KEYWORD: Guideline B; Guideline C

DIGEST: While it is important for the Judge to consider the foreign country in which the foreign contact is located in Guideline B cases, the "heightened risk" language in Disqualifying Condition 7(a) addresses an applicant's foreign contacts, not necessarily the foreign country involved. Depending upon the particular circumstances presented in a case, one or more foreign contacts located in even a foreign country that is friendly to the United States may create a "heightened risk" of foreign exploitation, inducement, manipulation, pressure, or coercion. In the past, we noted with approval a Judge's analysis that concluded "heightened risk" is not a high standard to meet. In the present case, Applicant graduated from a British military academy, held a British security clearance, and retired as a British military officer. Favorable decision remanded.

CASENO: 17-03026.a1

DATE: 01/16/2019

DATE: January 16, 2019

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Anthony J. Kuhn, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 20, 2017, DOD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 12, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge erred by concluding that the Government failed to establish a case of heightened risk under Disqualifying Condition 7(a)[1] and whether the Judge's decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline C have not been raised as an issue on appeal. For the following reasons, the Board remands the Judge's favorable security clearance determination.

The Judge's Pertinent Findings of Fact

Applicant, who is in mid-50s, was born in the United Kingdom (U.K.), graduated from a military academy, held a British security clearance, and retired as a British military officer after more than 20 years of service. While in the British military, he served as an exchange officer with the U.S. military for about two years and had a limited DoD security clearance. After retiring from the military, Applicant and his family came to the United States. Since then, he has been consistently employed by Federal contractors. He, his wife, and his children became U.S. citizens in 2013 and 2014, and all of them reside in the United States.

Under Guideline B, "[t]he SOR alleges that Applicant served as an officer in the British [military] . . . ; that he expected to inherit a share of his mother's property . . . ; that he maintained contact with 'many foreign nationals' due to his U.K. citizenship and [British military service]; that he has friends . . . who are serving in the British Military; and that he possessed a security clearance from the U.K. . . ." Decision at 6-7.

Applicant's father is deceased. His mother, who suffers from dementia, and his two brothers are citizens and residents of the U.K. His mother's home was sold to help pay her assisted-living expenses. Applicant anticipates that he and his two brothers will split some cash when their mother passes away. One of his brothers works at an educational institution and the other is self-employed as a used car salesman. Applicant and his wife have about $220,000 equity in their home in the United States.

Applicant has infrequent contact with about nine retired British military officers and one high-ranking officer who is still on active duty. He maintains close contact with a retired British

[1] Directive, Encl. 2, App. A ¶ 7(a) states "contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion[.]"

brigadier general who was his classmate. He maintains contact with a few former U.K. friends and neighbors. He maintains occasional contact with a retired officer who had served as his second in command.

The Judge's Analysis

Department Counsel declined to submit a request for administrative notice of facts pertaining to the U.K. While an administrative judge may *sua sponte* take administrative notice after providing the parties notice, a judge is neither obligated to gather information nor authorized to act as an investigator for either party. The Judge concluded it would be inappropriate from him to assume the role as assistant department counsel to obtain evidence to contradict Applicant's SOR answer or testimony. The Judge further stated:

> AG ¶¶ 7(a) and 7(f)[2] require a finding of a "heightened risk." Department Counsel declined to concede that "heightened risk" was not in issue. (Tr. 14.) However, notwithstanding the admonition in AG ¶ 6 that "[a]ssessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located," Department Counsel submitted no evidence, by way of administrative notice, stipulation of fact, or otherwise, to show that Applicant's family members, friends, former colleagues, or financial interests in the United Kingdom subject him to a "heightened risk" of foreign inducement, exploitation, manipulation, pressure, or coercion. I have considered whether Applicant's status as a retired British [military] officer and his continued association with active and retired members of his [unit], standing alone, is sufficient to show the required "heightened risk." However, Department Counsel presented no evidence that the government of the United Kingdom, the U.K. intelligence services, or U.K.-based industries use retired military officers to obtain classified, sensitive, or proprietary information. He presented no evidence of attempts by the United Kingdom or U.S.-based industries to circumvent U.S. restrictions on export of military or dual-use technology. Hence, I conclude that these disqualifying conditions are not established. To conclude otherwise would amount to speculation not supported by evidence.[3]

The Judge also stated that mitigating conditions applied even if a potential disqualifying condition were established. Applicant's family members in the U.K. are not in positions likely to cause a conflict of interest. Moreover, Applicant has developed deep and longstanding relationships and loyalties to the United States. Whatever inheritance he may receive is outweighed by his financial interests in the United States.

