DATE: December 14, 1999

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 98-0476

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Barry M. Sax issued a Remand Decision, dated August 2, 1999, 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's findings are supported by substantial record evidence; and (2) whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The earlier procedural history of this case is set forth in the Board's July 22, 1999 Decision and Remand Order.

On August 2, 1999, the Administrative Judge issued a Remand 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 the Administrative Judge's Remand Decision.

Appeal Issues

1. Whether the Administrative Judge's findings are supported by substantial record evidence. The following facts are not disputed on appeal: Applicant's parents were born in a foreign country (FC) and became United States citizens in 1974. Applicant was born in the United States. Applicant entered FC in 1972 (when he was two years old) with his parents. Applicant again entered FC on business in August 1993, using his United States passport to enter FC. Applicant tried to leave FC in November 1993 to visit a neighboring country, but initially was denied permission to leave FC unless he used an FC passport. Applicant was given permission to leave FC after he agreed to obtain an FC passport. Applicant later applied for an FC passport and was issued one in early March 1994. Applicant used his FC passport when he left FC to visit a neighboring country in March 1994 (and when he returned to FC), and when he left FC in 1994 to return to the United States. Applicant still had his FC passport when he gave a written statement to a federal investigator in June

1997. Applicant's FC passport expired in February 1999.

Department Counsel challenges the following findings made by the Administrative Judge: (a) Applicant did not voluntarily apply for a passport from FC; (b) Applicant did not use the FC passport in preference to his United States passport; and (c) Applicant has done nothing to indicate a preference for FC over the United States. Department Counsel contends the Judge's findings are erroneous because they ignore admissions by Applicant and record evidence that detracts from the Judge's findings.

An applicant's possession and use of a foreign passport are clearly of security significance. However, the Adjudicative Guidelines require that Applicant's conduct be analyzed from the perspective of whether Applicant was expressing a foreign preference by using or possessing his FC passport. Given the totality of the record evidence in this case, Applicant's use and possession of a foreign passport cannot fairly be characterized as an expression of foreign preference. The evidence of record establishes the following: Applicant attempted to enter FC (a country both his parents had held citizenship from) on a U.S. passport. He was asked by FC officials at the point of entry to answer questions. Based on Applicant's honest responses, the FC officials determined that under FC law he was a citizen of FC. They allowed Applicant to enter FC but they entered FC citizenship information on his U.S. passport. When Applicant attempted to depart FC for a neighboring country he presented his U.S. passport. At that point he was denied permission to exit FC and told he must exit with an FC passport. Only then did Applicant seek to obtain an FC passport. He has only used the FC passport to enter and depart FC, otherwise he has used his U.S. passport. Applicant has made clear that the only circumstances under which he would use FC's passport again is to enter and depart FC if it is required of him. Given the totality of the circumstances in this case, it was appropriate for the Administrative Judge to conclude that Applicant's conduct with his FC passport was not demonstrative of a foreign preference within the parameters of the Directive.[(1)]

There are several references in the Concurring opinion to matters (hypothetical scenarios) not in the record. By contrast, at no time has the majority analyzed the case on anything but the evidence that actually is in the record. It is often tempting to speculate about what parties might have done. Ultimately such an exercise may be unproductive or even misleading. For example, the Concurring opinion refers to a case where a defendant failed to contact law enforcement officials. Applicant in this case *was* responding to law enforcement officials. He was in a sovereign foreign country. US officials had no legal authority over the situation. The pertinent law enforcement officials of that jurisdiction were the foreign officials who instructed Applicant on two occasions at two locations that to leave their country he needed their passport. Therefore the proffered example is not pertinent to the instant case. Also, speculation about "would have been" and "could have been" leads one to establish exceptional standards of conduct that do not take normal human frailties into consideration . Ultimately that is the failing of the analysis in the concurring opinion.

2. Whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (a) the Judge misapplied pertinent provisions of the Adjudicative Guidelines; and (b) the Judge evaluated Applicant's case in a piecemeal manner, failed to consider the totality of the record evidence, and reached favorable conclusions that are not supported by the record evidence as a whole.

