

DATE: December 19, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0511

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Daniel C. Schwartz, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated December 30, 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 denied the government a fair and impartial decision; (2) whether the Administrative Judge erred in his application of pertinent provisions of the Adjudicative Guidelines; (3) whether the Administrative Judge improperly relied on an inference instead of record evidence in reaching his conclusions concerning the foreign preference allegations in the SOR; and (4) whether the Administrative Judge failed to properly weigh the record evidence of Applicant's connections with a foreign country against nonexistent or minimal mitigating evidence. Applicant asks the Board to affirm the Administrative Judge's decision. In the alternative, Applicant asks the Board to remand the case to the Administrative Judge to reopen the record for a limited purpose.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated August 11, 1999. The SOR was based on Guideline C (Foreign Preference) and Guideline B (Foreign Influence).

A hearing was held on November 15, 1999. The Administrative Judge issued a written decision, dated December 30, 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 the Judge's favorable decision.

On March 22, 2000, the Director, DOHA, issued an e-mail message that read "Effective immediately and until further notice there is an across the board moratorium on the issuance of any decisions in cases involving any dual citizenship issues. This applies to actions by security specialists, Department Counsel, Administrative Judges, and the Appeal Board." On April 11, 2000, the Director, DOHA issued an e-mail message that read "This is to provide further guidance

as to the moratorium on dual citizenship cases issued on Wednesday March 22nd. Effective immediately the moratorium applies only to decisions to clear or issue an SOR by a security specialist, decisions to clear or deny by an Administrative Judge and decisions to affirm, reverse or remand by the Appeal Board in cases involving an Applicant's use and/or possession of a foreign passport." Copies of the March 22 and April 11, 2000 e-mail messages were provided to Applicant and the processing of this appeal was held in abeyance.

By letter dated September 1, 2000, the Board informed the parties that the Deputy General Counsel (Legal Counsel) had (1) provided the Board with a copy of an August 16, 2000 memorandum by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I) entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline" (hereinafter "ASDC3I memo"), and (2) advised the Board that the moratorium imposed on March 22, 2000 had been lifted. A copy of the ASDC3I memo was provided to the parties with the September 1, 2000 letter.

Through the September 1, 2000 letter, the Board also gave both parties the opportunity to: (1) express their views on the ASDC3I memo and how it applies to this case; and (2) to respond to the other party's submission. Both parties made submissions to the Board. By letter dated October 4, 2000, the Board advised the parties that each had been given the opportunity to respond to the September 1, 2000 letter and that no further submissions would be accepted by the Board.

Administrative Judge's Findings

Applicant was born in a foreign country (FC) in 1943. Applicant grew up in FC, went to school there, served in the FC military, and then served in the FC merchant marine. Applicant graduated from an American university with a bachelor's degree in 1970. Applicant did postgraduate work at another U.S. university and received a Ph.D. in 1975. He then taught at a state college and worked for a U.S. government contractor in 1976-1978.

In 1977, Applicant became a naturalized U.S. citizen. In December 1977, Applicant was granted a security clearance, which he held until it was administratively terminated in 1981.

Applicant got a U.S. passport in 1978. He renewed his U.S. passport in 1984 and 1997. In 1978, Applicant traveled to FC, using his U.S. passport to enter and leave FC. During the 1978 visit, FC officials noted that Applicant's U.S. passport listed his birthplace and told him that he remained an FC citizen under FC law, and that in the future he had to enter and leave FC using an FC passport. Applicant applied for an FC passport in September 1979 and used it to enter and leave FC in December 1979-January 1980 and again in December 1980-January 1981.

In August 1981, Applicant moved to FC to take a job with an aircraft manufacturer in FC and to see if his romance with a woman (who later became his wife) would develop further. In 1983, Applicant transferred to a subsidiary of the FC aircraft manufacturer. While in FC, Applicant worked on a military aircraft development project that was heavily supported by the U.S. Government, both in terms of funding and official transfers of U.S. classified technology. Applicant worked on that project from August 1981 to early 1986. During that period, Applicant did not vote in any FC or United States elections and did not involve himself in any political activities.

Applicant married an FC citizen in 1983. After an exploratory trip in 1985, they moved permanently to the United States in April 1986. Applicant was hired by his present employer in April 1986 and was granted a security clearance in August 1986.

Since 1986, Applicant has traveled to FC twice, once in 1997 and again in 1999. He did so to celebrate religious occasions with his sons in the presence of their paternal grandparents and maternal grandmother. The grandparents were very elderly and had serious health impairments that precluded them from traveling to the United States on those occasions. Applicant used his FC passport when entering and leaving FC on those occasions. Applicant has used his U.S. passport for all other international travel.

Applicant owns no foreign property and has no financial interests outside the United States. Applicant and his wife have assets in the United States that total nearly \$1 million in value.

