

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant, who is a U.S. naturalized citizen and was a citizen of Algeria solely by virtue of his birth and his parents' birth in the country, and who applied for an obtained an Algerian passport for use in emergency situations when traveling to and from Algeria in the future, fails to absolve himself of preference concerns, despite his being a U.S. citizen since 1984 and his having few identified financial interests in Algeria. Because Applicant's immediate and extended family members who reside in Algeria and the U.S. (Applicant's spouse) are shown to be still potentially vulnerable to pressure or coercion, foreign influence concerns pose unmitigated security risks as well. Clearance is denied.

CASENO: 02-29990.h1

DATE: 08/16/2004

DATE: August 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29990

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, who is a U.S. naturalized citizen and was a citizen of Algeria solely by virtue of his birth and his parents' birth in the country, and who applied for an obtained an Algerian passport for use in emergency situations when traveling to and from Algeria in the future, fails to absolve himself of preference concerns, despite his being a U.S. citizen since 1984 and his having few identified financial interests in Algeria. Because Applicant's immediate and extended family members who reside in Algeria and the U.S. (Applicant's spouse) are shown to be still potentially vulnerable to pressure or coercion, foreign influence concerns pose unmitigated security risks as well. Clearance is denied.

STATEMENT OF CASE

On December 18, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on January 19, 2004, and requested a hearing. The case was assigned to me on March 10, 2004, and was scheduled for hearing on April 6, 2004. A hearing was convened on April 6, 2004, for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of one exhibit; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) of the proceedings was received on April 19, 2004.

PROCEDURAL ISSUES

Before the close of the hearing, Department Counsel requested official notice be taken of three US State Department official documents covering Algeria. There being no objection from Applicant, and good cause being shown, official notice was taken of the State Department documents.

Prior to the close of the hearing, Applicant volunteered in his testimony that about a month ago he received an Algerian passport that he had applied for several months before after learning he was a dual citizen of Algeria (R.T., at 60-61). Based on this new information, Department Counsel moved to amend the SOR to add a Guideline C (foreign preference) allegation to conform with the evidence. Following discussion, the Government's proposed amendment was granted for good cause shown. Under amended paragraph 2, Applicant is alleged to (a) have exercised dual citizenship by applying for an Algerian passport in late 2003 or early 2004 and (b) currently possess an Algerian passport.

Applicant responded to amended paragraph 2 by admitting his obtaining an Algerian passport for emergency purposes when necessary to travel to Algeria on short notice without having to go through the visa process associated with using his U.S. passport.

Applicant, in turn, was informed of the ASDC3I memorandum of August 16, 2000, concerning possession of foreign passports by applicants for security clearances. At Applicant's request, the record was held open an additional 14 days to afford Applicant the opportunity to obtain a copy of the ASDC3I memorandum (*viz.*, the Money Memorandum) and determine what course of action he wished to take with respect to his Algerian passport. By his faxed submission of April 22, 2004, Applicant acknowledged receiving a copy of the Money Memorandum. He confirmed his election to keep his Algerian passport for emergency circumstances should they arise when making plans to travel to Algeria to see family members (*see ex. B*). Responding to Applicant's post-hearing election to keep his Algerian passport, Department Counsel contends that Applicant's security clearance must be denied. The issue is taken under advisement for consideration on the merits.

SUMMARY OF PLEADINGS

Under Guideline B, Applicant is alleged to (a) have a mother, brother and sister who are citizens of Algeria residing in that country, (b) have a wife who he met on the internet who is a dual citizen of Algeria and France residing in the US, (c) maintain contact with his mother-in-law, father-in-law, sister-in-law and two brothers-in-law who are citizens of Algeria currently residing in Algeria and (d) to have traveled with his wife to Algeria from February 2001 to March 2001 to have a traditional Algerian wedding celebration. For his response to the SOR, Applicant admitted each of the allegations.

FINDINGS OF FACT

Applicant is a 51-year old senior staff engineer for a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant immigrated to the U.S. in 1973. He received his graduate training from a prestigious state university in the US and was naturalized as a U.S. citizen in 1984. In 1992, he brought his mother to the U.S. for a visit. She stayed one month and returned to Algeria where she has remained. His father was a taxi driver in Algeria before he passed away.