(a) Department Counsel contends the Administrative Judge: (i) misapplied Foreign Preference Disqualifying Condition 1 and Foreign Influence Disqualifying Conditions 1 and 3; and (ii) misquoted Foreign Preference Mitigating Condition 4. Department Counsel's contention has mixed merit.

(i) Department Counsel argues that the Administrative Judge gave insufficient weight to Foreign Preference Disqualifying Condition 1[(2)] and Foreign Influence Disqualifying Conditions 1[(3)]

and 3.[(4)] Department Counsel's argument lacks merit to the extent it suggests that application of those Disqualifying Conditions is dispositive of Applicant's case. Although an Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines, the mere presence or absence or Adjudicative Guidelines Disqualifying or Mitigating Conditions is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 98-0657 (November 16, 1999) at p. 2. Furthermore, the Board has rejected a similar argument previously raised by Department Counsel in connection with Foreign Influence Disqualifying Condition 1. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at pp. 4-5; ISCR Case

No. 98-0507 (May 17, 1999) at pp. 10-11.

(ii) The Administrative Judge erred by adding the word "conditional" to his recitation of Foreign Preference Mitigating Condition 4[(5)] on page 6 of his decision. The word "conditional" does not appear in Mitigating Condition 4 as it currently reads in the Directive. A Judge does not have the authority or discretion to alter the language of the Directive. Furthermore, an unqualified or unconditional willingness to renounce foreign citizenship should be given more weight than a qualified or conditional willingness to do so. *See* ISCR Case No. 98-0252 (September 15, 1999) at p. 7.

(b) Department Counsel persuasively argues that the Administrative Judge evaluated Applicant's case in a piecemeal manner and reached favorable conclusions that are not supported by the record evidence as a whole. The Judge's piecemeal analysis of Applicant's case is inconsistent with the whole person analysis required by the Directive. *See, e.g.*, ISCR Case No. 98-0583 (November 18, 1999) at pp. 9-10. The Judge's piecemeal analysis resulted in the Judge failing to consider the security significance of the totality of the facts and circumstances of Applicant's case. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at p. 8; ISCR Case No. 98-0331 (May 26, 1999) at p. 8. In addition, it was arbitrary and capricious for the Judge to conclude Applicant's conduct did not have negative security significance under Criterion B or Criterion C because Applicant did not engage in other types of conduct that had greater negative security significance. Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in. *Cf.* ISCR Case No. 96-0525 (June 17, 1997) at page 4 note 6 ("The Administrative Judge's discussion of what kinds of sexual misconduct were not proven by Department Counsel was totally irrelevant. Just because Department Counsel did not prove that Applicant engaged in certain kinds of sexual misconduct enumerated by the Judge, the Judge was not free to infer or conclude that Department Counsel failed to prove Applicant engaged in *any* sexual misconduct with his granddaughter.")(italics in original).

The Administrative Judge's piecemeal analysis of Applicant's case resulted in the Judge failing to give due consideration to record evidence that detracted from, and seriously undercut, his favorable conclusions about Applicant's security eligibility. Furthermore, the Administrative Judge's piecemeal analysis resulted in an artificial, unrealistic characterization of Applicant's situation that violates the requirement that a security clearance decision must reflect an overall common sense determination. *See* Directive, Section F.3. Even if each facet of Applicant's situation, viewed in isolation, were deemed to be insufficient to warrant an adverse security clearance decision, the totality of Applicant's situation clearly raises serious doubts about his suitability for a security clearance.

Applicant made statements that raise a serious question whether he prefers the United States over FC or *vice versa*. Specifically, Applicant stated that he does not want to renounce his FC citizenship because he does not want to forego the possibility of obtaining financial benefits as an FC citizen in the future. Applicant's statements demonstrate he is equivocal about whether he prefers the United States over FC and indicate that, under some circumstances, he may prefer FC over the United States. Such an equivocal position raises a doubt that the Judge should have resolved in favor of the national security. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at p. 8 (under clearly consistent with national interest standard, applicant's ambivalence about his or her preference between United States and a foreign country should be resolved in favor of the national security). The Judge erred by concluding Applicant's statements lacked security significance because they were made in terms of his personal interests. The fact that Applicant's statements were made in terms of his personal financial interests does not support the Judge's conclusion that Applicant has not expressed a preference for FC over the United States. Applicant may be motivated by his personal financial interests, but the personal nature of his motivation does not negate or diminish the security significance of Applicant's interest in retaining FC citizenship. Preference for a foreign country need not be motivated by political or ideological reasons to have negative security implications within the meaning of Criterion C. *Cf.* ISCR Case No. 98-0252 (September 15, 1999) at p. 8 (negative security implications of voluntary procurement and use of a foreign country passport not reduced merely because applicant acted out of personal convenience and not sinister motive).

