused were compellable before the inquiry notwithstanding the potential for conflict between the two proceedings:

> 98 In oral argument before this Court, the Attorney General of Nova Scotia acknowledged the risks in proceeding immediately with a full inquiry. He nonetheless stated that his government considered the immediate resumption of the Inquiry to be of such overriding importance to the community that it is willing to accept the risk that the criminal prosecutions may be adversely affected or even stayed as a result of the Inquiry proceedings. The government is almost certainly better placed than the courts to assess the need for and value of the Inquiry. It is best able to calculate and weigh the risks and benefits to the public of proceeding with the Inquiry. In the absence of demonstrated misconduct on the part of government, such as a refusal to enforce the criminal law in a manner that amounts to a flagrant impropriety, courts should not interfere with the choice it has made.
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> 99 To put it another way, unless it can be shown that the government is acting in bad faith, prior restraint of government action in creating and proceeding with a public inquiry that is within its jurisdiction will be rare. There is no evidence of bad faith or of a refusal to enforce the criminal law in this case. The government of Nova Scotia has appreciated and considered the possibility that Gerald Phillips and Roger Parry may never be brought to trial, and there is nothing to indicate that its decision should be reviewed by this Court. If the Inquiry were to be held prior to the criminal trials by jury, it would be for the trial judge to determine the appropriate remedy for the breach of any *Charter* rights which the hearings might have occasioned.
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> 100 To summarize, there can be no doubt that the respondents Gerald Phillips and Roger Parry would be compellable witnesses before the public Inquiry. They clearly meet all the requirements set out in *S. (R.J.)* and in *Branch*. They are not being called to testify in order to demonstrate their criminal guilt. Rather, the predominant purpose of obtaining their evidence is to further the

> objectives of the Inquiry which are of very significant public importance central to the nature and effectiveness of the Inquiry.
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> 101 Nonetheless, although Phillips and Parry are compellable witnesses, there may be grounds for objecting to individual questions posed to them which might go beyond the purposes of the Inquiry. For the moment, however, the only prejudice which they stand to suffer relates to the use of evidence derived from their testimony. As indicated in *Branch*, this is not a sufficient ground for refusing to compel them.

[15] In this case, unlike *Branch* and *Phillips*, there was no collateral proceeding in Canada involving Mr. Bruzzese. Therefore, no ulterior purpose could be served by attempting to elicit incriminating testimony for use in some other proceeding.

[16] Mr. Bruzzese's reliance on the decision by Justice Eleanor Dawson in *Re Jaballah*, 2010 FC 224, [2011] 3 FCR 155 is misplaced. The statutory language that applies in security certificate cases and the consequences for the interested person are very different from those that apply here.

[17] In the context of a case like this, much of the relevant evidence will be known only to the interested person. To properly carry out its mandate the Board must have the means to compel testimony and to weigh it against other evidence. To allow a person like Mr. Bruzzese to avoid giving testimony would be to potentially frustrate the legitimate purposes of the Board's inquiry. The fact that Mr. Bruzzese was not believed by the Board is not a basis for concern. Indeed, the ability to test this evidence is the very rationale for compelling it in the first place.

[18] In finding Mr. Bruzzese to be compellable the Board rendered a thoughtful and comprehensive decision that, in my view, correctly resolved the issue before it (see Certified Tribunal Record [CTR], Vol 1, pp 135-158).

B. Did the Board Err by Declining to Order Further Production of Evidence?

[19] Mr. Bruzzese complains that the Board infringed the duty of fairness by failing to order the Minister to seek and, if successful, to produce the audio tapes of the wiretap intercepts that underpinned the Italian arrest warrant.

[20] I have no doubt that, in the context of an admissibility hearing like this one, the Minister has a duty of disclosure. Indeed, the Board did not hold otherwise, describing the obligation as follows:

> [311] In light of all the circumstances of this case, the Tribunal rendered an interlocutory decision essentially declining to endorse Mr. Bruzzese's expectation of fuller disclosure from the Minister. Whilst recognizing that the Minister is obligated to provide to Mr. Bruzzese adequate disclosure that makes clear the case to be met and the opportunity to respond, the Tribunal was satisfied that, in this matter, the case to be met had been amply made known to Mr. Bruzzese. The Tribunal did not consider the absence of full intercepts as somehow attenuating or compromising his ability to respond or as undermining the fairness of the proceedings to him.
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> [Footnotes omitted.]

