

DATE: May 26, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0331

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Joseph Testan issued a decision, dated December 11, 1998, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge improperly used a favorable credibility determination as a substitute for record evidence, and reached conclusions not supported by the record evidence; (2) whether the Administrative Judge failed to properly weigh the evidence of Applicant's foreign preference against the absence of mitigating evidence; and (3) whether the Administrative Judge's favorable 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 April 30, 1998. The SOR was based on Criterion C (Foreign Preference) and Criterion B (Foreign Influence).

A hearing was held on September 16, 1998. The Administrative Judge subsequently issued a written decision in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Administrative Judge's Findings and Conclusions

Applicant, a 34-year-old man, was born in the United States. At age eight, Applicant moved to a foreign country (FC) with his mother. ⁽¹⁾ In 1992, at age twenty-eight, Applicant applied for and was granted FC citizenship. Applicant did this to become eligible for a prestigious postdoctoral fellowship that was available only to citizens of certain countries (including FC).

Applicant also got an FC passport at the time he was granted FC citizenship. About five times between 1992 and 1997, Applicant traveled to different countries, using his FC passport on those occasions for convenience. Prior to learning that his possession of an FC passport posed a problem for him with respect to possession of a security clearance, Applicant planned on renewing his FC passport. However, Applicant now does not know what he is going to do about renewing his FC passport.

In 1996 or 1997, Applicant voted in an FC election. He does not intend to vote in future FC elections. Although Applicant is registered to vote in the United States, he has not done so yet. He plans to vote in the United States in the future.

Applicant accepted a job offer from a United States defense contractor in early 1997. Applicant moved from FC to the United States in May 1997. When Applicant moved to the United States, his mother remained in FC and his girlfriend (an FC citizen) lived in his FC home. When moving to the United States, Applicant was unsure whether he would remain here and "was keeping his options open." Since then, Applicant's mother passed away, Applicant broke up with his FC girlfriend, and Applicant married a United States citizen. He now intends to settle down and remain in the United States.

Applicant still owns a home in FC; he has about \$100,000 in equity in that home and keeps it as an investment. Applicant maintains a bank account in FC that he uses to service the home as rental property. The current balance of that bank account is approximately \$1,000.

Applicant has an aunt and two cousins, as well as a number of close friends, who are citizens and residents of FC. There is no evidence that any of these individuals are connected with the government of FC. Applicant's grandfather and sister live in the United States.

Applicants' second level supervisor testified that Applicant is the type of person who would handle classified information appropriately.

Applicants' relationship with relatives and close friends in FC do not leave him vulnerable to coercion, exploitation, or pressure. Standing alone, these relationships do not render Applicant an unacceptable security risk.

Although Applicant is reluctant to renounce his FC citizenship or sell his FC property, those connections with FC do not make him vulnerable to coercion, exploitation, or pressure, and they do not indicate a preference for FC over the United States. Applicant's receipt of educational benefits from FC⁽²⁾

and his participation in FC elections occurred before he moved to the United States, and therefore, they do not accurately reflect his current allegiance or intentions. Applicant is likely to remain in the United States because his mother passed away, he broke up with his FC girlfriend, and he married a United States citizen.

Appeal Issues⁽³⁾

1. Whether the Administrative Judge improperly used a favorable credibility determination as a substitute for record evidence, and reached conclusions not supported by the record evidence. Department Counsel makes three arguments in support of this appeal issue: (a) the Administrative Judge improperly used a credibility determination by accepting Applicant's testimony concerning his financial and other ties to FC and the United States even though Applicant did not offer independent evidence of his financial interests; (b) the Administrative Judge erred by finding Applicant was credible despite the fact Applicant was unable to testify he would renounce his FC citizenship or his FC passport; and (c) the Administrative Judge erred by relying on Applicant's testimony to conclude Applicant's family members and friends in FC did not constitute an unacceptable security risk.

Improper use of credibility determination. Department Counsel's first and third arguments conflate an insufficiency of the evidence argument with an argument that the Administrative Judge impermissibly used a credibility determination in lieu of record evidence. Even if the Board were persuaded that Applicant's testimony is insufficient, in light of the record as a whole, to support the Judge's findings in this case (Directive, Additional Procedural Guidance, Item 32.a.),

such a conclusion would not mean the Judge impermissibly relied on a credibility determination as a substitute for record evidence. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 3. Accordingly, it is untenable for Department Counsel to argue that the Judge acted improperly merely because the Judge happened to find Applicant's testimony was credible.

