

DATE: April 25, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-09818

## DECISION OF ADMINISTRATIVE JUDGE

**ELIZABETH M. MATCHINSKI**

### APPEARANCES

#### FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

#### FOR APPLICANT

*Pro se*

### SYNOPSIS

Applicant, a native of Hong Kong, came to the U.S. to attend college in 1987. He became a U.S. naturalized citizen in September 1994. He used a Hong Kong residency card to enter Hong Kong to visit his relatives in preference to his U.S. passport until he realized it was of concern to the Department of Defense. He has no future plans to use the foreign residency card but wants to retain it in case he needs to travel to Hong Kong for an extended period. Applicant's parents, a maternal uncle from whom he borrowed \$220,000, and his spouse's parents and siblings reside in Hong Kong. His father is a U.S. naturalized citizen but the other family members are citizens of Hong Kong. Foreign preference and foreign influence concerns persist because of these ties to Hong Kong. Clearance is denied.

### STATEMENT OF THE CASE

On May 4, 2004, the Defense Office of Hearings and Appeals (DOHA) 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. [\(U\)](#) DOHA recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. The SOR was based on foreign preference (Guideline C) and foreign influence (Guideline B).

Applicant filed an undated response to the SOR that was received by DOHA on May 26, 2004. He requested a hearing before a DOHA administrative judge, and the case was assigned to me on September 16, 2004. Pursuant to formal notice of that date, a hearing was scheduled for October 6, 2004. At the hearing, two government exhibits and three Applicant exhibits were admitted, and testimony was taken from Applicant and his supervisor, as reflected in a transcript received on October 18, 2004. At the government's request, administrative notice was taken of three U.S. State Department publications: *Background Note: China*, August 2004; *Country Reports on Human Rights Practices-2003 on China* (includes Tibet, Hong Kong, and Macau), February 25, 2004; and *Background Note: Hong Kong*, December 2003. Administrative Notice was also taken of extracts of the Operations Security Threat Handbook, revised May 1996.

## FINDINGS OF FACT

The SOR alleges foreign preference concerns because of Applicant's possession and use of a Hong Kong residency card to enter Hong Kong. Foreign influence is alleged because of Applicant's ongoing contact with family members who are Hong Kong resident citizens (mother, a maternal uncle who lent him \$200,000, and his spouse's parents and her siblings) or who are naturalized U.S. citizens living in Hong Kong (his father and brother). In his Answer to the SOR, Applicant admitted possessing a Hong Kong residency card and using it to enter Hong Kong for convenience, but expressed a willingness to stop using the residency card, citing his consistent use of his U.S. passport to enter Hong Kong since he applied for a clearance. Applicant admitted he has contact with his relatives in Hong Kong, with the exception of telephone contact with his parents-in-law. Applicant's admissions are accepted and incorporated as findings of fact. After a thorough review and consideration of the evidence of record, I make the following additional findings of fact:

Applicant is a 34-year-old computer scientist who has been employed by a federally-funded research and development corporation since December 2001. He seeks a secret-level security clearance for his duties as a lead engineer. He held an interim secret clearance from mid-2002 until it was withdrawn on receipt of the SOR.

Applicant was born in Hong Kong and educated there through high school. His father, a native of the PRC, had been naturalized in the U.S. in 1961 while he was employed as a physicist for the U.S. government. He had left the PRC because he did not like the Communist government and obtained his degree in the U.S. He moved to Hong Kong before Applicant's birth and was employed as a manager for a hardware company. Applicant's mother, a PRC native and citizen of Hong Kong, was a homemaker.

In 1987, Applicant came to the U.S. to pursue undergraduate studies in computer science at a public university in the U.S. where his paternal uncle was (and still is) a professor. Applicant entered the U.S. on a British Dependent Territory citizen passport that expired on the transfer of sovereignty of Hong Kong to the PRC in June 1997.<sup>(2)</sup> Applicant's parents financed his undergraduate degree, although he also worked to obtain money. Applicant earned his master's degree at the same institution, but pursued his doctorate degree in computer science at a different public university. Applicant worked as a research assistant for a U.S. Army construction engineering laboratory from May 1991 to August 1995, and from August 1995 to late June 2001 as a graduate student research programmer for the state university. While Applicant was in graduate school, his mother purchased a home for \$92,000 in the area. Applicant resided in the residence from ay 1996 to November 2001 until he relocated for his present job. When he moved, his mother sold the house. Applicant was awarded his Ph. D. in February 2002.

