KEYWORD: Guideline B

DIGEST: The Appeal Board has recognized that an applicant's ties, either directly or through a family member, to persons of high rank in a foreign government or military are of particular concern, insofar as it is foreseeable that through an association with such persons the applicant could come to the attention of those interested in acquiring U.S. protected information. The decision is reversed.

CASE NO: 19-01688.a1

DATE: 08/10/2020

DATE: August 10, 2020

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Ross Hyams, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 15, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 24, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Pamela C. Benson granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in applying the Guideline B mitigating conditions and whether the Judge's favorable decision was unsupported by the weight of the record evidence and, therefore, was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant was born in Sudan. He is married with children. He attended college in a former Soviet republic and has earned post-graduate degrees. He has worked for a Middle Eastern government. When a genocide occurred in Darfur, he became an activist informing the international community about the needless slaughter of innocent people. He became a target of the Sudanese Government, which had him arrested and detained on multiple occasions in another country. Approximately ten years ago, he entered the United States as a refugee. He and his wife became U.S. citizens about five years ago. Since then, he has returned to Sudan to visit family despite the risk.

Applicant's sibling, sibling-in-law, half-sibling, and cousin are citizens and residents of Sudan. His sibling and sibling-in-law held high-level positions in the Sudanese Government before a military coup in 2019. Applicant admitted that his sibling could be in danger for previous involvement with the Sudanese Government. His half-sibling lives in a dangerous part of the country. He communicates with his half-sibling sporadically, and they met on one of his most recent trips there. He has weekly communication with his cousin who is a law enforcement officer.

In 1993, Sudan was designated a State Sponsor of Terrorism. In 2002, the U.S. Embassy in Sudan reopened after being closed for about six years. In 2003 and 2011, Sudan experienced conflicts that displaced millions of people and resulted in thousands of deaths. Although fighting has largely subsided, low-level violence continues largely due to the weak rule of law. Since 2007, United Nations and African Union forces have jointly conducted peacekeeping operations in Darfur, and those forces have been the targets of armed groups. In 2019, a military coup overthrew the republican government. A national state of emergency is in effect across Sudan. Human rights abuses, such as arbitrary killings and detentions, have been reported. The U.S. State Department has issued a "do not travel" warning for Sudan.

The Judge's Analysis

Noting that Applicant maintains frequent and regular contact with his family members in Sudan, particularly his sibling and cousin, the Judge found that Disqualifying Conditions 7(a) and

(b)[1] apply to his circumstances. In her mitigation analysis, the Judge concluded that Applicant had strong and longstanding ties to the United States. Even though his sibling and sibling-in-law may be held accountable in Sudan for their involvement with the previous regime, Applicant would support such an inquiry. All of Applicant's assets are in the United States. Applicant's oath of allegiance to the United States and his candor throughout the security clearance process are sufficient to mitigate the security concerns raised by his family contacts in Sudan.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

In foreign influence cases, the nature of the foreign government involved, its human rights record, and the presence of terrorist activity are important considerations that provide context for the other record evidence and must be brought to bear on the Judge's ultimate conclusions in the case. *See*, *e.g.*, ISCR Case No. 16-04056 at 3-4 (App. Bd. Sep. 6, 2018) and Directive, Encl. 2, App. A ¶ 6. Department Counsel notes the Judge stated, "an applicant with familial or other connections to a hostile foreign country faces a heavy burden in mitigating security concerns raised by such foreign ties." Decision at 8. Department Counsel points out the burden placed on an applicant who has close family members in a hostile country is a "very heavy burden" and argues the Judge did not apply that standard. Much of Department Counsel's argument is based on the conditions that exist in Sudan. In ISCR Case No. 19-01689 at 3 (App. Bd. Jun. 8, 2020), we stated that application of the "very heavy burden" mitigation standard is not based on the conditions in a foreign country but

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[1] Directive, Encl. 2, App. A ¶¶ 7(a) and (b): "contact . . . with a foreign family member . . . 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;" and "connections to a foreign person . . . 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[.]"

instead on whether that country has interests or policies that are adverse to U.S. interests or that it has taken actions that threaten U.S. national security. We recognize Sudanese Government has recently changed and conclude that a determination of whether the "very heavy burden" applies in this case is not needed to resolve the issues before us.

Department Counsel contends that the Judge failed to apply properly the mitigating conditions. He argues the Judge's analysis "was generic and did not specifically discuss individual facts as they might apply to a particular Mitigating Condition." Appeal Brief at 12. We find this argument to be persuasive. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 18-01482 at 2 (App. Bd. Sep. 6, 2019). A Judge also has wide latitude in writing a decision and is not expected to discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 16-02243 at 3 (App. Bd. Nov. 30, 2018). However, a Judge cannot ignore, disregard, or fail to discuss record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. *See, e.g.*, ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017).

