

DATE: April 21, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0356

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Jonathan C. Green, Esq.

Administrative Judge Paul J. Mason issued a decision, dated December 12, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board reverses the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated July 1, 1997. The SOR was based on Criterion C (Foreign Preference) and alleged Applicant planned to maintain foreign citizenship and planned to vote in future foreign elections.

A hearing was held on September 11, 1997. The Administrative Judge subsequently issued a written decision, dated December 12, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issue⁽¹⁾

Applicant raises several arguments in support of his contention that the Administrative Judge's decision should not be affirmed: (a) the Administrative Judge's adverse credibility determination should not be sustained; (b) the Judge's findings are not supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record; (c) the Judge's decision is based, in part, on conduct neither charged in the SOR nor proven by Department Counsel; (d) the Judge failed to completely list Foreign Preference Mitigating Guideline 2 or acknowledge its obvious applicability to Applicant's case; (e) the Administrative Judge's decision is against the manifest weight of the record evidence; and (f) the Judge's adverse decision is arbitrary

and capricious when compared to a decision by a different Judge in another Criterion C case. For the reasons that follow, the Board concludes Applicant has met his burden of demonstrating error that warrants reversal.⁽²⁾

Applicant contends the Administrative Judge's negative assessment of his credibility should not be sustained because the Judge failed to properly consider Applicant's "lack of command of the nuances of the English language," the effect of Applicant's cultural origins on his use of language, and Applicant's nervousness at the hearing, when he was appearing *pro se*. An Administrative Judge's credibility determination is entitled to deference on appeal. Directive, Additional Procedural Guidance, Item 32.a. A party seeking to challenge a Judge's credibility determination has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at p. 3. However, the deference owed to credibility determinations does not immunize them from review, nor does it preclude the Board from concluding that a challenged credibility determination cannot be sustained. *See, e.g.*, DOHA Case No. 96-0316 (February 24, 1997) at p. 3; ISCR Case No. 95-0178 (March 29, 1996) at pp. 2-3.

In this case, the record evidence shows that Applicant became a naturalized citizen in 1991, at the age of 26. Considering that English was not Applicant's native language and the fact that he did not come to the United States until 1984, his claim of not being entirely fluent in the nuances of the English language is both natural and understandable. A person who learns a new language later in life reasonably can be expected to have less fluency in the new language and its nuances than a person who grew up learning that language. In assessing an applicant's credibility, some allowance must be made for communication problems (including awkward use of words and phrases and apparent inconsistencies) that may arise when English is not an applicant's native language. A review of the written record and the hearing transcript persuades the Board that neither Department Counsel nor the Judge gave due consideration to the fact that English was not Applicant's native language.

More significantly, the Administrative Judge's decision seems to turn a great deal on his negative assessment of Applicant's credibility. Credibility determinations are important in assessing the testimony of an applicant or a witness. However, credibility determinations, whether positive or negative, are not a substitute for record evidence. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at pp. 3-4. Accordingly, the Judge erred when he found, based on his negative assessment of Applicant's credibility, that Applicant engaged in some forms of conduct that Applicant denied he had engaged in. There was no record evidence that Applicant engaged in such conduct and the Judge's negative credibility determination could not substitute for *some* record evidence that Applicant did the things the Judge found he did. *See* DISCR Case No. 87-1983 (August 29, 1989) at p. 3 ("An Examiner's disbelief of an applicant's denials, standing alone, is not a legally acceptable substitute for some credible evidence in support of the SOR allegations.") (emphasis in original).

Applicant persuasively argues that the Administrative Judge erred by basing his decision, in part, on conduct neither charged in the SOR nor proven by Department Counsel. The Judge's citation of Foreign Preference Disqualifying Guidelines 4,⁽³⁾ 6,⁽⁴⁾ and 7⁽⁵⁾ in his decision was clearly erroneous because the SOR did not allege Applicant engaged in any conduct that fell under those guidelines and there is no record evidence to support the application of those guidelines. Although an SOR is not to be measured against the strict standards of a criminal indictment, ISCR Case No. 95-0817 (February 21, 1997) at pp. 7-8, a Judge cannot base an adverse security clearance decision on uncharged conduct. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at p. 3 n.1. If Department Counsel or the Judge believes that an SOR should be amended to reflect security-significant information developed after issuance of the SOR, they can take steps to do so consistent with the requirements of Item 17 of the Additional Procedural Guidance. And, in any event, the absence of record evidence to support application of those disqualifying guidelines seriously undermines the Judge's analysis.