Applicant has sentimental and religious ties with FC. Applicant has expressed his commitment to the United States and

has indicated he would not compromise classified information under any circumstances. Applicant does not see his FC citizenship or his FC passport as creating any conflict or inconsistency with his duties as a naturalized U.S. citizen. Applicant has expressed a conditional willingness to renounce his FC citizenship and return his FC passport. Applicant is unwilling to pursue any procedures available under FC law to renounce his FC citizenship, unless he is pressured directly or indirectly (through coercion or threats of harm to his family members in FC) to reveal classified information or otherwise violate security rules.

A branch of the U.S. military has praised Applicant's scholarly work and inventions over the years. Applicant's first-level supervisor believes Applicant has extraordinary expertise in his area of military technology.

Administrative Judge's Conclusions

Applicant's conduct before he became a naturalized U.S. citizen in 1977 cannot be considered to be an exercise of dual citizenship.

Applicant's employment in FC during 1981-1986 was sanctioned by the U.S. Government within the meaning of Foreign Preference Mitigating Condition 3.

Applicant's possession and use of an FC passport constitute an exercise of dual citizenship. However, Applicant's possession and use of an FC passport occurred because it was required by FC law. Furthermore, Applicant used an FC passport on only two occasions in the last 13 years for a singularly extenuating purpose. It is more significant that the U.S. Government does not endorse or object to the use of a foreign passport by a dual citizen to enter or depart a foreign country in compliance with the requirements of that country.

There has been no comprehensive determination that FC has interests that are inimical to those of the United States. There is no evidence that Applicant's parents and mother-in-law are, or ever were, connected with FC intelligence, the FC military (other than required military service), the FC government, or FC law enforcement. There is no evidence that Applicant's immediate family members living in FC are agents of a foreign power. There is persuasive evidence that Applicant would refuse to cooperate with the FC government and would report the threat to his security officer if the FC government ever tried to exploit his immediate family to force him to choose between FC and the United States.

Applicant's conditional willingness to renounce his FC citizenship is entitled to little weight under Guideline C (Foreign Preference) but entitled to great weight under Guideline B (Foreign Influence) in the context if FC were to try to pressure Applicant directly or indirectly through coercion or threat of harm against his family members in FC, which Applicant discounts as highly unlikely. The potential for pressure, coercion, exploitation or duress is minimal.

There is a broad line distinguishing a foreign preference that has security significance and mere respect for the land of an applicant's national origin or religion. Applicant's case falls within the latter category.

The nature and extent of Applicant's use of an FC passport and the presence of immediate family members in FC are less serious when considering all the circumstances, including his personal opinions and reactions to those facts. Applicant's motivations for his conduct, especially his ignorance of the legal implications and complications, weigh in his favor. Applicant has demonstrated a strong sense of security rectitude over the last few decades.

The Administrative Judge entered formal findings for Applicant with respect to all the SOR allegations and concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issues

1. Whether the Administrative Judge denied the government a fair and impartial decision. Department Counsel contends the Administrative Judge denied the government a fair and impartial decision because the Judge improperly took administrative notice of federal law favorable to Applicant but failed to take official notice of laws favorable to the government. More specifically, Department Counsel argues: (a) the Judge erred by researching federal law concerning the military aircraft development project that Applicant worked on in FC during 1981-1986 (hereinafter "FC project") and relying on that law in his decision, but then declining to research easily available FC law favorable to the

government; (b) the parties did not have an opportunity to object to the Judge taking administrative notice of facts concerning the FC project; (c) the Judge's research of federal law favorable to Applicant after the hearing was contrary to his statement at the end of the hearing that the record was closed; and (d) the Judge's conduct on this aspect of the case shows the Judge abdicated his role of an impartial adjudicator and adopted the role of advocate for Applicant. Applicant argues the Judge did not err because: (aa) the nature of the FC project was raised by Applicant's answer to the SOR and by Applicant at the hearing, not by the Judge after the hearing; (bb) the Judge did not err by taking administrative notice of the facts he cited; and (cc) the Judge was not obligated to take administrative notice of FC law since Department Counsel did not develop the issue during the proceedings below. Department Counsel's arguments raise the question of whether the Administrative Judge acted in a biased manner.

It is not tenable for Department Counsel to argue that it did not have an opportunity to object to the Administrative Judge taking administrative notice of facts concerning the FC project Applicant worked on during 1981-1986. A review of the hearing transcript shows Department Counsel had notice of the likelihood that the Administrative Judge would take administrative notice of matters pertaining to the FC project. Given that notice, Department Counsel could have objected on the record to the Judge's suggestion. Department Counsel's failure to make such an objection at the hearing fatally undercuts its appeal argument on this point.

Even though Department Counsel failed to object to the Administrative Judge taking administrative notice after the hearing, there remains the question of whether the Judge's challenged action denied the government a fair and impartial decision. Even in the absence of a formal objection raised at the hearing level, both parties are entitled to receive a fair and impartial hearing and adjudication. There is a rebuttable presumption that an Administrative Judge is fair and impartial, and the appealing party has a heavy burden of persuasion when seeking to overcome that presumption. *See, e.g.*, ISCR Case No. 99-0007 (November 28, 2000) at p. 3. The fact that a Judge has made findings and reached conclusions adverse to a party, standing alone, is not sufficient to demonstrate bias. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 4. Moreover, a showing of legal error by a Judge is not enough to demonstrate bias. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5.