Department Counsel argues that Applicant's foreign family members' activities and status were important factors to be considered in the mitigation analysis. We agree. Applicant's sibling and sibling-in-law served in high-level governmental positions in the former regime. Applicant acknowledged that these relatives "may be held accountable for their past involvement with the corrupt [former] government." Decision at 8. In the past, we have recognized that an applicant's ties, either directly or through a family member, to persons of high rank in a foreign government or military are of particular concern, insofar as it is foreseeable that through an association with such persons the applicant could come to the attention of those interested in acquiring U.S. protected information. *See, e.g.*, ISCR Case No. 17-01979 at 5 (App. Bd. Jul. 31, 2019)(citing other cases involving applicants with high-level foreign governmental relatives or contacts). Given the facts in this case, it is foreseeable that Applicant's sibling and sibling-in-law could become a means through which a foreign person, group, or government could attempt to exert pressure on him. Department Counsel persuasively argues that there is no way gauge how Applicant would react to threats of violence against his family members. The Judge erred in failing to analyze the security significance arising from the former status and activities of these family members.

Department Counsel challenges the Judge conclusions that Applicant's "closest family, life, and assets are in the United States" and he has "strong and longstanding ties to the United States." Decision at 8. Department Counsel effectively argues the Judge erred in failing to analyze evidence as well as the lack of evidence that undermines those conclusions, such as:

a. Applicant had been in the United States for about 10 years and a citizen for about five years. Decision at 3.

b. Applicant's wife and minor children are temporarily living in an African country with her family. His children will attend school there. He indicated his plan was for them to return in the summer of 2020 unless he got a job outside the United States for a year or two because to leave them alone in the United States was not an option. Tr. at 72-75, 77-79.

c. No evidence was offered establishing that Applicant has other significant relationships or ties in the United States. Appeal Brief at 16.

d. During a background interview, Applicant stated that he did not intend to renounce his Sudanese citizenship because he hoped to help the Sudanese people in an ambassador-type role and assist with positive change in that country. GE 4 at 14. At the hearing, he testified that he still intended to serve is such a role and stated, "[b]ut Sudan, of course, is my motherland country. So, I have the moral obligation to defend the rights, especially the Darfurian people who have been oppressed for a long time." Tr. at 59.

e. Applicant does not own a house in the United States. While he has a bank account in the United States, he did not disclose its balance. Besides working for ride-sharing companies, he has had part-time employment in the United States. He describes his financial situation as "I'm not that very steady." Tr. at 13, 71-72.

f. At one point, Applicant testified that it was a possibility he could retire in Sudan as a U.S. citizen promoting human rights. Tr. at 70-71. At another point, he stated that he did not believe retiring in Sudan would be an option. Tr. at 77.

Department Counsel challenges the Judge's conclusion that Applicant's contact or communication with foreign citizens is so casual and infrequent that there is little likelihood it could create foreign influence or exploitation. Department Counsel argues that the Judge contradicted this conclusion when she earlier stated, "that Applicant did not rebut the legal presumption of close familial bonds or ties to his family in Sudan." Appeal Brief at 18, quoting from Decision at 7. Department Counsel convincingly argues that the evidence of Applicant's frequent and regular contact with his sibling and cousin, as well as the presumptive ties of affection or obligation to his sibling-in-law, was sufficient to refute the challenged conclusion.

Applicant has been a target of the former regime in Sudan. In the past, the Sudanese Government had him arrested and detained in another country. While Applicant has traveled to Sudan in recent years, he did not travel there in 2019 to visit a dying parent because he would be in danger. On that occasion, family members advised him that they did not "want to have two tragedies at the same time." Tr. at 85. Given that this event occurred recently, it is reasonable to conclude that danger has not ceased. Moreover, when that danger may cease is unknown. There is no evidence in the record to confirm that Applicant would not travel there while that danger continues to exist. The Judge failed to address the obvious risk of foreign exploitation that would arise if Applicant traveled to Sudan before the danger ceased.

Considering the security concerns present in this case, the record evidence is not sufficient to demonstrate that Applicant's relationships and loyalties in the U.S. would necessarily outweigh his sense of loyalty or obligation to his relatives in Sudan. Application of the guidelines is not a comment on an applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family

member. As stated above, any doubt concerning security clearance eligibility must be resolved in favor of the national security.

Based on our review of the record, we conclude that the Judge's decision is arbitrary and capricious because it fails to articulate a rational connection between the facts found and the choice made, fails to consider important aspects of the case, and runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard. The decision is not sustainable.

Order

The Decision is **REVERSED**.

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