

DATE: May 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04364

## DECISION OF ADMINISTRATIVE JUDGE

**ROBERT ROBINSON GALES**

### APPEARANCES

#### FOR GOVERNMENT

Stephanie C. Hess, Esquire, Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Security concerns were raised regarding a 38-year-old native-born American Applicant--holding dual citizenship because of his father's U.S. birth and his mother's British birth--who obtained a British passport, had it renewed on two occasions, and used it repeatedly to enter the United Kingdom and other countries, instead of using his American passport. His refusal to surrender the British passport; and his failure to obtain official approval for the foreign passport's use from the appropriate agency of the United States Government, in light of the August 2000 ASD/C<sup>3</sup>I memorandum implementing a passport policy "clarification," raises grave questions and doubts as to his allegiance to the United States and as to his security eligibility and suitability. Clearance is denied.

### STATEMENT OF THE CASE

On January 13, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated January 30, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on March 25, 2004. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation, no later than May 12, 2004. He chose not to do so. The case was assigned to me on May 24, 2004.

## FINDINGS OF FACT

Applicant has admitted the factual allegation pertaining to foreign preference under Guideline C (subparagraph 1.a.). Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 38-year-old employee of a defense contractor, and he is seeking to retain a SECRET security clearance which was initially granted to him in August 1989.

Applicant was born in 1965 in the United States.<sup>(2)</sup> His father is a native-born citizen and resident of the United States,<sup>(3)</sup> and his mother is a citizen and resident of the United Kingdom,<sup>(4)</sup> who was born in the United Kingdom<sup>(5)</sup>--a nation whose interests are not inimical to the United States. When he was 12-years-old, his mother registered him with the British Embassy to secure British citizenship for him to "reflect [Applicant's] heritage coming from that country and partially in case [he] might want to someday live or work in the U.K."<sup>(6)</sup> Applicant noted that since he was a minor at the time he did not have any say in the matter.<sup>(7)</sup> Shortly after acquiring his British citizenship, Applicant received his British passport.<sup>(8)</sup> It has since been renewed on two occasions, with the most recent renewal occurring in September 1996.<sup>(9)</sup> That passport does not expire until September 2006.<sup>(10)</sup> Applicant has used his British passport, in lieu of his U.S. passport, periodically on trips to the European Union and the U.K. mainly for convenience and to avoid longer waits at border crossings and airport terminals.<sup>(11)</sup>

Although he considers himself a loyal American and contends he would never do anything to hurt the security of this country,<sup>(12)</sup> he acknowledges he is a dual citizen. He has exercised no rights of U.K. citizenship except to use his British passport and work in the U.K. while he lived there as a graduate student during 1987-88 and 1994-97.<sup>(13)</sup> He has never voted, held political office, or served in any military service in the U.K.<sup>(14)</sup> He has not maintained his dual citizenship to protect any financial interests in the U.K.<sup>(15)</sup>

On August 13, 2002, upon being sworn and under oath, Applicant stated:

. . . after careful consideration I would not be willing to renounce my citizenship with the U.K., nor relinquish my U.K. passport, as a condition of access to classified information.<sup>(16)</sup>

Applicant is married to a native-born U.S. citizen.<sup>(17)</sup> He received a Ph.D. from a U.S. university in 1998.<sup>(18)</sup>

Applicant has been employed by the same government contractor since February 1998. The quality of his performance has not been developed.

On August 16, 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD/C<sup>3</sup>I) issued a passport policy "clarification" pertaining to Adjudicative Guideline C--foreign preference. A photocopy of the memorandum was furnished to Applicant along with the SOR on January 21, 2004.<sup>(19)</sup> The memorandum states, in pertinent part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. ***Therefore, 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.* odification of the Guideline is not required. (Emphasis supplied)

As noted above, Applicant has expressed an unwillingness to relinquish either his U.K. citizenship or his British passport in August 2002. Furthermore, he offered no evidence subsequent to receipt of the ASD/C<sup>3</sup>I memorandum to indicate he had either actually received official approval to use the passport or that he had surrendered it to the British Embassy. As of the date of the closing of the record herein, it appears Applicant still possesses a British passport, and its use has not been officially approved by the appropriate agency of the United States Government.

### POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**GUIDELINE C - FOREIGN PREFERENCE: 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.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security," [\(20\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline C. Applicant has been portrayed as an American citizen who failed to formally renounce the British citizenship derived from his mother's British citizenship and acted in such a way as to indicate a preference for a foreign country--in this instance, the United Kingdom--over the United States, and in so doing, he may be prone to provide information or make decisions harmful to the interests of the United States.

In support of its contentions, the government has cited Applicant's active exercise of "dual citizenship" with the United Kingdom and the United States; his acceptance and use of a British passport; his renewal of that passport; and his refusal to surrender the passport. Moreover, Applicant actively exercised the rights and privileges of a citizen of the United Kingdom--all while he was a native-born citizen of the United States who also was eligible to hold citizenship of the United Kingdom by virtue of his mother's citizenship. Applicant's actions clearly fall within foreign preference disqualifying condition (FP DC) E2.A3.1.2.1. (*the exercise of dual citizenship*), and FP DC E2.A3.1.2.2. (*possession and/or use of a foreign passport*).

Applicant's allegiance to the United States has been questioned, and an allegation made he prefers the United Kingdom over the United States. A review of the evidence reveals his allegiance and loyalty to the United States are apparently resolute. It is true that when his mother registered him in order to obtain the citizenship of her country, Applicant had little if any say over the matter. That situation raises foreign preference mitigating condition (FP MC) E2.A3.1.3.1. (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*).

This case is not to be construed as an assault on dual citizenship, for the issue is not that Applicant is a dual citizen, but rather his possession and use of a foreign passport. Of substantial significance is Applicant's subsequent renewal of that passport after it was first presented to him, and using it repeatedly to enter not only the United Kingdom, but other countries as well, instead of using his American passport. Even more significant is his conscious refusal to surrender the British passport.

As noted above, in August 2000, ASD/C<sup>3</sup>I issued a passport policy "clarification." Under that policy "clarification," it is clear the possession and repeated use--or any use for that matter--of the British passport falls within DC E2.A3.1.2.2. The ASD/C<sup>3</sup>I memo states there are no mitigating factors "related to an applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country," a phrase which I construe to relate solely to the use of a foreign passport, and not to mere possession of same. On the other hand, the memo requires a 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."

In this instance, the evidence is clear. While there may be lingering skepticism as to this policy "clarification;" or the mandated disinterest in the identity of the foreign country--even one as closely aligned to the United States in democratic principles, ideals, and policies as the United Kingdom, one fact is inescapable: the policy, as "clarified" by ASD/C<sup>3</sup>I and interpreted by the Appeal Board, must be complied with. Consequently, I conclude Applicant has failed to mitigate or overcome the government's case. Accordingly, allegation 1.a. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

**FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline C: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the 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 a security clearance for Applicant. Clearance is denied.

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Robert Robinson Gales

Chief Administrative Judge

1. The government submitted six items in support of its contentions.
2. Item 4 (Security Clearance Application, dated April 19, 2002), at 1.
3. *Id.*, at 3-4.
4. *Id.*, at 4; Item 5 (Statement of Subject, dated August 13, 2002), at 2.
5. *Id.*, Item 5.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Item 4 (Security Clearance Application, dated April 19, 2002), at 3.
18. *Id.*, at 2.

19. Item 6 (Attachment 4 to Letter of Transmittal from DOHA, dated January 13, 2004). Applicant acknowledged receipt of the materials on January 21, 2004. Item 3 (Letter of Receipt, dated January 21, 2004).
20. Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).