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[2] Directive, Encl. 2, App. A ¶ 7(f) states "substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest[.]"

[3] Decision at 8-9.

Discussion

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)).

"[N]o one has a right to a security clearance. . . The general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). The Appeal Board may remand or reverse a Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.2 and E3.1.32.3.

Department Counsel contends the Judge erred by concluding the Government failed to establish a "heightened risk" under Disqualifying Condition 7(a). Department Counsel's arguments center around the Judge's analysis in the paragraph quoted above. Department Counsel persuasively argues that the Judge overemphasized the lack of a request for an administrative notice of facts pertaining to the U.K.,[4] failed to consider appropriately the nature of the foreign contacts

[4] Department Counsel takes exception to the Judge's comments that noted the absence of a request for administrative notice of facts pertaining to the U.K. Specially, Department Counsel stated, "the Administrative Judge asserted that it was incumbent upon the Government to seek administrative notice of country conditions in all Guideline B cases, regardless of the country involved." Appeal Brief at 6. The Judge, however, did not make that specific assertion. We view the Judge's comments as an expression of frustration about the lack of evidence on an issue he was obliged to consider. Guideline B provides that a Judge should consider the country in which the foreign contacts or interests are located. Directive, Encl. 2, App. A ¶ 6. The Judge noted the absence of evidence about the country concerned created a "vacuum." Decision at 8. Without evidence submitted by either party that sets forth facts about the country concerned -- regardless of whether it is hostile, neutral, or friendly to the United States -- the Judge is left in a quandary about what facts he should consider about that country. While the Judge acknowledged that he could *sua sponte* take administrative notice of facts about the country, he also noted the Directive does not authorize him to act as an investigator for either party and concluded it would be inappropriate for him to assume the role of assistant department counsel. This is error.

The Board has previously noted that an accurate and current assessment of the geopolitical situation and intelligence/security profile of the country vis-a-vis the United States is "crucial" in Guideline B cases. *See, e.g.*, ISCR Case No. 07-14508 at 4 (App. Bd. Oct. 22, 2008). This requirement holds true even if one supposes that the ultimate conclusion regarding the country's conduct and circumstances would not likely exacerbate the risks and vulnerabilities inherent in an applicant's foreign contacts. (Remember, also, that the risks attendant to the contacts may be heightened regardless of the country's identity.) The parties could have introduced pertinent evidence for official notice or through the ordinary course of the hearing. Failing that, the Judge could have notified the parties of official documents he planned to notice regarding the country. He could have given the parties an opportunity to respond, which, of course, would have delayed the processing of the case. The Judge cannot, however, fail to do part of the required analysis because he is frustrated by the choices made by the litigants. Furthermore, a Judge may not summarily consider the country concerned, conclude it does not have a profile of any security significance (*e.g.*, it is a friendly nation to the United States, close ally, strategic partner, etc.), and decide not to make an assessment of it in the decision. Such a situation is further exacerbated when the Judge is aware that the pertinent evidence is not in the record. As we have previously stated, the Judge's decision must be written in a manner that allows the parties and the Board to discern what findings the Judge is making and what conclusions he or she is reaching. *See, e.g.*, ISCR Case No. 16-02536 at 5 (App. Bd. Aug. 23, 2018).

involved in the case, and improperly placed the burden on the Government to prove matters not required under Guideline B.

While it is important for the Judge to consider the foreign country in which the foreign contact is located in Guideline B cases, the "heightened risk" language in Disqualifying Condition 7(a) addresses an applicant's foreign contacts, not necessarily the foreign country involved. *See, e.g.*, ISCR Case No. 08-0448 at 4 (App. Bd. Apr. 23, 2009) and ISCR Case No. 08-09211 at 3-4 (App. Bd. Jan. 21, 2010). Depending upon the particular circumstances presented in a case, one or more foreign contacts located in even a foreign country that is friendly to the United States may create a "heightened risk" of foreign exploitation, inducement, manipulation, pressure, or coercion.