In addition, the Administrative Judge's analysis of Applicant's family ties in FC was arbitrary and capricious. The Judge's analysis of Applicant's family ties in FC totally fails to take into account Applicant's statement that "I feel I owe an obligation to [FC] because I have many relatives in [FC]" (Government Exhibit 6 at p. 1). Given Applicant's statement, it was untenable for the Judge to conclude "[i]t would therefore be speculative to conclude that the relationship with his [FC] relatives comes within the scope of Criteri[on] B." Applicant's expression of feelings of

obligation toward FC based on his family ties raises legitimate security concerns under Criterion B. And, even if Applicant's family ties in FC, standing alone, were deemed to be insufficient to warrant an adverse security clearance decision, those family ties and the feeling of obligation toward FC that they have engendered in Applicant add to the negative security significance to Applicant's interest in maintaining his FC citizenship for financial benefits. Considering the record as a whole, Applicant's stated interest in retaining FC citizenship to keep open the possibility of obtaining financial benefits as an FC citizen in the future is not hypothetical or abstract and raises security concerns under Criterion C.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's August 2, 1999 decision.

See separate opinion

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

Separate Opinion of Chairman Emilio Jaksetic,

concurring in part and dissenting in part

I concur fully with: (a) the majority's statement of the procedural history and the appeal issues; (b) the majority's discussion and resolution of the second appeal issue; and (c) the majority's reversal of the Administrative Judge's August 2, 1999 decision. For the reasons that follow, I do not concur with my colleagues' resolution of the first appeal issue.

As the majority correctly notes, an applicant's possession and use of a foreign passport has security significance. Once conduct with negative security significance has been admitted or proven, the burden shifts to the applicant to present evidence to seek to demonstrate extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. Directive, Additional Procedural Guidance, Item 15. Given the clearly consistent with the national interest standard, the applicant's burden of persuasion is a heavy one. *See, e.g.*, ISCR Case No. 98-0252 (September 15, 1999) at p. 7; ISCR Case No. 98-0507 (May 17, 1999) at p. 11. An applicant's claim of extenuation or mitigation due to compulsion or necessity is an affirmative defense, for which the applicant bears the burden of persuasion. If the record does not contain evidence sufficient to support such a claim, then an Administrative Judge cannot reasonably give an applicant the benefit of such an affirmative defense.

There is a rebuttable presumption that an adult acts in a voluntary manner. Accordingly, an applicant who seeks to extenuate or mitigate his or her conduct through a claim of compulsion or necessity bears the burden of overcoming that presumption. Furthermore, given the clearly consistent with the national interest standard, an applicant's claim of compulsion or necessity must be evaluated in light of the reasonable person standard. *See* ISCR Case No. 97-0184 (December 8, 1998) at p. 4 (explaining why claim of duress must be evaluated under reasonable person standard in security clearance cases). An applicant's statements about his or her motivation(s) and state of mind are relevant and material evidence, but they are not binding or conclusive. Rather, such statements must be evaluated in light of the record evidence as a whole, including evidence of the applicant's actions. *See* ISCR Case No. 98-0507 (May 17, 1999) at p. 6 (applicant's statements about his intentions must be evaluated in light of record evidence as whole to determine whether they are consistent with applicant's conduct).