Applicant persuasively argues that the Administrative Judge erred with respect to his application of Foreign Preference Mitigating Guideline 2.⁽⁶⁾ In the decision, the Judge listed Foreign Preference Mitigating Guideline 2, but failed to include the following crucial language: ". . . occurred *before* obtaining United States citizenship" (emphasis added). A reading of the decision as a whole persuades the Board that this error was not a mere typographical one. The tenor of the Judge's decision seems to ignore the significance of the record evidence that shows Applicant used a passport of his native country (Country X) and voted in its elections *before* becoming a naturalized U.S. citizen in 1991. Until Applicant became a naturalized U.S. citizen, his conduct could not, as a matter of law, constitute "the exercise of dual citizenship" (Foreign Preference Disqualifying Guideline 1). Indeed, until Applicant became a naturalized U.S. citizen, it would be

appropriate for him to use a passport issued by Country X and vote in its elections. Furthermore, until Applicant became a naturalized U.S. citizen, his conduct could not reasonably be construed as "indicat[ing] a preference for a foreign country over the United States" within the meaning of Criterion C (Foreign Preference). To hold otherwise could result in an untenable situation where a naturalized U.S. citizen would be ineligible for a security clearance solely because of conduct lawfully and properly undertaken prior to becoming a naturalized U.S. citizen. And, in any event, the federal government cannot reasonably expect a foreign national to get and use a U.S. passport or vote in U.S. elections prior to becoming a naturalized U.S. citizen.

The Board notes the SOR alleges Applicant plans to maintain foreign citizenship. Absent evidence of the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the scope of Criterion C.

The Board finds merit in Applicant's argument that the Administrative Judge's decision is against the weight of the evidence. On appeal, the Board must consider not only whether there is evidence supporting the Judge's findings, but also whether there is record evidence that fairly detracts from the weight of the evidence supporting those findings. Directive, Additional Procedural Guidance, Item 32.a. *See, e.g.*, ISCR Case No. 96-0360 (September 25, 1997) at p. 2.⁽⁷⁾ Using that analysis here, the Board concludes the Judge's findings and conclusions about Applicant's intention to prefer the interests of Country X over those of the United States cannot be sustained on the basis of the record evidence as a whole.

As discussed earlier, Applicant's use of a Country X passport and voting in Country X elections occurred *before* he became a naturalized citizen. Furthermore, when Applicant became a naturalized citizen, he had to take an oath in which he swore allegiance to the United States and renounced allegiance to any foreign leader, state or sovereignty. 8 U.S.C. Section 1448 (Oath of renunciation and allegiance).⁽⁸⁾ Department Counsel presented no evidence that Applicant's oath was taken as a sham or that Applicant engaged in any conduct after becoming a naturalized U.S. citizen that was contrary to that oath. In addition, Applicant presented evidence (Applicant Exhibit A) that he had petitioned the government of Country X, asking it to formally recognize his renunciation of Country X citizenship, which he had by virtue of being born in Country X (a step which appears to be more than is required of him). There is no record evidence that indicates or suggests Applicant's petition was a sham. Furthermore, the Judge erred by finding Applicant did not express a willingness to renounce his Country X citizenship until he filed his petition (Applicant Exhibit A) with the government of Country X. In making that finding, the Judge failed to take into account the oath Applicant took to become a naturalized U.S. citizen, an oath which involved Applicant's renunciation of allegiance to any foreign leader, state or sovereignty. Applicant's taking of that oath is evidence of his intent to renounce the citizenship of Country X. *Compare Richards v. Secretary of State*, 752 F.2d 1413, 1421 (9th Cir. 1985)(in case involving a U.S. citizen who signed Canadian Declaration of Renunciation and Oath of Allegiance, which had language that parallels U.S. oath of renunciation and allegiance, the court noted that U.S. citizen's voluntary act of signing the Canadian Declaration demonstrated his intent to renounce U.S. citizenship). Such evidence supports application of Foreign Preference itigating Guideline 4 ("[I]ndividual has expressed a willingness to renounce dual citizenship").

The Board does not find persuasive Department Counsel's appeal arguments concerning the significance of Applicant's possession and use of a Country X passport. It is entirely understandable for Applicant to get a Country X passport while he was a citizen of Country X and not yet a naturalized U.S. citizen. The fact that Applicant did so while he was located in the United States is of no legal or security significance. The relevant fact is that, at the time Applicant obtained the passport, he was a citizen of Country X and not yet a naturalized U.S. citizen. Furthermore, under the particular facts of this case, Applicant's possession of the passport does not have the significance Department Counsel asserts. Foreign Preference Disqualifying Guideline 2 refers to "possession and/or use of a foreign passport." However, possession of a foreign passport cannot be considered merely in isolation. *See ISCR Case No. 97-0289* (January 22, 1998) at p. 3 (Adjudicative Guidelines should not be considered or construed in isolation). Rather, possession of a foreign passport should be analyzed in light of all the facts and circumstances, with the adjudicator needing to consider whether the facts and circumstances of possession reasonably indicate the applicant is demonstrating a foreign preference within the meaning of Criterion C. *See also* Directive, Section F.3 and Adjudicative Guidelines (general factors for adjudicators to consider). The record evidence shows that Applicant was issued a Country X passport in 1989 and that the passport expired automatically five years later (Applicant Exhibit A). There is no record evidence that Applicant used the Country X passport after he became a naturalized U.S. citizen in 1991, nor any record evidence that

Applicant renewed or tried to renew the Country X passport after he became a naturalized U.S. citizen. Considering the record evidence as a whole, the particular facts and circumstances of Applicant's possession of the Country X passport do not have the security significance attributed to it by Department Counsel.⁽⁹⁾

