

KEYWORD: Guideline B

DIGEST: The Judge’s whole-person analysis is unsustainable for several reasons: it confuses opposition to a foreign regime with credible, independent evidence of ties to the United States; it fails to consider the security significance of Applicant’s beliefs that his phone conversations with his family are currently being tapped in conjunction with Applicant’s family’s past experiences; it fails to consider the Judge’s own findings about the nature of the Libyan regime. Favorable decision reversed.

CASENO: 04-02511.a1

DATE: 03/20/2007

DATE: March 20, 2007

In Re:	)	
	)	
	)	
-----	)	ISCR Case No. 04-02511
SSN:-----	)	
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

William F. Savarino, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 15, 2005, DOHA issued a statement of reasons advising Applicant of the basis

for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 16, 2006, after the hearing, Chief Administrative Judge Robert Robinson Gales granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Chief Administrative Judge’s application of Foreign Influence Mitigating Condition (FIMC) 1 is arbitrary, capricious, and contrary to the record evidence; and whether the Chief Administrative Judge’s whole-person analysis is unsustainable because the whole-person considerations relied upon are unsupported by the record evidence and their application is arbitrary, capricious, and contrary to law.

**Whether the Record Supports the Chief Administrative Judge’s Factual Findings**

A. The Chief Administrative Judge made the following relevant findings of fact: **REDACTED**

Applicant’s Libya was formerly a monarchy, and  
1969. Qadhafi overthrew the monarchy in  
and Applicant’s mother is a housewife,  
Likewise, Applicant’s siblings live quiet lives  
without government ties.

cultivated relationships with  
Applicant  
began to disagree with the actions of the Libyan government, but at first was circumspect about his  
political opinions While  
working toward a degree,  
Applicant was aware that he would be  
imprisoned or executed if he returned to Libya.

Applicant has no  
plans to return there. Applicant’s loyalties and financial ties are all to the United States now.

Libya has been an authoritarian state under the leadership of Qadhafi since 1969. In the early 1970s, Qadhafi aligned himself with anti-colonial, separatist, and Islamic movements and terrorist

groups around the world, and supported terrorist training within Libya. Following a number of international bombing incidents, the United Nations imposed sanctions against Libya in 1992. In 2003, Libya renounced terrorism, and the sanctions were lifted. Libya's relationship with the U.S. has improved. In May 2006, Libya was removed from the U.S. State Department's list of sponsors of state-sponsored terrorism, and formal diplomatic relations have been restored.

Internally, beginning in 1984, thousands of Libyans were imprisoned and interrogated, with many being executed because of a failed coup attempt. It was at that time that

## B. Discussion

The appeal involves the Chief Administrative Judge's conclusions.

### **Whether the Record Supports the Chief Administrative Judge's Ultimate Conclusions**

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Administrative Judge. We review matters of law *de novo*.

Department Counsel argues that the Chief Administrative Judge erred by applying FIMC 1<sup>1</sup> and concluding that Applicant's family in Libya is not in a position to be exploited by the Libyan government. Department Counsel contends that the Chief Administrative Judge's conclusion regarding the possibility of exploitation is arbitrary, capricious, and unsupported by the record evidence. Department Counsel's argument has merit. Application of FIMC 1 requires that an applicant's relatives in a foreign country not be agents of a foreign government and that they not be in a position to be exploited by a foreign government in a way that could influence the applicant to act in a way that would be detrimental to the United States. *See, e.g.*, ISCR Case No. 05-04648 at 4 (App. Bd. Jan. 24, 2007).