Applicant had an older sister who was a citizen and resident of Algeria before her death from an earthquake that struck Algeria in May 2003. She had worked for an Algerian oil company and was divorced at the time of her sudden death. Applicant has not maintained contact with his sister's ex-husband.

Applicant has an older brother and a younger sister who are citizens and residents of Algeria. His brother is a physician who works in the oil fields for a private company and talks to Applicant to him on a regular basis. Applicant's surviving sister is a high school superintendent; who is neither employed by nor maintains contact with the Algerian government. Her husband teaches pharmacy classes in a local university but likewise has no contact with the Algerian government. Applicant maintains regular telephone contact with his surviving sister.

Applicant met his spouse, an Algerian citizen, through the internet and married her in November 2001 in the US. Later the same year, he and his spouse traveled to Algeria for a ceremonial marriage that included both families (R.T., at 48-49). Applicant's spouse remains very close to her family residing in Algeria. Although she doesn't belong to any Algerian community groups in the U.S., she has shown no interest to date in becoming a naturalized U.S. citizen. She keeps regular contact with her parents, two sisters (one of who resides in France) and two brothers (R.T., at 50-54). None of his spouse's immediate family has ever visited her or Applicant in the U.S. Applicant's attempts to obtain a visa for his mother-in-law come to the U.S. in 2001 were denied by U.S. immigration authorities (R.T., at 48-49). Applicant's spouse's mother does not work in Algeria: The spouse's father was a baker until his retirement two years ago. None of the spouse's immediate family members are, or have ever been, agents or employees of the Algerian government, and none maintain any kind of contact with the government that Applicant is aware of (R.T., at 50-54).

Since his mother and sister perished in an earthquake that struck Algeria in May 2003, Applicant inherited considerable money from his mother through Algeria's intestacy laws (R.T., at 56-57). Algeria apparently does not have a succession

regime that permits the designating of devisees to receive the settler's wealth upon his or her death. Applicant does not have any identified financial interests still in Algeria.

Before completing his security clearance application (SF-86) in January 2002, Applicant was unaware he had dual citizenship status with Algeria, and did not list it in his SF-86. When he applied for a visa to visit Algeria in May 2003 to settle his mother's affairs, he encountered considerable bureaucratic delays in obtaining a visa. To better insulate himself from such delays in the future, he obtained an Algerian passport in May 2003. He wants the passport for use in emergencies when he must travel to Algeria, and for no other purpose. Advised of DoD's mandatory clearance bar to persons who possess foreign passports, Applicant elected to keep his Algerian passport (*see ex. B*).

According to official U.S. State Department documents, Algeria is a multiparty republic that is constitutionally constructed and has a presidential form of government that includes a bicameral parliament, whose members of both houses are elected by popular vote. Algeria today is a country in transition from a state-administered to an open market economy. It is currently running unemployment rates in excess of 30 percent in a country whose population exceeds 31 million. Historically, Algeria has a poor human rights record, which has actually worsened in certain areas of the country. Aspects of its continued state of emergency continue to place restrictions on individual rights to change their government with the vote.

As Algeria gradually emerges from decades of civil strife between proponents and opponents of an Islamic state, fighting between government forces and terrorist groups has continued in rural and mountainous areas, and the country remains in a State of Emergency status. *See US Department of State Country Report* of February 2004. State Department travel warnings urge Americans to defer non-essential travel to Algeria and to carefully evaluate their security and safety should they choose to ignore cautions about travel to the country. Citing random terrorist attacks and some hostage taking over the past year, the State Department cautions both American travelers and Embassy personnel to take special security precautions when making trips outside the capital area. *See US State Department Travel Warning* of March 2004.

Dual citizens residing or visiting in Algeria are subject to all Algerian laws affecting U.S. citizens, as well as laws applicable to persons of Algerian nationality that impose special obligations on citizens of that country. *See U.S. State Department Consular Information Sheet* of March 2004. Dual nationals remain subject to Algeria's military service requirements and can be conscripted into service while on Algerian soil. While such conscripted service seems unlikely to confront Applicant, given his age and longstanding U.S. citizenship, it remains a possibility.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could

raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Preference

The Concern: When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Disqualifying Conditions:

DC 1: The exercise of dual citizenship

DC 2: Possession and/or use of a foreign passport.