It would have been clearly erroneous for the Administrative Judge to take administrative notice of the kinds of details of the FC project suggested by the Judge at the hearing. The matters alluded to by the Judge (Hearing Transcript at pp. 189-190) are not the kinds of easily verifiable, indisputable fact that would be appropriate for taking administrative notice. However, a close reading of the Judge's decision persuades the Board that the Judge properly restricted himself to taking notice of federal statutes, not the kinds of factual matters he alluded to at the hearing. [\(1\)](#)

The Board rejects Department Counsel's suggestion that the Administrative Judge should have conducted his own research of FC law. Research and proof of foreign law poses various problems that make it generally inappropriate to be the subject of administrative notice by a Judge without prior, specific notice to the parties. *See* DISCR Case No. 90-1550 (March 25, 1992) at p. 4. *Accord* ISCR Case No. 99-0452 (March 21, 2000) at p. 8.

As will be discussed later in this decision, the Administrative Judge erred by relying on his use of certain federal laws to justify application of Foreign Preference Mitigating Condition 3. However, such a legal error is not sufficient to demonstrate the Judge acted in a biased manner.

2. Whether the Administrative Judge erred in his application of pertinent provisions of the Adjudicative Guidelines.

Department Counsel contends the Administrative Judge erred in his application of various provisions of the Adjudicative Guidelines. In support of this contention, Department Counsel argues: (a) the Administrative Judge erred by applying Foreign Preference Mitigating Condition 3; (b) the Administrative Judge erred by applying Foreign Preference Mitigating Condition 4; (c) the Administrative Judge improperly imposed on Department Counsel the burden of disproving Foreign Influence Mitigating Condition 1; and (d) the Administrative Judge failed to applying pertinent provisions of the Adjudicative Guidelines and did not explain his deviations from those provisions. Department Counsel's arguments have mixed merit.

(a) Foreign Preference Mitigating Condition 3. Foreign Preference Mitigating Condition 3 (E2.A3.1.3.3) provides: "Activity is sanctioned by the United States." The Administrative Judge concluded Applicant's work on the FC project during 1981-1986 was sanctioned by the federal government within the meaning of Foreign Preference Mitigating

Condition 3 because the FC project was supported by the U.S. funding and official transfers of U.S. classified technology. Department Counsel contends the Judge erred because there is no record evidence the federal government affirmatively sanctioned Applicant's participation on the FC project and that, to the contrary, the record evidence shows Applicant acted on his own initiative and for his personal reasons by seeking employment on the FC project. Applicant argues: (a) there is sufficient record evidence to support the Judge's application of Foreign Preference Mitigating Condition 3 to Applicant's work on the FC project; and (b) the Judge did not apply Foreign Preference Mitigating Condition 3 to all of Applicant's conduct; rather the Judge properly and fully addressed (independent of Foreign Preference Mitigating Condition 3) Applicant's conduct prior to becoming a naturalized U.S. citizen and the facts and circumstances of his possession and use of an FC passport.

Department Counsel's argument concerning the reach of Foreign Preference Mitigating Condition 3 is persuasive. "What is required under [Foreign Preference] Mitigating Condition 3 is evidence that the federal government has indicated that it affirmatively approves, authorizes, consents to, or otherwise sanctions a particular type of act or conduct, either as part of an official policy or with respect to a particular applicant." ISCR Case No. 98-0252 (September 15, 1999) at p. 5. There is sufficient record evidence for the Administrative Judge to conclude that the federal government sanctioned the FC project through foreign military aid and other official U.S. cooperation. However, there is no evidence the federal government affirmatively approved, authorized, consented to, or otherwise sanctioned applicant or any other U.S. citizen to work on the FC project as employees of FC entities. Indeed, the record evidence shows Applicant returned to FC and obtained employment with FC entities in connection with the FC project for purely personal reasons. Furthermore, the record evidence shows Applicant was granted a security clearance (or its equivalent) by FC in connection with his work on the FC project. There is no record evidence that the U.S. government sanctioned Applicant's receipt of an FC security clearance.

If the Board were to accept the Administrative Judge's interpretation of Foreign Preference Mitigating Condition 3 in this case, then any cooperation between the United States and a foreign country could be cited to justify conduct indicative of the exercise of dual citizenship and foreign preference even if an applicant's conduct was not specifically approved, authorized, consented to, or otherwise sanctioned by the federal government. Such a broad interpretation of Foreign Preference Mitigating Condition 3 would have a vast impact the Board will not adopt or sustain. Evidence of any cooperation between the United States and a foreign country is not enough to warrant application of Foreign Preference Mitigating Condition 3. Rather, for Foreign Preference Mitigating Condition 3 to be applicable there must be record evidence⁽²⁾ that an applicant's conduct is specifically approved, authorized, consented to, or otherwise sanctioned by the federal government. It was arbitrary and capricious for the Judge to apply Foreign Preference Mitigating Condition 3 to Applicant's work on the FC project.