The absence of corroborating evidence is a factor that an Administrative Judge should consider when weighing the record evidence. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 4 ("[T]he Judge must consider the record as a whole and use common sense (Directive, Section F.3.) in evaluating the absence of corroborating evidence."). However, Department Counsel fails to articulate how it was prejudiced in this case by the fact that Applicant did not provide corroborating documentation concerning his financial interests in FC. *Compare* ISCR Case No. 98-0419 (April 30, 1999) at pp. 4-5 (Judge's failure to take into account applicant's failure to provide corroborating evidence about his financial interests contributed to Judge's erroneous application of Foreign Influence Mitigating Condition 5).

Department Counsel also asserts the record evidence is insufficient to support the Administrative Judge's conclusion that Applicant's family members and friends in FC do not constitute an unacceptable security risk. This argument has two flaws. First, it is based in part on Department Counsel's fallacious argument that the Judge cannot rely on Applicant's testimony without corroborating evidence. Second, given the language of Criterion B (Directive, Enclosure 2 at pages 2-6 and 2-7), the Judge was not compelled to find a security problem existed merely because Applicant had family ties and friends in FC. A Judge has to consider the evidence as a whole to reach a reasoned decision as to whether the particular facts and circumstances of family ties and friendships in a foreign country raise security concerns within the meaning of Criterion B. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5. ⁽⁴⁾

Department Counsel's argument fails to demonstrate the Judge erred to the extent it seeks application of a *per se* rule concerning family ties and friends in a foreign country that is not required by Criterion B. However, Department Counsel's argument has merit to the extent it questions the sustainability of the Judge's conclusion in light of the record evidence. Specifically, the Judge's conclusion is problematic to the extent he considered the security significance of Applicant's family ties and friends in FC "by itself." As will be discussed later in this decision, such a piecemeal analysis is not appropriate in these cases.

Applicant's credibility. Department Counsel's second argument is groundless. The fact that Applicant expressed a reluctance to renounce his FC citizenship or give up his FC passport (Hearing Transcript at pp. 49-53) does not diminish his credibility as a witness. As will be discussed later, Applicant's reluctance to renounce his FC citizenship or his FC passport has security significance. However, Applicant's reluctance does not demonstrate his testimony was not credible.

2. Whether the Administrative Judge failed to properly weigh the evidence of Applicant's foreign preference against the absence of mitigating evidence. Department Counsel makes two arguments in support of this contention: (a) the Administrative Judge failed to properly weigh the evidence of Applicant's connections with FC against minimal evidence of his connections with the United States; and (b) the Administrative Judge erred by focusing solely on Applicant's changed circumstances regarding the United States.

(a) Department Counsel's first argument overlaps with some of its arguments made in support of the third appeal issue. It will be considered in conjunction with those other arguments later in this decision.

(b) A review of the decision shows that the Administrative Judge's evaluation of Applicant's changed circumstances since he moved to the United States was important to the Judge's analysis of the case. However, merely because the Judge gave great weight to Applicant's changed circumstances it does not follow that he totally ignored other aspects of the case. Indeed, a fair reading of the decision shows the Judge did not focus solely on Applicant's changed circumstances. Accordingly, this argument by Department Counsel lacks merit.

3. Whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. In support of this contention, Department Counsel argues: (a) the Administrative Judge failed to apply Adjudicative Guideline factors regarding Applicant's motivation and likelihood of recurrence; (b) the Administrative Judge erred by impermissibly imposing a burden of proof on Department Counsel that improperly allowed Applicant to avoid his burden of

demonstrating extenuation or mitigation; (c) the Administrative Judge erred by concluding Applicant's ties to FC were not significant, and by giving more weight to Applicant's ties to the United States than his ties to FC; and (d) the Administrative Judge erred by finding it is clearly consistent with the national interest to grant or continue a security clearance for Applicant because Applicant expressed no preference for the United States. For the reasons that follow, the Board concludes Department Counsel's arguments have mixed merit.

(a) Applicant's motivation and the likelihood that he would continue his conduct are factors which the Administrative Judge had to consider. *See* Directive, Sections F.3.d. and F.3.f.; Adjudicative Guidelines, Enclosure 2 at page 2-2. A reading of the decision persuades the Board that the Judge took into account Applicant's motivations for his conduct and considered the likelihood that Applicant would continue to engage in the conduct that gave rise to the SOR in this case. Department Counsel's argument is flawed because it conflates an improper weighing of relevant factors argument with an argument that the Judge failed to consider pertinent factors. Even if the Board were to conclude that the Judge weighed the relevant factors in an arbitrary and capricious manner, such a conclusion would not mean the Judge failed to consider those factors.