Mitigating Conditions:

MC 1: Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

Foreign Influence

The Concern: A security risk may exist when an individual's immediate family, including co-habitants, and other persons to whom he or she may be bound by affection, influence, or are obligation *are not* citizens of the United States *or may* be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Disqualifying Conditions:

DC 1: An 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.

DC 2: Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists.

Mitigating Conditions:

MC 1: A determination that the immediate family members, co-habitant or associate 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 persons involved and the United States.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of

Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant presents as a conscientious senior engineer for a defense contractor who after being born and raised in Algeria, immigrated to the U.S. in 1973 to seek better economic opportunities. Claiming the need for an Algerian passport to aid him in emergency situations, he recently applied for and obtained an Algerian passport.

Dual citizenship concerns necessarily entail country allegiance assessments and invite critical considerations over acts indicating a preference or not for the interests of the foreign country over the interests of the U.S. In a different vein, the continued residence of his immediate family members (his sister and brother) and his wife's immediate family members in Algeria raises potential concerns about their being vulnerable to future pressure or duress that could result in the compromise of classified information. The issues, as such, raise concerns over Applicant's preference for a foreign country over the U.S. and the potential for members of Applicant's immediate and extended family being placed at risk to pressure or duress to induce Applicant to divulge classified information he might be privy to.

Foreign Preference

By virtue of his birth in Algeria to parents of Algerian descent and citizenship, Applicant was endowed with Algerian citizenship through his parents. This citizenship could not be lost except by

express renunciation, approved by the Algerian Government, which Applicant has never explored. To the contrary, two years ago he applied for an Algerian passport (an active exercise of dual citizenship) and has since received one. While he is yet to use his Algerian passport, he has pledged to retain it for use in emergency situations when he needs to travel to Algeria on family-related matters. Risks of his being taken hostage behind Algerian lines and denied the customary diplomatic intercession made available to U.S. citizens traveling on US passports cannot be discounted, given the

country threat risks assigned Algeria by the U.S. State Department's travel advisory.

The Appeal Board has tended to blur convenience/force of law distinctions when appraising legal necessity passport usage in multiple return to country situations (as here). *See* ISCR Case No. 99-0424 (February 8, 2001); ISCR Case No. 99-0254 (February 16, 2000). Exercise of choice to take out and retain his Algerian passport out of desire to preserve his options when traveling to Algeria to see his family is itself a voluntary election, not a submission to legal compulsion, when made in juxtaposition to known security risks extant in traveling to a country that lacks acceptable security protections against terrorists operating within the country. By applying for and obtaining an Algerian passport, Applicant displayed a conscious preference for Algeria, even if it was for perfectly logical and understandable reasons: wanting to see his immediate and extended family members.

So, even Applicant's limited exercise of dual citizenship is sufficient under the facts of this case to invoke Disqualifying Condition (DC) 1 (exercise of dual citizenship) and DC 2 (possession and/or use of a foreign passport) of the Adjudicative Guidelines for foreign preference. Use and/or possession of a foreign passport is considered a *per se* basis for denying or suspending a security clearance under the clarifying provisions of the memorandum of August 16, 2000 authored by the Asst SecDef forC3I ("the ASDC3i memorandum"), unless the foreign passport is surrendered, or the Applicant obtains official approval for its use from the appropriate agency of the US Government. Nothing in the ASDC3i memorandum on foreign passports indicates that possession of a foreign passport may be extenuated or mitigated by an applicant's showing of personal hardship and delay typically encountered in utilizing the visa process involved with travel abroad on a US passport. DOHA's Appeal Board has construed the ASDC3i memorandum to be legally binding on DOHA administrative judges and the Board. *See* ISCR Case No. 02-07625 (May 2004). Neither judges nor the Board retain jurisdiction to review of pass judgment on the wisdom or desirability of the ASDC3i memorandum. *See* ISCR Case No. 02-04237 (August 2003).