Applicant is correct in asserting that the Administrative Judge did not purport to apply Foreign Preference Mitigating Condition 3 to conduct other than Applicant's work on the FC project. However, Applicant is not correct in arguing the Judge properly addressed and evaluated Applicant's conduct under the whole person concept. Applicant notes the Judge correctly concluded that Applicant's conduct prior to becoming a naturalized U.S. citizen in 1977 did not constitute the exercise of dual citizenship. *See* ISCR Case No. 98-0592 (May 4, 1999) at pp. 5-6; ISCR Case No. 97-0356 (April 21, 1998) at p. 4. However, the Judge's conclusion should not have marked the end of the Judge's consideration of that conduct in this case. Applicant's conduct prior to becoming a naturalized U.S. citizen in 1977 was relevant, under the whole person concept, to assessing the nature and seriousness of Applicant's ties to FC that continued long after he became a naturalized U.S. citizen. *Compare* ISCR Case No. 97-0356 (April 21, 1998) (Board noted that the applicant had not engaged in any exercise of dual citizenship after becoming a naturalized U.S. citizen). Under the facts of this case, the Judge's summary dismissal of Applicant's conduct before he becoming a naturalized U.S. citizen demonstrated a piecemeal analysis that is inconsistent with the whole person concept required by the Directive (E2.2.1).

In responding to Department Counsel's argument about Foreign Preference Mitigating Condition 3, Applicant also calls the Board's attention to the fact that "up until the present proceedings, the government has known about the Applicant's employment by the [FC] companies [and] [t]his information has not prevented the Applicant from receiving and retaining his security clearance for the last 14 years." Applicant's argument seems to suggest a claim that he is entitled to retain a security clearance based on some notion of vested right or a form of equitable estoppel. Such a claim is unwarranted. There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). A decision to grant a security clearance to an applicant does not give the applicant any vested right or interest in keeping a

security clearance. Accordingly, a prior grant of a security clearance does not preclude the federal government from considering, at a future date, whether to continue that grant or to revoke it. Furthermore, the federal government is not equitably estopped from denying or revoking a security clearance. *See, e.g.*, ISCR Case No. 99-0481 (November 29, 2000) at p. 5.

(b) Foreign Preference Mitigating Condition 4. Foreign Preference Mitigating Condition 4 (E2.A3.1.3.4) provides: "Individual has expressed a willingness to renounce dual citizenship." The Administrative Judge concluded Applicant expressed a conditional willingness to renounce his FC citizenship and indicated he would give it little weight in connection with Guideline C (Foreign Preference), but would give it great weight in connection with Guideline B (Foreign Influence). Department Counsel contends the Judge erred because: (i) the record evidence shows Applicant is unlikely to ever renounce his FC citizen and, therefore, Applicant's conditional willingness to renounce his FC citizenship is entitled to no weight at all under Guideline C; and (ii) it was arbitrary and capricious for the Judge to applying a Foreign Preference mitigating condition to the Foreign Influence allegations in this case. Applicant argues that (aa) Department Counsel incorrectly treats Mitigating Condition 4 as an element that Applicant must prove rather than a mitigating factor that the Judge may rely on in the context of the record evidence to make his security clearance decision; and (bb) the Judge had a rational basis for applying Foreign Preference Mitigating Condition 4 in connection with the Foreign Influence allegations in this case.

As discussed in footnote 2 of this decision, an applicant has the burden of demonstrating the applicability of an Adjudicative Guideline mitigating condition unless relieved of that burden. Given the record evidence in this case, Applicant's conditional willingness to renounce his FC citizenship is so limited and constrained as to make it extremely unlikely that Applicant would ever renounce his FC citizenship because of his strong ties to FC. (3) Under the "clearly consistent with the national interest" standard, an applicant has a heavy burden of demonstrating extenuation or mitigation sufficient to warrant a favorable security clearance decision. *See, e.g.*, ISCR Case No. 99-0005 (April 19, 2000) at p. 4. And, the decision as to what weight reasonably can be given to Foreign Preference Mitigating Condition 4 in a given case must be made in the context of the "clearly consistent with the national interest" standard. *See* ISCR Case No. 98-0252 (September 15, 1999) at p. 7. Furthermore, the security significance of an applicant's conditional willingness to renounce foreign citizenship cannot be considered independently of the security significance of the totality of the applicant's conduct and circumstances. *See* ISCR Case No. 99-0295 (October 20, 2000) at p. 7.