Sometime in the early 1990s, during a trip home to visit family members, Applicant renewed his Hong Kong residency card that had been originally issued to him on his birth.<sup>(3)</sup>

In September 1994, Applicant became a U.S. naturalized citizen, taking the oath to renounce all foreign allegiances, to support and defend the U.S. Constitution and its laws, and to bear arms or noncombatant service or civilian service on behalf of the U.S. if required. At the time of his naturalization, Applicant anglicized his name by taking on a new first name consistent with his new nationality. Applicant acquired his U.S. passport later in September 1994.

In May 1997, Applicant married his spouse, a native of Hong Kong whom he had met in 1992 at the U.S. university where she was pursuing her degree. Their wedding took place at the university. She became a U.S. naturalized citizen in November 2002.

Applicant traveled to Hong Kong for pleasure in June 1996, June 1998, and May 2001. He traveled on his U.S. passport from the U.S. but presented his Hong Kong residency card to enter Hong Kong as it was more convenient than using his U.S. passport. By entering on this foreign residency card, Applicant could remain in Hong Kong for an extended period without acquiring a visa and he avoided long lines at the airport.<sup>(4)</sup> On leaving Hong Kong, he showed his passport as well as his Hong Kong residency card.

Needing a secret clearance for his duties with his present employer, Applicant executed a security clearance application

(SF 86) on December 26, 2001. He disclosed the Hong Kong residency (and with respect to his mother also Hong Kong citizenship) of his parents and brother, and the Hong Kong citizenship of his spouse. Applicant's brother, who had become a U.S. naturalized citizen in October 1998, had moved back to Hong Kong after earning his master's degree from a university in the U.S. and working for a private financial company in the U.S. for about three years.

In 2002, Applicant borrowed \$220,000 from a maternal uncle who is a resident citizen of Hong Kong. Applicant did not want to obtain the loan from a bank as it would be easier to negotiate with his uncle if for some reason he was unable to repay the loan under agreed upon terms. Applicant used \$200,000 of the funds to purchase a small condominium in his new locale. The remaining \$20,000 was used for a car. After about a year, Applicant sold the condominium and purchased his present residence.

On March 26, 2003, Applicant was interviewed by a Defense Security Service (DSS) special agent about his foreign connections and foreign travel. Applicant denied any loyalty to the PRC, its people or its government, but he expressed "feelings for Hong Kong, as that is where [he] was raised and [his] family is still there." Applicant disclosed the extent of his and his spouse's contacts with family members residing in Hong Kong, including his brother who was working for their uncle's company, a purveyor of consumer electronics (VCR and DVD systems) with offices in California and Hong Kong. Applicant volunteered he had regular contact with this uncle as well, as Applicant had borrowed \$200,000 from this uncle. He had not yet started to repay the loan, but they had verbally agreed that Applicant would pay his \$2,200 monthly payments in a lump sum quarterly. (5) Concerning his travels to Hong Kong, Applicant explained that none of his trips were documented in his U.S. passport as he had used his Hong Kong residency card to enter Hong Kong to avoid long lines at the airport and having to obtain a visa. Applicant indicated that the residency card had to be renewed every 10 to 15 years, and he last renewed it in the early 1990s when he was in Hong Kong. Asked by the DSS agent whether he would be willing to relinquish his Hong Kong residency card, Applicant responded:

I do not know if I would hand in my residency card if it were to be a stipulation for my obtaining a security clearance. I like to have the freedom to travel there on short notice without having to apply for the VISA.

Applicant asserted that his loyalties are to the U.S. government, and if he were ever approached by a representative from a foreign intelligence agency, he would contact the Federal Bureau of Investigation (FBI) or his employer's security officer.

Applicant traveled to Hong Kong in 2003 to visit family members. He entered Hong Kong on his U.S. passport rather than his Hong Kong residency card because he had applied for a U.S. security clearance and was not staying in Hong Kong for an extended period.

On July 16, 2004, Applicant arranged for a wire transfer of \$130,375 from his bank account in the U.S. to his uncle's bank account in Hong Kong in partial repayment of his loan from his uncle. Applicant had not paid his uncle earlier as he viewed the stock market as a better investment. As of September 15, 2004, Applicant owed about \$90,876.14 on the loan.