[21] In *Canada v Harkat*, 2014 SCC 37, [2014] 2 SCR 33 [*Harkat*], the Court discussed the disclosure requirement in the context of a security certificate proceeding where only summaries of intercepted communications were available. The Court held that disclosure will be sufficient if

it enables the interested party to know and meet the case being asserted. Presumably, this also implies a duty of good faith in the sense that the government cannot knowingly withhold evidence that could assist the interested party. The Court's discussion about reliance on evidentiary summaries is particularly apt in this case:

> [96] Thus, the question here is whether the exclusion of the summaries is necessary to remedy the prejudice to Mr. Harkat's ability to know and meet the case against him, or to safeguard the integrity of the justice system. In my view, it is not.
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> [97] The disclosure of the summaries in an abridged version to Mr. Harkat and in an unredacted form to his special advocates was sufficient to prevent significant prejudice to Mr. Harkat's ability to know and meet the case against him. It is true, as the Federal Court of Appeal noted, that the destruction of the originals makes it impossible to ascertain with complete certainty whether the summaries contain errors or inaccuracies: para. 133. "An assessment of prejudice is problematic where, as in this case, the relevant information has been irretrievably lost": *R. v. Bero* (2000), 137 O.A.C. 336, at para. 49. However, the impact of the loss of evidence on trial fairness must be considered "in the context of the rest of the evidence and the position taken by the defence": *R. v. J.G.B.* (2001), 139 O.A.C. 341, at para. 38.
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> [98] The destruction of the original operational materials did not significantly prejudice Mr. Harkat's ability to know and meet the case against him. As Noël J. noted, reliable summaries of the original materials pertaining to the intercepted conversations were disclosed to Mr. Harkat. Mr. Harkat's position was to deny the very occurrence of most of those conversations rather than to challenge their specifics. And the content of the summaries is corroborated by the overall narrative of Mr. Harkat's life which emerged during the proceedings: 2010 FC 1243, at paras. 66-67.
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> [99] Moreover, I am satisfied that the admission of the summaries does not undermine the integrity of the justice system. While the destruction of CSIS operational materials was a serious breach of the duty to preserve evidence, it was not carried out for the purpose of deliberately defeating the Minister's obligation to disclose. It must also be recognized that, prior to this Court's holding in *Charkaoui II*, the existence and scope of CSIS's legal obligation to preserve operational materials had not been definitively settled by the courts. It cannot be said that CSIS's

> application of policy OPS-217 evidenced a systematic disregard for the law. Since the admission of the summaries would neither deny procedural fairness to Mr. Harkat nor undermine the integrity of the justice system, I conclude that Noël J. made no reviewable errors in refusing to exclude the impugned summaries of intercepted conversations.

[22] In *Harkat*, above, the Court also discussed the Minister's obligation to seek relevant evidence in the possession of foreign government agencies in the context of *ex parte* proceedings where candour and utmost good faith are required. The scope of this duty was said to be the following:

> [100] The special advocates argue that duties of candour and utmost good faith required the ministers to make extensive inquiries of foreign intelligence agencies for information and evidence regarding several alleged terrorists with whom they claim that Mr. Harkat had associated. They contend that the ministers failed to discharge these duties. The courts below found that the ministers made reasonable efforts to obtain information sought by the special advocates.
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> [101] In *Ruby*, this Court recognized that duties of candour and utmost good faith apply when a party relies upon evidence in *ex parte proceedings*: "The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld" (para. 27). The Federal Court added, in *Almrei (Re)*, 2009 FC 1263, [2011] 1 F.C.R. 163, at para. 500, that "[t]he duties of utmost good faith and candour imply that the party relying upon the presentation of *ex parte* evidence will conduct a thorough review of the information in its possession and make representations based on all of the information including that which is unfavourable to their case."
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> [102] The duties of candour and utmost good faith require an ongoing effort to update, throughout the proceedings, the information and evidence regarding the named person: see, for example, *Almrei*, 2009 FC 1263, at para. 500. The special advocates argue that, pursuant to these duties, the ministers must send detailed requests to foreign intelligence agencies. In their view, those requests must explain the context of security certificate hearings, the purposes for which the information will be used, and