To date, the Board has declined to hold that a conditional willingness to renounce foreign citizenship is entitled to be given no weight ever. The Board declines to do so now, but notes that an Administrative Judge does not have unfettered discretion in deciding what weight to give to the evidence. *See, e.g.*, ISCR Case 99-0205 (October 19, 2000) at p. 2. This case involves the expression of a conditional willingness to renounce foreign citizenship so limited and constrained as to render it essentially insubstantial and entitled to no practical weight under the particular facts and circumstances of Applicant's case. *Cf. Lauvik v. I.N.S.*, 910 F.2d 658, 956 (9th Cir. 1990) ("There is some point at which evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it."). Accordingly, it was arbitrary and capricious for the Judge to give any weight to Foreign Preference Mitigating Condition 4 in this case. (4)

(c) Foreign Influence Mitigating Condition 1. Foreign Influence Mitigating Condition 1 (E2.A2.1.3.1) provides: "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." The Administrative Judge concluded Foreign Influence Mitigating Condition 1 was applicable in this case because there is no evidence that Applicant's immediate family members living in FC are agents of a foreign power, and "there is persuasive evidence that, should the [FC] government ever attempt to exploit them in a way that could force Applicant to choose between his loyalty to them and the United States, the Applicant would refuse to cooperate and would report the threat to his security officer to the FBI." Department Counsel contends the Judge erred in applying Foreign Influence Mitigating Condition 1 because the Judge impermissibly shifted the burden of proof to Department Counsel to disprove the applicability of Foreign Influence Mitigating Condition 1. Applicant contends the Judge properly applied Foreign Influence Mitigating Condition 1 because (i) Applicant presented all the evidence he reasonably could to show his immediate family members in FC are not agents of a foreign power; (ii) Department Counsel's position would have the practical effect of establishing a *per se* rule that the mere fact of having close

relatives in a foreign country would result in an adverse security clearance decision without regard to any mitigating evidence or consideration of the "whole person"; and (iii) the Judge could accept as credible Applicant's testimony that he would resist any effort by the FC government to influence him through his immediate family members in FC.

Department Counsel argues, *inter alia*, "[a]n Administrative Judge cannot use the absence of any evidence on a given point to find for or against either party." That argument goes a bit too far. In general, a Judge should not draw inferences, whether favorable or unfavorable, from the absence of record evidence. DISCR Case No. 92-0711 (July 14, 1993) at p. 5. However, when a party has the burden of proof on a particular point, the absence of any evidence on that point requires the Judge to find or conclude that point against the party that has the burden of proof. *See also* ISCR Case No. 98-0419 (April 30, 1999) at p. 4 (discussing circumstances under which Administrative Judge should consider failure of a party to present corroborating evidence).

Department Counsel is correct in asserting that it does not have the burden of disproving the applicability of Foreign Influence Mitigating Condition 1. An Administrative Judge cannot decide to apply an Adjudicative Guideline mitigating condition solely because Department Counsel has not offered evidence to rebut or refute application of that mitigating condition. As discussed earlier in this decision, an applicant has the burden of demonstrating the applicability of Adjudicative Guidelines mitigating conditions, unless relieved of that burden by the presence of record evidence supportive of the application of pertinent mitigating conditions. However, these general principles do not end the analysis of this appeal issue.

Deciding whether to apply Foreign Influence Mitigating Condition 1 in a given case is not a simple proposition because of its bifurcated nature. Foreign Influence Mitigating Condition 1 can be applied if the record evidence supports a determination that an applicant's immediate family members in a foreign country are neither (i) agents of a foreign power, nor (ii) in a position to be exploited by a foreign power. *See also* ISCR Case 98-0507 (May 17, 1999) at p. 10 ("The security significance of an applicant's family ties in a foreign country does not turn on the simple question of whether the applicant's relatives have official ties with a foreign government."). *Accord* ISCR Case No. 99-0295 (October 20, 2000) at p. 8.

Considering the record as a whole, there is sufficient record evidence to permit the Administrative Judge to conclude Applicant's immediate family members in FC are not agents of a foreign power. However, the Judge's reasoning in this case about the second prong of Foreign Influence Mitigating Condition 1 is problematic. First, the Judge erred by limiting his analysis of Foreign Influence Mitigating Condition 1 to situations where FC might try to pressure or influence Applicant through threats to his immediate family members in FC. Guideline B (Foreign Influence) is not limited to situations involving coercive means of influence. Rather, it also covers situations where an applicant may be vulnerable to noncoercive means of influence. *See* ISCR Case No. 99-0295 (October 20, 2000) at pp. 7-8. *Cf.* ISCR Case No. 98-0592 (May 4, 1999) at p. 3 (noting even countries friendly to United States can attempt to gain unauthorized access to classified information).⁽⁵⁾ Such an analysis would have been particularly appropriate in this case because of the record evidence of Applicant's strong, long-term ties to FC. *See* ISCR Case No. 99-0295 (October 20, 2000) at pp. 8-9 (security significance of an applicant's family ties in a foreign country must be assessed in light of totality of the applicant's conduct and circumstances, not just by considering the applicant's family ties in isolation). Second, statements by an applicant about what he or she will do in the future in response to any attempt to exploit his or her family ties, however sincere or credible, cannot be taken simply at face value. An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in an identical or similar manner in the past under identical or similar circumstances. As a matter of common sense, a person's stated intention to engage in future conduct that is identical or similar to the person's past conduct is entitled to be given more weight than a person's stated intention to engage in future conduct of a kind that the person never has engaged in before. Accordingly, it was arbitrary and capricious for the Judge to give great weight to Applicant's statements about what he would do in the future if the FC government were to threaten immediate family members in FC.