The Chief Administrative Judge stated that Applicant's family members have no ties to the Libyan government, although he found that Applicant and his father have each had personal interactions with a very senior Libyan official. The Chief Administrative Judge noted the repressive nature of the Libyan government, but stated that the "domestic reign of terror and violation of human

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<sup>1</sup> "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" Directive ¶ E2.A2.1.3.1.

rights has apparently modified over time.”<sup>2</sup> The record indicates that Applicant’s parents have been threatened, and that Applicant himself then refrained from contacting them for many years, fearing that they would be harmed because of their relationship to him. Applicant began calling them subsequently, after a brother contacted him from Europe and told him to do so. Applicant now calls them regularly, but only speaks of inconsequential things. (The Chief Administrative Judge cites to pages 75-76 of the transcript for this finding. On the same pages, Applicant explains that his reason for keeping the conversations mundane is his belief and, he thinks, his family’s belief that their phone conversations are tapped.)<sup>3</sup> The Chief Administrative Judge’s conclusion that Applicant’s family members are not a position to be exploited by the Libyan government, and thus his application of FIMC 1, is not supported by the record.

The Chief Administrative Judge performed a whole-person analysis. Department Counsel argues that the Chief Administrative Judge based his whole-person analysis in part on conclusions which are unsupported by record evidence. One example of lack of support in the record is the Chief Administrative Judge’s application of FIMC 1, as discussed above. Another is the Chief Administrative Judge’s characterization of Applicant’s family in Libya, which we construe as an implicit application of FIMC 3.<sup>4</sup> While Applicant down-played his relationship with his family, the record indicates that Applicant speaks regularly with his parents and is concerned for their safety. There is a rebuttable presumption that an applicant’s contacts with family members are not casual. *See, e.g.*, ISCR Case No. 05-04648 at 4-5 (App. Bd. Jan. 24, 2007). Applicant had the burden of proving that his ties to his family are casual in nature. Applicant has not met that burden. The Chief Administrative Judge’s conclusion on the matter is not supported by the record.

The Board does not agree with Department Counsel that the factors listed in E2.2.2.1 of the Directive are the only ones that may be considered in performing a whole-person analysis in a Guideline B case. Other matters such as evidence of an applicant’s personal attachments; the nature and extent of an applicant’s family ties to the U.S. relative to his ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case can properly be factored into a judge’s evaluation of an applicant’s worthiness for a security clearance. *See, e.g.*, ISCR Case No. 04-00631 at 4-5 (App. Bd. Sept. 6, 2006); ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006). The consideration for the Board is whether in a given case a judge’s whole-person analysis supports his or her final decision. *See, e.g.*, ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

In this case, however, the Chief Administrative Judge’s analysis is not sustainable in part because it relies on his misapplication of FIMCs 1 and 3. Furthermore, the Chief Administrative Judge’s favorable analysis relied on his misplaced view that Applicant has “walked the walk.” The Board agrees with the general proposition that an applicant’s track record is very important and can lead to a favorable result for an applicant in a Guideline B case. *See*, ISCR Case No. 05-03846 at 5-6 (App. Bd. Nov. 14, 2006). However, this Applicant’s expressed opposition to a foreign

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<sup>2</sup>Decision at 12.

<sup>3</sup>Applicant’s testimony is consistent with Government Exhibit 2 for Official Notice—the 2004 U.S. Department of State Libya Country Report on Human Rights Practices which states that the Libyan regime “. . . routinely monitored telephone calls.”

<sup>4</sup>“Contact and correspondence with foreign citizens are casual and infrequent” Directive ¶ E2.A.2.1.3.3.

regime—for personal reasons—is not commensurate with “credible, independent evidence” of ties to the United States, or, *e.g.*, a prior history of “. . . compliance with security procedures and regulations . . . in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security.” *See, e.g., id. citing* ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006). The probative value of such opposition is even lower when expressed in a context such as Applicant’s deportation hearing. Similarly, where an applicant has no significant track record of complying with security rules and practices, such opposition is of less weight.

The Chief Administrative Judge’s conclusory statement that Applicant has very close ties to the U.S. is not supported by his own findings of fact. Indeed, there is a paucity of independent record evidence in that regard. Aside from the evidence relating to Applicant’s opposition to the Libyan regime, the remaining favorable facts recited by the Judge either do not readily suggest refutation, extenuation, or mitigation or have low probative value. *See, e.g.,* ISCR Case No. 04-00109 at 5 (App. Bd. July 13, 2006). Furthermore, the Chief Administrative Judge’s reference to Applicant’s “loyalties in and to the U.S.” is problematic given the language of Executive Order 10865 that these proceedings “shall in no sense be a determination as to the loyalty of the applicant concerned.”