> the consequences for the named person if the information is not provided.
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> [103] The position advocated by the special advocates is tantamount to requiring the ministers to conduct an investigation under the instructions of the special advocates. The ministers have no general obligation to provide disclosure of evidence or information that is beyond their control: *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 21; *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, at para. 2. With respect to evidence and information held by foreign intelligence agencies, the ministers' duty is to make reasonable efforts to obtain updates and provide disclosure. What constitutes reasonable efforts will turn on the facts of each case. In the present appeal, I agree with Noël J. that reasonable efforts were made by the ministers: see 2010 FC 1243, Annex "A", at paras. 6-7. The ministers sent letters of request to the relevant foreign intelligence agencies. The outcome of those requests may not have been satisfactory to the special advocates, but this fact alone is not enough to conclude that the efforts made by the ministers were insufficient.

[23] It seems to me that, in the context of an *inter partes* proceeding, the ability of the interested person to seek the requested disclosure from a third party (in this case from the Italian prosecuting authorities) is a factor the Board is entitled to consider in determining the limits of the Minister's corresponding obligation. Although the evidentiary record is not entirely clear about the opportunities open to Mr. Bruzzese to seek the recorded Italian intercepts, there was sufficient evidence to support the Board's conclusion that he had made no attempt to secure this evidence through his Italian criminal counsel. Indeed, his counsel testified that he had listened to the wiretaps and found the quality "not exactly the best" [see CTR, Vol 19, p 4135]. The obvious inference is that the recordings were accessible to Mr. Bruzzese but he elected not to obtain them for use before the Board. In this case the Board found that the Italian arrest warrant was inherently reliable and very detailed. The warrant was not solely based on intercepted communications; it also included considerable surveillance evidence confirming Mr. Bruzzese's

attendance at Ndrangheta meetings. The summaries of the intercepts were also sufficiently particularized to permit a meaningful challenge.

[24] Mr. Bruzzese's stated purpose for seeking the intercepted recordings was simply to test the fidelity of the summaries contained in the Italian arrest warrant. He presented nothing to cast doubt on the accuracy of the summaries. In the face of the Board's thorough assessment of the reliability of the content of the Italian arrest warrant, the idea that there could be inconsistencies is largely a matter of speculation.

[25] This interlocutory decision by the Board involved the weighing of evidence and the exercise of discretion. The Board understood that a proper balance was required. In these circumstances exhaustive disclosure by the Minister was not necessary for Mr. Bruzzese to answer the Minister's case. The Minister is not, after all, required to search out every scrap of relevant evidence that may be in the possession of a foreign agency, particularly where what is produced is inherently reliable. The Board's decision was reasonable, fair and correct in law. Mr. Bruzzese was not deprived of a meaningful opportunity to answer the case against him.

[26] I would add to this that the record before me indicates in a number of places that counsel for the Minister made an effort to obtain the intercepted recordings but was unsuccessful. Although better evidence on this point could have been produced, I am satisfied that, to the extent that a higher duty of disclosure was required, it was fulfilled in accordance with the principles expressed in *Harkat*, above.

C. Was a Reasonable Apprehension of Bias made out?

[27] Mr. Bruzzese alleges that a reasonable apprehension of bias arises from the Board Member's previous involvement with his case. It is argued that, by hearing and dismissing an earlier detention review, the Member had essentially made up her mind about Mr. Bruzzese's credibility and would not be seen to be objective in presiding over his admissibility hearing. On an earlier motion Justice Yvan Roy declined to entertain this argument and dismissed the motion.