(d) Pertinent provisions of the Adjudicative Guidelines. Department Counsel contends the Administrative Judge did not apply pertinent provisions of the Adjudicative Guidelines. In support of this contention, Department Counsel argues: (i) the Judge failed to consider the likelihood of continuation or recurrence of Applicant's acts indicative of a foreign preference; (ii) in applying the Section 6.3 factors,⁽⁶⁾ the Judge relied on Applicant's personal opinions and reactions to

the facts instead of the actual facts and the record evidence; and (iii) the Judge erred by concluding Applicant acted out of ignorance of the legal implications and complications of his actions under United States and FC law. Applicant contends: (aa) the record evidence shows Applicant has no intention of ever working again in FC, and Applicant has no intention of returning to FC except to visit his elderly parents and mother-in-law; and (bb) the Judge properly found that Applicant's use of the FC passport did not pose a security risk because it was due to the requirements of FC law, not due to a preference for FC over the United States.

The Directive specifically makes consideration of an applicant's motivation relevant to a security clearance decision. *See* Directive, Section 6.3.4.; E2.2.1.7. Accordingly, an applicant's opinions and reactions to the facts and circumstances of his situation can be relevant to the extent they have probative value as to his motivations. However, an applicant's opinions about the security significance of his conduct or situation do not relieve a Judge of the obligation to consider and weigh the security significance of the facts and circumstances of an applicant's case. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at p. 4 n.4. In this case, the Judge gave too much weight to his conclusion that Applicant acted out of ignorance of the legal implications and complications of his actions. The negative security implications of evidence indicative of a foreign preference or foreign influence are not negated merely because an applicant acted out of ignorance of the legal implications or complications of his or her voluntary actions. An applicant's good intentions do not trump the negative security implications of conduct or circumstances indicative of foreign influence (Guideline B) or foreign preference (Guidelines C). *Cf.* ISCR Case No. 99-0454 (October 17, 2000) at p. 6 ("The absence of any sinister motive on Applicant's part does not negate or reduce the negative security significance of his conduct.").

Applicant asks the Board to affirm the Administrative Judge's favorable conclusions about Applicant's possession and use of an FC passport. The Board cannot do so. In the past, the Board has held an applicant's use of a foreign passport can be extenuated or mitigated when it is based on legal necessity. *See* ISCR Case No. 99-0452 (March 21, 2000) at pp. 8-9; ISCR Case No. 98-0476 (December 14, 1999) at pp. 2-3. However, that Board precedent has been superseded and is no longer viable. *See* ISCR Case No. 99-0295 (October 20, 2000) at pp. 6-7 (explaining how ASDC3I memo supersedes prior Board rulings on legal necessity); ISCR Case No. 99-0454 (October 17, 2000) at p. 5 and n.5 (same). Application of the requirements of the ASDC3I memo to this case precludes the Board from affirming the Administrative Judge's formal findings in favor of Applicant with respect to his possession and use of an FC passport. (7)

3. Whether the Administrative Judge improperly relied on an inference instead of record evidence in reaching his conclusions concerning the foreign preference allegations in the SOR. Department Counsel challenges the following passage from the Administrative Judge's decision: "It is more significant that the U.S. Government neither endorses nor objects to the use of a foreign passport by a dual citizen to enter or depart a foreign country in compliance with the requirements of that country." Department Counsel argues that: (a) the Judge improperly relied on an inference instead of record evidence in reaching his conclusions; (b) the State Department position on foreign passports does not support the Judge's inference "to the extent he carries it" because the State Department position on foreign passports "does not equate to ratification by the Government of such use and possession by a specific cleared individual for personnel security purposes." Applicant argues the Judge did not err because the Judge relied on record evidence and past DOHA decisions. (8)

The Board does not find persuasive Department Counsel's argument that the Administrative Judge improperly relied on an inference instead of record evidence in reaching his conclusions. As a general proposition, a Judge is entitled to draw reasonable inferences from record evidence. There is nothing inherently improper about a Judge reaching a conclusion based on an inference that is reasonable in light of the record evidence as a whole. The Board agrees with Department Counsel's contention that a Judge's personal opinion about U.S. Government policy would be irrelevant to a security clearance adjudication. However, the passage from the Judge's decision cited by Department Counsel does not reflect any expression of the Judge's personal opinion about U.S. Government policy.

Contrary to Department Counsel's assertion, the Administrative Judge did not find or conclude that the State Department's position on the possession and use of foreign passports constituted ratification of that practice. It would be a stretch to say that the Judge equated a State Department position of neither endorsing or objecting to a practice as being a State Department "ratification" of that practice.

Applicant's reliance on the Administrative Judge's challenged statement is misplaced. The Judge did not articulate any rational basis for concluding there is any favorable security significance to the fact that the State Department "neither endorses nor objects to" the use of foreign passport by a dual national under certain circumstances.⁽⁹⁾

4. Whether the Administrative Judge failed to properly weigh the record evidence of Applicant's connections with a foreign country against nonexistent or minimal mitigating evidence. Department Counsel contends the Administrative Judge failed to properly weigh the record evidence of Applicant's connections with FC and gave undue weight to the evidence presented by Applicant in mitigation. Applicant argues the Judge fairly weighed the record evidence and that Department Counsel's arguments on this point fail to demonstrate the Judge erred.