(b) Given Applicant's admissions and the evidence presented by Department Counsel, the burden shifted to Applicant to present evidence of extenuation, mitigation, or changed circumstances sufficient to warrant a conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for him. Directive, Additional Procedural Guidance, Item 15. Nothing in the decision persuades the Board that the Administrative Judge improperly allowed Applicant to avoid his burden of presenting evidence of extenuation, mitigation, or changed circumstances. To the contrary, the Judge recognized Applicant's burden when he stated "I conclude that applicant has presented convincing evidence" (Decision at p. 3). Even though the Judge's favorable conclusions are not sustainable, the Judge did not fail to recognize Applicant had a burden under Additional Procedural Guidance Item 15.⁽⁵⁾

Accordingly, Department Counsel's argument on this point lacks merit.

(c) Department Counsel's third and fourth arguments overlap and will be discussed together. For the reasons that follow, the Board concludes the Administrative Judge's favorable conclusions are arbitrary and capricious.

An Administrative Judge's decision can be arbitrary or capricious if: 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. 97-0435 (July 14, 1998) at p. 3. A Judge's decision can be contrary to law if it fails to comply with pertinent provisions of the Directive or is contrary to applicable legal principles. The Judge's favorable decision suffers from several of these defects.

The Administrative Judge erred in his analysis of Applicant's ties with FC in three significant ways. First, the Judge's analysis is faulty because it ignored or gave little weight to the significant fact that Applicant, a United States citizen by birth, voluntarily sought and obtained FC citizenship and an FC passport in 1992 (when he was 28 years old)⁽⁶⁾

for his personal convenience, and the further fact that Applicant freely exercised the rights and privileges of an FC citizen between 1992 and 1997. A person who voluntarily obtains the citizenship of another country is taking an action that is fraught with serious implications for the person's allegiance, duties and obligations. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 8. Second, the Judge erred by discounting the security significance of Applicant's conduct merely because it occurred before he moved to the United States. There is no rational basis for the Judge to discount the security significance of Applicant's voluntary assumption and active exercise of FC citizenship merely because he later moved to the United States. Applicant's decision to move to the United States in 1997 to obtain a job with a defense contractor does not significantly reduce the security concerns raised by his voluntary acquisition and exercise of FC citizenship during the previous several years.⁽⁷⁾

Third, the Judge erred by focusing on Applicant's stated intention to remain in the United States and discounting the security significance of: Applicant's retention of FC citizenship and an FC passport; Applicant's reluctance to renounce his FC citizenship or to give up his FC passport;⁽⁸⁾

and Applicant's maintenance of a significant financial interest in FC. Applicant's decision to remain in the United States does not extenuate or mitigate his desire to maintain the rights and privileges of FC citizenship, which also entails his acceptance of the duties and obligations associated with FC citizenship regardless of where he resides.

Applicant argues that his behavior is legal and therefore is not a security problem. Even if an applicant chooses to engage in conduct or place himself or herself in a situation that is legally available, the government is not precluded from deciding whether the applicant's choice has security significance. *See, e.g., Gayer v. Schlesinger*, 490 F.2d 740, 752-54 (D.C. Cir. 1973)(government entitled to deny security clearance to applicant who refused to provide information based on claim of privacy); *Clifford v. Shultz*, 413 F.2d 868 (9th Cir. 1969)(government could suspend applicant's security clearance based on his refusal to answer questions based on claim of constitutional privilege), *cert. denied*, 396 U.S. 962 (1969); ISCR Case No. 98-0349 (February 3, 1999) at p. 3 (neither filing for bankruptcy nor discharge of debts in bankruptcy precludes consideration of security significance of applicant's financial problems). Therefore, although Applicant has the right to decide whether to relinquish his FC citizenship (and the rights and privileges associated with FC citizenship), his failure (as of the hearing) to decide whether to relinquish his FC citizenship has security significance that cannot be ignored. *See, e.g., ISCR Case No. 98-0419* (April 30, 1999) at p. 8 (noting exercise of dual citizenship has security implications). Department Counsel persuasively argues that Applicant's reluctance to renounce his FC citizenship and relinquish his FC passport indicates an ambivalence about his preference between the United States and FC which, under the clearly consistent with the national interest standard, should be resolved in favor of the national security. *See, e.g., ISCR Case No. 98-0419* (April 30, 1999) at p. 8.