In this case, the evidence indicates that Applicant has close ties to multiple immediate family members who live under a repressive regime. The Board has previously held that an applicant with immediate family members living in a country hostile to the U.S. has a heavy burden to show that those family ties do not pose a security risk. *See, e.g.* ISCR Case No. 04-06386 at 4 (App. Bd. Aug. 25, 2006); ISCR Case No. 03-09053 at 4 (App. Bd. Mar. 29, 2006). As a result, Applicant has a greater burden than would be the case for an applicant with relatives living under another sort of government. *Compare* ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006); ISCR Case No. 03-19101 at 2 (App. Bd. Oct. 13, 2006). The record evidence also indicates that Applicant is not unconcerned about his family’s fate. *Compare* ISCR Case No. 04-06564 at 4 (App. Bd. May 30, 2006); ISCR Case No. 04-00631 at 5 (App. Bd. Sept. 6, 2006).

Moreover, the record evidence indicates that Applicant and his family have not only been previously targeted for coercion, exploitation and pressure by the Libyan regime,<sup>5</sup> but remain, in Applicant’s view, currently subject to Libyan surveillance. As noted above, Applicant testified that he believes his current phone conversations with his family are tapped. He also indicated that his family believes the same thing. The Chief Administrative Judge’s decision only analyzes the Libyan regime’s actions in regard to Applicant’s ability to resist pressures similar to those Applicant encountered in the past. However, Chief Administrative Judge provides no analysis or discussion as to how the combination of past and current circumstances heighten the security concerns presented in this case. *See, e.g.,* ISCR Case No. 04-00109 at 5-6 (App. Bd. July 13, 2006). Indeed, the Chief Administrative Judge states that “the mere possession of family ties with a person in a

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<sup>5</sup>The Chief Administrative Judge’s findings in this regard derive from Applicant’s Answer to the SOR and the exhibits and testimony presented at the hearing. Applicant answered “No” to question 14 on his Security Clearance Application, which asked: “Have you ever had any contact with a foreign government, its establishments (embassies or consulates), or its representatives, whether inside or outside the U.S., other than on official U.S. Government business?”

foreign country should not, as a matter of law, be disqualifying under Guideline B.”<sup>6</sup> He then concludes: “Based on the evidence, . . . the security concerns manifested by the government, in this instance, are largely unfounded.” Decision at 12. The Chief Administrative Judge’s conclusion in this regard ignores his own findings regarding the nature of the Libyan regime and the significance of the record of its prior treatment and current surveillance of Applicant and his family by that regime. Such factors are “. . . important evidence that provides context for all the other evidence of record and must be brought to bear on the Judge’s ultimate conclusions in the case.” *See, e.g.*, ISCR Case No. 04-07766 at 3 (App. Bd. Sept. 26, 2006).

In light of the foregoing, the Chief Administrative Judge’s whole person analysis is unsustainable in that it fails to consider an import aspect of the case, fails to articulate a satisfactory explanation for its conclusions, and offers an explanation for the decision that runs contrary to the record evidence. *See, e.g.*, ISCR Case No. 97-0435 at 3 (July 14, 1998) (*citing Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

### Order

The Chief Administrative Judge’s favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra’anan  
Michael Y. Ra’anan  
Administrative Judge  
Chairman, Appeal Board

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

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<sup>6</sup>As authority for this statement, the Chief Administrative Judge cites to the decision of a fellow Administrative Judge in ISCR Case No. 03-21434 (A.J. May 24, 2006). That case was remanded by the Appeal Board because of error on the part of the Judge. *See* ISCR Case No. 03-21434 (App. Bd. Feb. 20, 2007). The Board has previously noted that decisions by Hearing Office Judges are not legally binding precedent on that Judge’s colleagues or the Board. ISCR Case No. 04-04004 at 2 (App. Bd. July 31, 2006); ISCR Case No. 02-24752 at 3 (App. Bd. July 31, 2006).