A claim of compulsion or necessity is seriously undercut if a person has an opportunity to seek a reasonable course of action that might avoid the circumstances that may compel the person to act and the person does nothing to try to avail himself or herself of such an alterative. Given the record evidence, the Administrative Judge reasonably could have concluded Applicant had little or no practical choice but to comply with the actions of the FC officials when he initially entered FC in 1993. Furthermore, given the record evidence, the Judge reasonably could have found that Applicant's actions when initially entering FC in 1993 did not constitute or demonstrate a preference for FC over the United States. It is with respect to the evidence concerning Applicant's conduct after he entered FC in 1993 that I respectfully disagree with my colleagues.

There are numerous actions taken by foreign officials that would not lead a reasonable person entering or leaving a foreign country to seek the advice or assistance of United States diplomatic or consular officials: for example, asking the person about their nationality or citizenship, their purpose for entering or leaving the foreign country, or the property or amount of currency they are bringing into or taking out of the foreign country; directing the person to fill out standard forms required of persons entering or leaving the foreign country; stamping or otherwise marking the person's United States passport to indicate entry into or departure from the foreign country; requiring the person to submit to luggage search or other routine security measures; and requiring the person to pay any fees, duties or other official charges with the currency of the foreign country. The actions of the FC officials in this case went far beyond those kinds of routine matters. It is not a routine, ordinary matter when foreign country officials tell a United States citizen that they consider him or her to be a citizen of that foreign country and state that they require the United States citizen to get a foreign country passport to use when entering or leaving that foreign country. It seems reasonable to expect an adult United States citizen to seek the advice, guidance or assistance of United States diplomatic or consular officials within a reasonable time after being faced with such a situation.[(6)]

There is no evidence that Applicant ever reported the November 1993 incident to United States diplomatic or consular officials. There is no evidence that Applicant ever sought any advice, guidance, or assistance from United States diplomatic or consular officials on how to deal with matter of FC officials telling him to get an FC passport. There is no evidence that Applicant told United States diplomatic or consular officials about his decision to apply for an FC passport. There is no evidence that Applicant sought any advice, guidance, or assistance from United States diplomatic or consular officials before he used the FC passport. After the November 1993 incident Applicant had ample opportunity to seek advice, guidance, or assistance from United States diplomatic or consular officials before applying for an FC passport and before using it instead of his United States passport.[(7)] Applicant's failure to seek such advice, guidance, or assistance seriously undercuts his claim that he was forced to get an FC passport. *Cf. United States v. Gaviria*, 116 F.3d 1498, 1531 (D.C. Cir. 1997)(defendant cannot claim duress when he had, but passed up, an opportunity to seek aid of law enforcement officials), *cert. denied*, 118 S.Ct. 865 (1998).[(8)] There is no evidence that Applicant, faced with a serious dilemma, took any steps to seek the advice, guidance or assistance of United States diplomatic or consular officials. Applicant's failure to take any such action seriously undercuts the Administrative Judge's finding that Applicant did not voluntarily apply for an FC passport.

For the reasons discussed in the preceding paragraphs, the Administrative Judge did not have sufficient record evidence to support his finding that Applicant's use of the FC passport was not a voluntary act. Absent a sustainable showing of compulsion or necessity, Applicant's use of the FC passport in lieu of his United States passport constituted evidence of a preference for FC over that of the United States.

The majority's discussion warrant some additional comments. First, noting the absence of evidence that would support an affirmative defense does not constitute speculation about matters outside the record. If a party fails to present evidence that would support an affirmative defense, then noting the absence of evidence that would support the affirmative defense is merely articulating a reason for concluding the party failed to meet its burden of persuasion with respect to proving the affirmative defense.

Second, application of the reasonable person standard in these proceedings is well-established. *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at p. 3 n. 1; ISCR Case No. 98-0470 (April 19, 1999) at p. 3.. There are at least two ways to decide whether an applicant's conduct is reasonable: (a) there is record evidence that the applicant has engaged in actions that are facially unreasonable; or (b) there is record evidence that the applicant was in a situation where a reasonable person would be expected to act in certain ways, and there is no evidence that the applicant acted in any of those ways.[(9)] It is not a matter of speculation to note the absence of record evidence necessary to support a finding that an applicant acted in a reasonable manner.