Department Counsel also notes that Applicant's financial ties with FC are significant. The Board need not decide whether those financial ties, standing alone, would be sufficient to warrant adverse conclusions under Criterion B or Criterion C. Under the whole person concept, Applicant's financial ties with FC should not be considered in isolation, but rather must be considered in light of the record as a whole. *See Directive, Section F.3; ISCR Case No. 98-0350* (March 31, 1999) at p. 3 (discussing whole person concept and need to consider totality of an applicant's conduct). Accordingly, Applicant's financial ties with FC must be viewed in light of his voluntary assumption of FC citizenship, his voluntary exercise of the rights and privileges of FC citizenship, and his reluctance to relinquish FC citizenship and forego the rights and privileges associated with FC citizenship.

Considering the record as a whole, the totality of the facts and circumstances of Applicant's acquisition and exercise of foreign citizenship as an adult raise security concerns under Criterion C. Furthermore, the Administrative Judge's findings and conclusions of extenuation, mitigation, and changed circumstances are not sustainable for the various reasons stated in this decision. Accordingly, the Judge's favorable conclusions under Criterion C are reversed.

For the reasons stated in this decision, Department Counsel has demonstrated the Administrative Judge erred in his analysis of Applicant's case under Criterion B. However, Department Counsel has not demonstrated the Judge's errors with respect to Criterion B warrant reversal. However, since the Board is reversing the Judge's decision under Criterion C, no useful purpose would be served by remanding the case to the Judge to correct his errors with respect to Criterion B.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's December 11, 1998 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. The record evidence shows: Applicant's father was a United States citizen and his mother was a citizen of FC; and Applicant's mother returned to FC after divorcing Applicant's father.
2. Applicant contends his receipt of educational benefits from FC should not be considered in his case because it was not specifically alleged in the SOR. The Administrative Judge did not err by taking into account Applicant's receipt of FC educational benefits because that conduct fell within the scope of Foreign Preference Disqualifying Condition 4. *See, e.g.*, ISCR Case No. 94-1159 (December 4, 1995) at p. 5 (Judge may consider conduct not alleged in the SOR to decide whether a particular Adjudicative Guideline is applicable).
3. Applicant's reply brief is replete with assertions that go beyond the record evidence and seek to introduce new evidence on appeal. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. The Board notes Applicant had ample opportunity to present evidence during the hearing.
4. Applicant's personal opinion as to the security significance of his family ties and friends in FC is irrelevant. *See, e.g.*, ISCR Case No. 95-0176 (August 15, 1996) at p. 2 (security significance of applicant's conduct is to be adjudicated by applying pertinent provisions of Directive, not decided by applicant's personal beliefs about the significance of his conduct).
5. Applicant cites to the testimony of his second level supervisor that he could be entrusted with properly handling classified information. That opinion does not compel a favorable decision for Applicant. *See, e.g.*, DOHA Case No. 96-0152 (January 14, 1997) at pp. 4-5 (opinions of applicant's supervisors not binding on Judge and do not preclude an adverse security clearance decision). Applicant also refers the Board to Applicant Exhibit A, which bears a notation that he was rated "Satisfactory" with respect to safeguarding classified information. That favorable evidence does not compel a favorable decision for Applicant because the absence of security violations does not preclude an adverse decision based on other grounds. *See, e.g.*, ISCR Case No. 98-0188 (April 29, 1999) at pp. 3-4.
6. Applicant correctly notes Department Counsel sought to place undue importance on his move from the United States to FC. There is no security significance to the fact that Applicant, when he was eight years old, accompanied his mother when she returned to FC. An eight-year-old child cannot be deemed to be capable of making a mature, voluntary decision whether to accompany a parent who relocates to another country. *See* Directive, Sections F.3.c. and F.3.d. *See also Perkins v. Elg*, 307 U.S. 325, 334 (1939) ("[V]oluntary action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of [making] a binding choice."); *Perri v. Dulles*, 206 F.2d 586, 588-89 (3rd Cir. 1953)(actions taken by United States citizen when he was a minor are not voluntary for purposes of deciding whether he voluntarily expatriated himself). The same reasoning must be applied to Applicant's conduct in FC until he reached maturity.
7. This case is distinguishable from other cases where the applicants engaged in the exercise of the rights and privileges of a foreign country *before* they became naturalized United States citizens. *See* ISCR Case No. 98-0592 (May 4, 1999) at pp. 5-6; ISCR Case No. 97-0356 (April 21, 1998) at p. 4. Here, Applicant's actions during the period 1992-1997

clearly constituted the exercise of dual citizenship.

8. There is conflicting record evidence on whether Applicant intends to renew or give up his FC passport. The presence of conflicting record evidence does not diminish the Administrative Judge's responsibility to make factual findings. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 2. Considering the record as a whole, it was not arbitrary or capricious for the Judge to find that Applicant was undecided about whether to renew his FC passport.