[28] The test for a finding of bias is not a matter of controversy. The law was thoroughly canvassed by the Supreme Court in *Yukon Francophone School Board, Education Area #23 v Yukon (AG)*, 2015 SCC 25, [2015] 2 SCR 282, and captured in the following passage:

> [20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
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> > ... what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]
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> (Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting))
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> [21] This test – what would a reasonable, informed person think – has consistently been endorsed and clarified by this Court: e.g., *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at para. 60; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 199; *Miglin v. Miglin*, [2003] 1 S.C.R. 303, at para. 26; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 46; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, per Major J., at para. 31, per L'Heureux-Dubé and Mclachlin JJ., at para. 111, per Cory J.; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267, at para. 45; *R.*

> *v. Lippé*, [1991] 2 S.C.R. 114, at p. 143; *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 684.
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> [22] The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality. In Valente, Le Dain J. connected the dots from an absence of bias to impartiality, concluding "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" and "connotes absence of bias, actual or perceived": p. 685. Impartiality and the absence of the bias have developed as both legal and ethical requirements. Judges are required - and expected - to approach every case with impartiality and an open mind: see S. (R.D.), at para. 49, per L'Heureux-Dubé and Mclachlin JJ.
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> [23] In Wewaykum, this Court confirmed the requirement of impartial adjudication for maintaining public confidence in the ability of a judge to be genuinely open:
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> > ... public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.
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> > The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. [Emphasis in original; paras. 57-58.]

[29] There is, of course, no presumption of bias by the mere fact that an adjudicator sits in judgment over related matters: see *Arthur v Canada*, [1993] 1 FC 94, [1992] FCJ No 1000 (CA) at paras 15-17. Something more is required to establish a predisposition as to the issue to be decided in the second proceeding. This necessarily involves a consideration of the relationship or overlap of issues between the two proceedings and a review of the procedural record to identify any indications of prejudgment.

[30] There is very little in common between a detention review and an admissibility hearing. The first is concerned with two issues: does a person represent a future danger to the public or a flight risk. Although these issues may relate to a person's history of criminality, no final determination of culpability is required. In contrast, an admissibility hearing turns on findings of past associations or conduct, and not about predictions for future behaviour.

[31] A review of the detention review decision concerning Mr. Bruzzese rendered by the Board Member indicates that, in maintaining his detention, heavy reliance was placed on the prior detention review decisions. The Member held that nothing substantive had been put to her "that would warrant a departure from those decisions". The Member explicitly acknowledged that the pending admissibility hearing had "yet to be determined". Indeed, the Member clearly distanced herself from the pending admissibility process with the following disclaimer:

> I will not be making any findings about your guilt or complicity and I will not be making findings that you are inadmissible to Canada, that is a matter for the admissibility hearing.

[32] In summary, there is nothing about the Member's detention review decision that suggests a negative predisposition. The Member was careful not to trench into admissibility considerations and made no definitive pronouncements about Mr. Bruzzese's credibility. On the record before me there is nothing to support a finding of a reasonable apprehension of bias or to suggest that the Board had closed its mind to the issues it was required to adjudicate based on its earlier involvement.

[33] Ms. Jackman also argues that a reasonable apprehension of bias arises in this case based on the Board's ostensible imbalanced treatment and overt hostility to Mr. Bruzzese's case and to his counsel.

[34] A review of the transcript does disclose that the hearing before the Board was challenging for everyone involved and, at times, unduly acrimonious. However, there is nothing in the record that comes close to suggesting the Board had closed its mind to the issues it was required to determine. Although a sense of frustration is evident on occasion from the Board, it is mostly the result of some provocation from counsel. For example, at one point counsel accused the Board of "not doing anything all day". This drew a pointed but not inappropriate rebuke from the Board (see CTR, Vol 16, p 3422). In many other instances the Board found it necessary to control interruptions by counsel or to deal with other troubling behavior. The situation was of sufficient concern that the Board appropriately admonished counsel at length during the hearing on June 26, 2014 (see CTR, Vol 15, pp 3130-3132). Another example of an inappropriate exchange by counsel can be found at pages 3008 to 3011 of Volume 15 of the CTR, from the transcript of June 24, 2014.

[35] If Mr. Bruzzese is aggrieved by the Board's treatment of his counsel's objections and the frequency with which they were rejected, it is assuredly not because of a lack of even-handedness. Objections are only as strong as the facts and the law will permit. On those occasions where objections were dismissed by the Board there was ample basis for the rulings.