Concerns over continued Applicant preference for Algeria are considerable for so long as he retains his Algerian passport and dual Algerian citizenship. With unsettled questions still very much in evidence about Applicant's reluctance to take any bold steps towards surrender of his Algerian passport and renunciation of his Algerian citizenship, too many preference questions loom at the present time to credit Applicant with satisfying the heavy mitigation burden imposed on applicants by the Appeal Board.

Considering all of the circumstances surrounding Applicant's dual citizenship exercise and absence of meaningful mitigation efforts, conclusions warrant that Applicant's exhibited active dual citizenship by his taking out an Algerian passport. In so doing, he has demonstrated a preference for Algeria that has not been mitigated by documented surrender of the passport and expressed intentions to renounce his dual Algerian citizenship. Such firm Applicant commitments are required to satisfy expressed Appeal Board burden requirements when it comes to successfully discounting residual security risks that exist with his continued exercise of dual Algerian citizenship. Unfavorable conclusions warrant with respect to sub-paragraphs 2.a and 2.b of Guideline C.

Foreign Influence

Besides foreign preference concerns, Government finds security risks associated with (a) Applicant's wife being a citizen of Algeria and his immediate family members (*i.e.*, sister and brothers) and (b) his extended family members (*i.e.*, his mother-in-law, father-in-law, sister-in-law and two brothers-in-law) residing in Algeria. Although Applicant's ties to his wife's parents and siblings do not appear to be particularly close, he communicates with them often enough to invite application of Disqualifying Condition (DC) 1 (immediate family members, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country) and DC 2 (an immediate family member, *etc.*) of the Adjudicative Guidelines for foreign influence.

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for any chosen set of guidelines covering risks of foreign influence. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing. Personnel security assessments continue to be governed by the same Change 4 requirements of the Directive for appraising the security risks associated with the individual's having family abroad, which include both common sense assessments of country risks and information available from public sources.

So, under these adjudicative guidelines, while an applicant with immediate family domiciled in a hypothetical hostile country might pose a risk of a hostage situation, he might conversely be able to neutralize material risks of exploitation of immediate and/or extended family members residing in a friendly country. While Algeria cannot be characterized as a particularly close ally of the US, it is not described in State Department official publications as hostile either. Based on reported terrorist activities in the country, Algeria cannot be deemed to provide an acceptable political environment for managing hostage risks. Without such assurances, no reasonable conclusions can be reached that Applicant's immediate and extended family members are not in a position to be exploited by Algerian authorities.

While the foreign influence provisions of the Adjudicative Guidelines are ostensibly neutral as to the character of the subject country, they should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. Algeria is a constitutional republic, governed by executive and legislative branches whose leadership and influence is directed and circumscribed by Islamic tenets. Algeria is also a country with a considerable history of ambivalence towards America and its longstanding institutional respect for human rights and the rule of law.

Because Algeria remains a transitioning country that lacks a secure infrastructure and track record for respecting human rights and the rule of law, the risk of a pressure or influence situation involving an immediate or extended family member of Applicant's cannot be safely discounted. Algeria's strategic location and political character, when coupled with Applicant's own demonstrated preference for the country, conduce to create security concerns over risks of direct or indirect pressure or influence of an immediate or extended family member of Applicant's by Algerian authorities. These concerns are not sufficiently mitigated to permit safe predictive judgments about Applicant's ability to withstand risks of exploitation and pressure attributable to his familial relationships and contacts with his immediate and extended family members domiciled in Algeria.

So, given the continued presence of Applicant's immediate and extended family members in Algeria, their presence there presents potential risks of pressure and coercion. Their Algerian citizenship and residence constitutes an unacceptable risk, for which the mitigation benefits of MC 1 (presence of immediate family in host country does not pose an unacceptable security risk) of the Adjudicative Guidelines may not be availed of by Applicant. Unfavorable conclusions warrant with respect to subparagraphs 1.a through 1.d of Guideline B.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance:

GUIDELINE B: (FOREIGN INFLUENCE): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST APPLICANT

Sub-para. 2.d: AGAINST APPLICANT

GUIDELINE C (FOREIGN PREFERENCE): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance.

Roger C. Wesley

Administrative Judge