There remains the matter of Applicant's statement in April 1997 that he would like to exercise his right to vote in future Country X elections as "[his] contribution to democracy in [Country X]" (Government Exhibit 2). As discussed earlier, the record evidence shows Applicant voted in Country X elections before he became a naturalized U.S. citizen (Foreign Preference Mitigating Guideline 2). Furthermore, the Judge specifically found voting in those elections was sanctioned by the United States (Foreign Preference Mitigating Guideline 3). In addition, there is no record evidence Applicant has voted in Country X elections after he became a naturalized U.S. citizen in 1991. Moreover, Applicant has affirmatively stated he no longer intends to vote in Country X elections (which is supported by his testimony that he cannot vote in Country X elections because his Country X passport expired). Finally, in light of the Judge's finding that the United States sanctioned voting in Country X elections, even if Applicant wanted to vote in future Country X elections, such an intention would not currently warrant an adverse security clearance decision if voting in such elections were sanctioned by the U.S. government in the future (Foreign Preference Mitigating Guideline 3).

Furthermore, as Applicant points out, the record evidence supports application of all four Foreign Preference Mitigating Guidelines. Although the mere presence or absence of Adjudicative Guidelines is not solely dispositive of a case, the applicability of multiple mitigating guidelines cannot be light dismissed. The Administrative Judge noted the applicability of all the Foreign Preference Mitigating Guidelines, but failed to articulate a sustainable basis for his decision to give them little weight.

One of Department Counsel's appeal arguments warrants discussion. Department Counsel urges the Board to adopt a narrow interpretation of Foreign Preference Mitigating Guideline 1 ("[D]ual citizenship is based solely on parents' citizenship or birth in a foreign country"). Specifically, Department Counsel cites a passage from an Administrative Judge decision in ISCR Case No. 97-0172 (August 13, 1997) as persuasive authority for the proposition that Foreign Preference Mitigating Guideline 1 should be applied only if the applicant has never actively engaged in the exercise of privileges of foreign citizenship. The Board finds neither the cited passage nor Department Counsel's argument persuasive. Literal acceptance of the cited passage or Department Counsel's argument would result in the untenable situation that every naturalized U.S. citizen who ever exercised the privileges of his or her native country prior to becoming a naturalized U.S. citizen would be *ipso facto* deemed a security risk. Such an interpretation does not comport with the meaning or intent of Criterion C and would ignore the plain meaning of Foreign Preference Mitigating Guideline 2. No Adjudicative Guideline should be interpreted or construed in a manner that is inconsistent with the meaning or intent of a pertinent criterion. Nor should an Adjudicative Guideline be interpreted or construed in a manner that renders another Adjudicative Guideline meaningless or superfluous. *See* ISCR Case No. 97-0289 (January 22, 1998) at p. 3.

Considering the record evidence as a whole, the totality of the Administrative Judge's identified errors warrants reversal.

Conclusion

Applicant has met his burden on appeal of demonstrating harmful error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's December 12, 1997 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant has submitted a document that post-dates the hearing. That document constitutes new evidence, which the Appeal Board cannot consider. Directive, Additional Procedural Guidance, Item 29.
2. Applicant's last argument can be readily addressed and dismissed. Just as a trial judge is not legally required to follow a decision by a colleague in another case, the Administrative Judge in this case was not bound to follow the decision of his colleague in another Criterion C case. Nor is the Administrative Judge decision cited by Applicant binding on the Board. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 2. For purposes of deciding this appeal, the Board need not address or comment on the decision cited by Applicant.
3. "[A]ccepting educational, medical, or other benefits . . . from a foreign country."
4. "[U]sing foreign citizenship to protect financial or business interests in another country."
5. "[S]eeking or holding political office in the foreign country."
6. "[I]ndicators of possible foreign preference . . . occurred before obtaining United States citizenship."
7. Whether there is substantial evidence to support an Administrative Judge's findings is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 97-0202 (January 20, 1998) at p. 4 n.2. The Board will not disturb a Judge's weighing of the evidence unless it is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at pp. 5-6.
8. At the hearing, Applicant attempted to offer evidence about taking this oath, but the Administrative Judge sustained Department Counsel's objection to it. The Board fails to see any legitimate basis for Department Counsel's objection or the Judge's ruling in this case. It is proper for administrative notice to be taken of pertinent federal statutes which either of the parties raises. Furthermore, given the evidence that Applicant became a naturalized citizen (Government Exhibit 3), there is a rebuttable presumption that Applicant was not allowed to become a naturalized U.S. citizen until he took the oath required by federal law. Apart from this presumption, Applicant testified that he took the oath.
9. Department Counsel's argument ignores some practical or innocent reasons why an applicant might keep possession of a foreign passport that was obtained before the applicant became a naturalized U.S. citizen: keeping it for sentimental reasons, to have a record of his former citizenship, to have a record of foreign travel that occurred before naturalization, or to have proof of legal entry into the United States. As indicated elsewhere in this decision, the particular facts and circumstances of each case must be considered before a decision is made as to the possible security significance of an applicant's actions or situation.