[36] The Board's rejection of Mr. Bruzzese's bias argument is laid out at pages 10 to 18 of its decision, the conclusion of which is set out below:

> [51] Rendering decisions that are unfavourable to a party is not evidence of bias. Neither is exercising proper judicial control to bring decorum, structure and boundaries to the Admissibility Hearing evidence of bias. In fact, if decision-makers were to make unjustified rulings, or gloss over inappropriate circumstances, or somehow endorse improper conduct before a hearing could be said to be free from bias, that would gravely undermine the dispensation of justice and strengthen improper actions by Counsel who can then selectively eliminate presiding Members by their conduct.
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> [52] This Tribunal agrees with Mad. Justice Boyd's insightful statements made in Middlekamp v. Fraser Valley Real Estate Board, when she was similarly plagued by the allegation of bias and recusal:
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> > I cannot accede to such an argument since to do so, in my view, would establish a very dangerous precedent in these courts. In effect, I would be inviting disgruntled, unhappy litigants or their counsel to make whatever allegations they wished, in support of an application for the judge to disqualify himself or herself. If the allegations failed to provide a proper foundation for a finding of bias or a reasonable apprehension of bias, the litigant could nevertheless take comfort in the knowledge that the mere making of the allegations would, by their very nature, taint the process and force the disqualification of the judge. This very danger was recognized by Chief Justice McEachern, C.J.B.C. in G.W.L. Properties Limited v. W.R. Grace & Company of Canada Ltd. (1992 CanLII 934 (BC CA), 74 BCLR (2d) 283 (BCCA) where he said:
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> > > "A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. That, however, does not permit the court to yield to every

> angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to ensure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price…"
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> It is tempting for a trial judge, in circumstances such as those at hand, to yield to the disgruntled litigant or to his or her counsel. But to do so would be to ignore and abandon the rights of the many litigants in this action, who have thus far participated in almost four months of trial. My public duly is to sit and continue to sit fairly and impartially and see this trial to its conclusion. I am confident that can be done in an atmosphere of goodwill, of fairness and impartiality.
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> [53] Indeed, this Tribunal has no stake in the outcome of these proceedings, but recognizes, and is mindful of, the important rights at stake for the parties involved. It has therefore only been interested in discharging its duty by fairly and impartially adjudicating this matter and making a determination that is reasonably supported by the evidence.
>
> [54] In conclusion, the Tribunal has not aligned itself with either party in any way. The record simply does not provide a foundation for a reasonably informed person well apprised of the context and circumstances to have a reasonable apprehension of bias.
>
> [Footnotes omitted.]

[37] On my review of the transcript the Board's handling of the matters before it was beyond reproach and no arguable case for bias was made out before the Board or before me.

D. Did the Board Err by Declining to Entertain an Abuse of Process Argument?

[38] Mr. Bruzzese complains that the Board unfairly deprived him of the opportunity to attack the Respondent Minister of Public Safety and Emergency Preparedness' (the Respondent)

motives for convening an admissibility hearing. According to this argument the Respondent's conduct amounted to an abuse of process intended to get around the inability to extradite. This was an argument previously raised in this Court in support of a production order in the context of a judicial review seeking declaratory relief and a prohibition order. Justice Peter Annis declined to order production because the underlying allegation of bad faith lacked an "air of reality". The same can be said of the argument now advanced to me: it amounts only to speculation.

[39] In an interlocutory decision rendered on January 22, 2015, the Board declined to entertain Mr. Bruzzese's abuse of process challenge on the basis of an absence of jurisdiction. After a thorough review of the case law, including some contradictory views, the Board concluded as follows:

> [37] Respectfully, this Tribunal prefers the Rogan trajectory, and considers the abuse of process and disguised extradition argument to be irrelevant to the present Admissibility Hearing; it in fact constitutes an indirect or collateral challenge or attack on the validity or legality of the report and referral, and this Tribunal finds that it has no jurisdiction to look behind the report and the referral.
>
> [38] As indicated above, subsection 162(1) of the IRPA explicitly empowers the Immigration Division to consider all questions of law, including questions of jurisdiction. Although wide-ranging, this power is nonetheless circumscribed where the legislator has, either expressly or impliedly, removed that power from the Tribunal.
>
> [39] In the context of Admissibility Hearings, section 45 of the IRPA, by its wording, limits the powers of the Immigration Division. It reads as follows:
>
> > **45.** The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions

> (*a*) recognize the right to enter Canada of a Canadian citizen within the meaning of the *Citizenship Act*, a person registered as an Indian under the *Indian Act* or a permanent resident;
>
> (*b*) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;
>
> (*c*) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or
>
> (*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

[40] The options, therefore, are quite limited, and, practically, the only action that can be taken by the Immigration Division at the conclusion of an Admissibility Hearing has to be under paragraph 45(d) of the IRPA. There is no other way for the Immigration Division to conclude or terminate the process. This provision does not grant the Immigration Division the authority to make determinations about the bona fides of processes undertaken by the CBSA, culminating in the referral of reports to the Division.

[41] Whilst the Immigration Division does retain some focused authority to prevent an abuse of its own process within its own proceedings and context in order to ensure that Charter rights and procedural rights are respected, its role cannot be overextended to include the scrutiny and evaluation of steps taken under processes which are peripheral to, or outside, its processes.

[42] The Admissibility Hearing, then, is not the forum to delve into considerations and assessments relating to how the report came to be, and/or what animated the report and the referral. It is simply the mechanism to determine admissibility or inadmissibility based on the totality of the evidence and, where justified and required, the mode to issue a removal order. This result, the Federal Court concludes, is a foregone conclusion.

…

> [56] In conclusion, this Tribunal rules that it does not have the authority to consider the abuse of process through disguised extradition argument raised by Mr. Bruzzese. To consider that argument would be to entertain a matter which has nothing to do with the central question of whether or not Mr. Bruzzese is inadmissible to Canada under subsection 37(1) of the IRPA. Additionally, to do so would be tantamount to questioning the validity or legality of the inadmissibility report and the related referral, something that the Immigration Division does not have the authority to do.
>
> [Emphasis in original.] [Footnotes omitted.]

[40] The Board's reasons for declining to open up the hearing to an attack on the Respondent's motives are thoughtful, thorough and in accordance with the weight of the applicable jurisprudence. Although the Board framed the issue as jurisdictional this is still an issue that involves the interpretation of the *IRPA*. It is, therefore, a ruling that is entitled to deference. The fact that Mr. Bruzzese can point to some competing legal authority does not render the decision unreasonable. If I am wrong about the requirement for paying deference to this finding, I am also satisfied that the Board was correct in ruling as it did.

E. Did the Board Unfairly Restrict Mr. Bruzzese's Right to Answer the Case Against Him?

[41] Mr. Bruzzese's written argument asserts that the Board made interlocutory rulings without the benefit of hearing his counsel and limited his counsel's right of cross-examination. It is, however, noteworthy that these allegations are unsupported by any cited examples. My review of the record validates the Minister's point that Mr. Bruzzese had the benefit of ample due process in the form of 280 pages of cross-examination of Major De Felice spread over five

sittings and with Mr. Bruzzese's friendly cross-examination taking up some 59 pages in the transcript.

F. Was the Board's decision unreasonable?

[42] Mr. Bruzzese contends that the Board erred in its attribution of weight to the evidence by accepting, at face value, Major De Felice's assurances of reliability. There is nothing in the decision to support this argument. Indeed, the Board's reasons reflect a sensitive, thoughtful and careful assessment of the evidence leading to the reasonable conclusion that Mr. Bruzzese was a member of the Ndrangheta and that the Minister had met the requisite burden of proof.

[43] For the foregoing reasons this application for judicial review is dismissed.

[44] Counsel for Mr. Bruzzese will have five days to propose a certified question and counsel for the Minister will have three days to respond.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3296-15
STYLE OF CAUSE:	CARMELO BRUZZESE v MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS, and MINISTER OF CITIZENSHIP & IMMIGRATION
PLACE OF HEARING:	TORONTO, ON
DATE OF HEARING:	APRIL 25, 2016
JUDGMENT AND REASONS:	BARNES J.
DATED:	OCTOBER 6, 2016

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