An Administrative Judge's responsibility to weigh the record evidence does not mean that the Judge is at liberty to draw whatever inferences or conclusions the Judge wants to. *See NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 21 (1st Cir. 1999) (when agency engages in fact-finding it is not free to simply decide which inferences from the evidence it will accept or reject; rather, the agency must draw all inferences that the evidence fairly demands). Rather, a Judge must: (a) draw reasonable inferences and reach reasonable conclusions that take into account the totality of the record evidence⁽¹⁰⁾; (b) evaluate the facts and circumstances of an applicant's case in a manner consistent with the "whole person" analysis required by the Directive⁽¹¹⁾; and (c) consider the totality of an applicant's conduct and circumstances under the "clearly consistent with the national interest" standard.⁽¹²⁾

Department Counsel's assertion that "[t]here is no evidence at all falling under [Foreign Preference Mitigating Conditions] #1 and #2" fails to demonstrate the Administrative Judge erred. The Judge did not cite or rely on Foreign Preference Mitigating Condition 1 in his decision. And, Applicant's conduct before 1977 falls within the scope of Foreign Preference Mitigating Condition 2. However, as discussed earlier in this decision, the Board finds merit in Department Counsel's contentions that the Judge erred by applying Foreign Preference Mitigating Condition 3 and giving any weight to Applicant's conditional willingness to renounce his FC citizenship.

The Board is persuaded by Department Counsel's contention that the Administrative Judge erred by concluding the favorable evidence outweighs the unfavorable evidence in this case. The record evidence shows: Applicant has strong, long-term ties to FC; Applicant engaged in acts of dual citizenship after he became a naturalized U.S. citizen in 1977; Applicant returned to FC to work on the FC project during 1981-1986 for personal reasons and without any sanctioning of his conduct by the U.S. government; Applicant is married to an FC citizen who has not become a naturalized U.S. citizen; Applicant has immediate family members in FC; Applicant possessed and used an FC passport after becoming a naturalized U.S. citizen. Given the totality of the record evidence, Applicant has a heavy burden of demonstrating extenuation or mitigation sufficient to warrant a decision that it is clearly consistent with the national interest to grant or continue a security clearance for him. Directive, Additional Procedural Guidance, Item E3.1.15. As discussed in this decision, Department Counsel has demonstrated the Judge erred by applying certain Adjudicative Guidelines mitigating conditions and made other errors. Furthermore, Applicant's contention that the Board should affirm the Judge's decision based on various aspects of the decision below is not persuasive because, as discussed in this decision, review of those aspects of the decision highlights other errors in the Judge's reasoning and analysis.

5. Whether the Board should remand the case to the Administrative Judge for further proceedings. Applicant asks the Board to remand the case to the Administrative Judge with instructions to reopen the record so that Applicant can present evidence to demonstrate he can satisfy the requirements of the ASDC3I memo. Department Counsel opposes Applicant's request, arguing that: (a) there is no need to remand the case because the record already contains the evidence Applicant wants to submit to the Judge on remand; (b) Applicant is not entitled to have the record reopened to allow him to submit evidence to bolster the favorable decision issued by the Judge; (c) the ASDC3I memo does not create a mitigating condition in foreign passport cases that can be applied in this case; and (d) there is no need for a remand because the ASDC3I memo is not relevant to various aspects of the case and Judge's decision can be reversed for a number of reasons unrelated to the ASDC3I memo.

The Board does not find persuasive Department Counsel's argument that a remand is not necessary because the record already contains the evidence Applicant proffers he would present to the Administrative Judge if the case were remanded. Applicant correctly notes that the Board cannot receive or consider new evidence on appeal. Directive,

Additional Procedural Guidance, Item E3.1.29. If an appealing party demonstrates that receipt of new or additional evidence is an appropriate remedy, then a remand would be appropriate to permit the appealing party the opportunity to present such evidence to the Judge, subject to: (a) whatever legitimate objections the nonappealing party might raise to the evidence presented on remand; (b) reasonable cross-examination by the nonappealing party of any witness presented by the appealing party; and (c) a reasonable opportunity for the nonappealing party to offer rebuttal evidence. Applicant proffers to submit evidence on remand that would go beyond the record evidence in this case. Furthermore, the combination of the unusual procedural posture caused by the promulgation of the ASDC3I memo and the particular nature of Applicant's proffer make this case distinguishable from the general principle that a party is not entitled to a remand merely to supplement its case.

Department Counsel takes the position that the ASDC3I memo "specifically does not create a new litigating Condition, it merely reaffirms and clarifies a part of Guideline C, Disqualifying Condition # 2 for which there is no Mitigating Condition." The Board does not find Department Counsel's argument persuasive. The ASDC3I memo indicates that its purpose "is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport." In the course of setting forth its clarification of Guideline C, the ASDC3I memo specifically indicates that "consistent application of the guideline requires that any clearance be denied or revoked *unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government*" (italics added). The italicized language in the quoted passage cannot simply be deemed to be meaningless or a nullity. Therefore, an Administrative Judge can consider (under Sections 6.3. and E2.2.1 of the Directive) whether an applicant has satisfied the requirements of the ASDC3I memo. *Cf.* ISCR Case No. 99-0435 (September 22, 2000) at p. 4 ("[T]he interpretation and application of an Adjudicative Guideline provision should not be undertaken without consideration of appropriate factors such as those set forth in Sections 6.3 and E2.2.1.").