Third, the majority's reference to a State Department publication and a cited Board decision is somewhat puzzling. The Administrative Judge did not rely on Foreign Preference Mitigating Condition 3 ("[A]ctivity is sanctioned by the United States") in making his favorable decision. Indeed, the Judge specifically found that Mitigating Condition was not applicable in this case. There is legal authority for the proposition that the nonappealing party can urge an appellate tribunal to affirm a decision on grounds other than those relied on by the lower tribunal, including grounds specifically rejected by the lower tribunal. However, I am unaware of legal authority for the proposition that an appellate tribunal can, on its own motion, seek to affirm a decision by a lower tribunal on grounds not relied on and specifically rejected by the lower tribunal. Applicant did not file any reply brief. Accordingly, Applicant did not ask the Board to affirm the Judge's decision on the alternative ground of Mitigating Condition 3. Furthermore, the majority's reference to the State Department publication adds nothing relevant to its analysis of Applicant's conduct in this case. There is not a scintilla evidence that Applicant knew about or acted in reliance on any State Department policy concerning the use of foreign passports by United States citizens who are dual nationals. Furthermore, the fact that the State Department has a policy that recognizes United States citizens who are dual nationals may be forced to use foreign passports under some circumstances does not have probative value with respect to a finding whether a particular dual national applicant was forced to use a foreign passport.

Fourth, the majority's reference to human frailties is problematic. Human frailties are part of the human condition. Human frailties are a prime reason why there is an industrial security program. Human frailties lead some people to not exercise good judgment. Human frailties lead some people to be not reliable. Human frailties lead to some people to be not trustworthy. Human frailties can lead some people to engage in alcohol abuse, drug abuse, criminal conduct, financial irresponsibility, security violations, or other kinds of conduct that has negative security implications. The issue is not whether an applicant exhibits human frailties. Rather, the issue is whether an applicant's human frailties result in conduct or circumstances that indicate the applicant does not demonstrate the high degree of judgment, reliability and trustworthiness required to persons granted access to classified information.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Although not relied upon by the Administrative Judge, we have noted in a prior case a State Department policy of sanctioning "a dual national's use of a foreign passport to enter or leave the foreign country of which he is a citizen because the foreign country requires the dual national to do so." (ISCR Case No. 98-0252, September 15, 1999). The record here contains a State Department publication which says, "Dual nationals may also be required by the foreign country to use its passport to enter and leave that country. Use of the foreign passport does not endanger U.S. citizenship."

2. "[T]he exercise of dual citizenship."

3. "[A]n immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."

4. "[R]elatives, cohabitants, or associates who are connected with any foreign government."

5. "[I]ndividual has expressed a willingness to renounce dual citizenship."

6. The law recognizes that there can be situations where a reasonably prudent person is expected to recognize the need to make inquiries to ascertain relevant facts. *See, e.g.*, DISCR Case No. 86-3753 (February 28, 1990) at p. 8 (citing federal cases on issue of imputed knowledge). Such a situation arises when a United States citizen is aware that foreign officials indicate they consider him or her to be a citizen of that foreign country and indicate they require him or her to use a foreign country passport when entering or leaving that foreign country.

7. It would be purely speculative to make any assumptions about what United States diplomatic or consular officials might have said or done if Applicant had contacted them for advice, guidance or assistance. The salient point is that there is not a scintilla of evidence in this case that Applicant ever tried to seek the advice, guidance or assistance of United States diplomatic or consular officials.

8. The majority's response to my reliance on this case misses a crucial distinction. Of course FC officials had jurisdiction over Applicant when he was entering or leaving FC. The issue is not their jurisdiction over Applicant. The issue is what should a United States citizen be expected to do when a foreign official tells the United States citizen to do certain things that will require him to hold himself out, under certain circumstances, as being a foreign citizen? *See* Exhibit 5 (Applicant's FC passport noting he is an FC citizen). With respect to questions as to the legal effect, if any, such actions might have under United States law, a reasonably prudent United States citizen would be expected to ask for advice, guidance, or assistance from appropriate United States officials, not foreign officials.

9. An example from tort law illustrates this point. If there is a standard or duty of care, then the absence of evidence that the defendant engaged in actions consistent with that standard or duty of care can be relied on by the trier of fact to find the defendant did not meet that standard or duty of care.