In the past, we noted with approval a Judge's analysis that concluded "heightened risk" is not a high standard to meet. *See, e.g.*, ISCR Case No. 12-05839 at 4 (App. Bd. Jul. 11, 2013) ("Heightened risk" is a "risk [that] is greater than the normal risk inherent in having a family member living under a foreign government.").[5] In the present case, Applicant graduated from a British military academy, held a British security clearance, and retired as a British military officer. He testified:

> I have 20 years-odd service in the British [military] which, again, is close-knit, like any military organization, a close-knit community.
>
> And so, I retain friendship with probably about ten, if that, people. Not that regularly.[6]

He noted that most of those friends are now retired from the British military because of their age. Tr. at 44. One of his retired friends went to work for the British government. Tr. at 57. He was not sure whether some of them are still working in the defense industry or had left such jobs. *Id*. The

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In this regard, it also merits noting that we have previously cautioned Judges against reliance on overly simplistic distinctions between "friendly" and "hostile" nations when adjudicating cases under Guideline B. We have recognized that an assumption that a foreign nation does not pose a serious security risk under Guideline B because it is friendly to the United States ignores the historical reality that (a) relations between nations can shift, sometimes dramatically and unexpectedly; (b) even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security; and (c) not all cases of espionage against the United States have involved nations that were hostile to the United States. Any analysis that seeks to rely in part on distinctions between "friendly" and "hostile" nations must articulate a rational explanation for why the distinction is relevant when Guideline B fails to articulate such a distinction. *See, e.g.*, ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002).

[5] The Judge in present case has used a similar "heightened risk" analysis standard in the past. *See, e.g.*, ISCR Case No. 17-03623 at 7 (A.J. Jul. 27, 2018) ("AG ¶¶ 7(a), (e), and (f) all require substantial evidence of a 'heightened risk.' The 'heightened risk' required to raise one of these disqualifying conditions is a relatively low standard. 'Heightened risk' denotes a risk greater than the normal risk inherent in living under a foreign government.")

[6] Tr. at 43.

Judge also found Applicant maintains occasional contact with a retired officer who had served as his second in command and maintains close contact with a classmate who is a retired British brigadier general. Most importantly, however, one of Applicant's friends, a high-ranking British officer, remains on active duty. While Applicant and the high-ranking officer do not keep in regular contact, they served together in the same regiment and were neighbors at one point. Furthermore, Applicant testified that, in the recent past, he attended a three-day meeting in which he was "representing the U.S. government and my program management office" and the high-ranking officer was also in attendance. He and the high-ranking officer talked on that occasion, but the substance of their discussions are not reflected in the record. Tr. at 44-45 and 57-58. In the decision, the Judge did not make findings of fact that Applicant and his high-ranking British friend were both involved in defense matters of mutual interest to the United States and the U.K. and they had interacted with each other at an event involving such matters.[7] When viewed in its entirety, the record supports a determination that the Judge erred in concluding that Applicant's foreign contacts do not create a "heightened risk" of foreign exploitation, inducement, manipulation, pressure, or coercion.

Department Counsel also challenges the Judge's apparent conclusion that disqualifying conditions were not established because the Government presented no evidence that the U.K., its intelligence services, or its industries use retired military officers to obtain U.S. classified, sensitive, or proprietary information. Department Counsel's challenge has merit. The Judge's conclusion in this case has the practical effect of requiring Department Counsel prove affirmatively that the U.K. specifically target U.S. citizens to gather protected information. The Directive does not require the Government to prove affirmatively that a country specifically targets U.S. citizens in order to raise Guideline B security concerns. *See, e.g.*, ISCR Case No. 08-09211 at 3. *See also*, our discussion in Footnote 4 of this Decision.

Although the Judge concluded that none of the Guideline B disqualifying conditions were established, he conducted an "even-if-they-were-established" mitigation analysis and concluded certain mitigating conditions applied. His mitigation analysis, however, is flawed because it does not address Applicant's contacts with retired and active duty British military officers. From our review of the record, the Judge's errors identified above are harmful and warrant corrective action. Accordingly, we conclude the best resolution of this case is to remand the case to the Judge for

[7] In this case, the Judge also concluded that Disqualifying Condition 7(b) was not established. Decision at 9. However, Applicant's testimony about his high-ranking British friend presents a classic conflict of interest situation under Disqualifying Condition 7(b), which states, "connections to a foreign person, group, government, or country that create **a potential conflict of interest** between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology[.]" [Emphasis added.] As a general proposition, individuals must avoid situations in which their personal interests may conflict with their responsibilities to protect U.S. classified or sensitive information. When a U.S. security clearance holder and his or her foreign friend represent their respective countries in a matter of interest to both countries, there exists, at the very least, **a potential conflict of interest** under Disqualifying Condition 7(b). In this case, the record is silent about what, if any, action Applicant took to disclose this apparent conflict of interest to appropriate U.S. authorities and what, if any, other precautionary measures may have been taken.

correction of the errors and for further processing consistent with the Directive. On remand, the Judge is permitted to reopen the record on the motion of either party.

Order

The Decision is **REMANDED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board