However, remand would not be warranted in this case even if the Board were to assume solely for purposes of deciding this issue that: (a) on remand, Applicant would prove the facts covered by his proffer of new evidence; and (b) the Administrative Judge would have a rational basis to conclude the facts Applicant would prove on remand are sufficient to satisfy the requirements of the ASDC3I memo. Even assuming solely for purposes of deciding this appeal that Applicant could succeed in demonstrating mitigation of his possession and use of an FC passport under the terms of the ASDC3I memo, the remaining aspects of this case have serious negative security implications under Guidelines B and C that are sufficient to warrant an adverse security clearance decision under the "clearly consistent with the national interest" standard. Accordingly, no useful purpose would be served by remanding this case for further proceedings.

Conclusion

Department Counsel has met its burden on appeal of demonstrating error below. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's December 30, 1999 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. Department Counsel argues the Administrative Judge relied on his personal knowledge or beliefs about the FC project. While the matters alluded to by the Judge at the hearing strongly suggest he was relying on his personal knowledge about the FC project at that point, the Judge's decision does not reflect any reliance on the Judge's personal knowledge about the FC project.
2. An applicant has the burden of demonstrating the applicability of Adjudicative Guidelines mitigating conditions, unless relieved of that burden by the presence of record evidence supportive of the application of pertinent mitigating conditions. *See* ISCR Case No. 99-0597 (December 13, 2000) at p. 7 and n.8.
3. The issue is not simply whether the Administrative Judge could reasonably conclude Applicant gave credible testimony on this point. A conclusion that Applicant's statements are sincere and credible did not give the Judge *carte blanche* in deciding what inferences or conclusions can be drawn from those statements. Rather, the Judge had to make findings of fact and draw inferences and conclusions that reflect a reasonable interpretation of the evidence that takes into account the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3; ISCR Case No. 99-0019 (November 22, 1999) at p. 3. Even if the Applicant's statements were sincere, a favorable credibility determination did not relieve the Judge of the obligation to consider what weight could reasonably be placed on the Applicant's conditional willingness to renounce his FC citizenship in light of the record evidence as a whole.
4. Given the Board's resolution of this issue, the Board need not decide in this appeal whether an Administrative Judge may apply Foreign Preference Mitigating Condition 4 to Guideline C (Foreign Influence) allegations.
5. The Administrative Judge's reliance on Subsection 2-403 of DoD 5200.2-R ("Personnel Security Program") is misplaced. Section 4 of DoD 5200.2-R, in which Subsection 2-403 appears, deals with investigations, not adjudications. Furthermore, the silence of Subsection 2-403 about non-hostage situations is not dispositive. A review of Section 4 of DoD 5200.2-R shows that it does not address a wide variety of clearly security-significant issues, including alcohol or drug abuse, financial difficulties, security violations, and misuse of information technology. It would be untenable to interpret or construe Section 4 of DoD 5200.2-R as setting the limits or parameters of what constitutes security-significant circumstances under the Adjudicative Guidelines.
6. Department Counsel's brief refers to the "Section F.3." factors. As a result of change 4, the provisions of the Directive were renumbered. The factors that previously were listed under Section F.3. are now listed under Section 6.3.
7. Later in this decision, the Board will explain why it will not grant Applicant's request to remand the case to the Administrative Judge for further proceedings.
8. Applicant relies, in part, on the argument that the Administrative Judge acted properly by taking into account "the legal reasons that made [Applicant's] use of [the FC] passport necessary." As discussed earlier in this decision, the ASDC3I memo supersedes any DOHA precedent concerning the use of foreign passports due to legal necessity.
9. Applicant also relies on a Board decision, ISCR Case No. 98-0252 (September 15, 1999), which contains a statement about the State Department policy on the use of foreign passports by dual citizens. A review of that Board decision shows that the passage relied on by Applicant was dicta in that case. And, in any event, statements about the possession and use of a foreign passport in any Board decision that was issued before the ASDC3I memo cannot be considered or applied without regard to the possible legal effect of the ASDC3I memo on such statements.
10. *See* Directive E3.1.32.3 (Board authorized to determine whether Administrative Judge's conclusions are arbitrary, capricious, or contrary to law). *See also* footnote 3 of this decision.
11. *See, e.g.*, ISCR Case No. 99-0295 (October 20, 2000) at pp. 5-6 and 8-9; ISCR Case No. 99-0554 (July 24, 2000) at

p. 6.

12. Directive, Section 4.2. *See* ISCR Case No. 94-1081 (May 3, 1996) at p. 3 (Administrative Judge cannot apply mitigating factor in manner that is not consonant with "clearly consistent with national interest" standard).