Applicant is not willing to relinquish his Hong Kong residency card if it meant he would not be able to travel to Hong Kong as a resident, but he would be willing to travel to Hong Kong on his U.S. passport only in the future if required for his clearance. He wants to retain his Hong Kong residency card as it gives him the ability to visit his family members for an extended period if necessary without having to obtain a visa for his stay. (6)

As of September 2004, Applicant's parents, brother, and the maternal uncle from whom he borrowed the \$220,000 reside in Hong Kong. Applicant's father works as a business manager for a company that sells small appliances and hardware. His mother, a homemaker, has permanent residence status in the U.S. under Applicant's sponsorship. Applicant has regular telephone contact with his mother and he speaks to his father about two to three times per year. Applicant's brother is currently residing in the U.S., as he splits his time between the U.S. and Hong Kong for his uncle's company. Applicant sees his brother occasionally when his brother is in the U.S. and he has telephone contact if his brother happens to be at their parents' residence in Hong Kong when Applicant calls. Applicant visited with the maternal uncle who lent him the \$220,000 during his trips to Hong Kong and he calls him once or twice a year to check on his well-being. Applicant's uncle has called him on occasion regarding the loan.

Applicant's spouse's family members were all born in the PRC, and are Hong Kong- Chinese citizens residing in Hong Kong. Her father is a retired construction worker; her mother is a homemaker. She maintains at least monthly contact by telephone with her parents. Applicant speaks with them two to four times per year and sees them on his trips to Hong Kong. Neither of his spouse's two sisters is employed, and Applicant has no contact with them. His spouse calls her sisters only once a year. Her three brothers are employed in Hong Kong as a salesman for an importer/exporter of raw materials, as a construction foreman, and as a supermarket manager, respectively.

Applicant is registered for the U.S. Selective Service, has voted in U.S. elections, and pays taxes in the U.S. He plans to pursue his career in the U.S. and has proved to be a valuable employee for the research and development corporation. A project manager, Applicant possesses text mining expertise and a unique understanding of extracting information from unstructured data in multiple natural languages. He leads a team that has developed a cross-lingual computer web search system using state of the art commercial translation products to translate web search queries between English and targeted languages. Lack of a security clearance limits Applicant's ability to work directly with customers. Applicant's manager, who hired Applicant and observed his performance, vouches for his personal character and trustworthiness.

## **POLICIES**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## **CONCLUSIONS**

Having considered the evidence in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to Guidelines C and B:

**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. (Directive ¶ E2.A3.1.1.) After becoming a U.S. citizen and acquiring a U.S. passport in September 1994, Applicant retained a Hong Kong residency card that he used in preference to his U.S. passport to enter Hong Kong in June 1996, June 1998, May 1999, and May 2001. Since the document is not a passport, disqualifying condition (DC) E2.A3.1.2.2. *Possession and/or use of a foreign passport*, does not apply, even though the residency card served as the functional equivalent of a passport in gaining entry to Hong Kong. Although not, a financial entitlement similar to those benefits specifically contemplated within DC E2.A3.1.2.4. *Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country*, the holder of the residency card is afforded perks not available to foreigners traveling to Hong Kong, including a separate queue at the border and no visa required for a lengthy stay. Hence, DC E2.A3.1.2.4. is pertinent to an evaluation of Applicant's security suitability.

His use of the Hong Kong residency card instead of his U.S. passport raises significant Guideline B concerns similar to use of a foreign passport as identified by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) in clarifying the policy concerning the use and possession of a foreign passport, <sup>(7)</sup> even

though Applicant is not mandated by the Department of Defense to relinquish his Hong Kong residency card as he would have a foreign passport. There is no evidence the Hong Kong residency card is accepted in lieu of a passport by PRC authorities to enter the PRC, but the U.S. would not be able to verify the date on which Applicant entered Hong Kong. Once in Hong Kong, he would not be identified as a U.S. citizen unless he volunteered his status or his U.S. passport. His choice to enter Hong Kong on the residency card is inconsistent with his U.S. citizenship and raises concerns of his primary allegiance.

In his favor, Applicant did not use his Hong Kong residency card to enter Hong Kong on a pleasure trip to see his relatives in 2003, although he had it in his possession. Applicant's explanation as to why he had his Hong Kong residency card with him if he did not intend to use it (*i.e.*, "I just have a bag that has all my travel documents in it." Tr. 57) is not persuasive. Given his desire to retain the residency card to guarantee that he would be able to remain in Hong Kong for an extended period if necessary, a more likely explanation is that he took it along in case of a problem. Applicant has expressed a willingness to refrain from using the Hong Kong residency card as a condition of his access, but he is not willing to give it up the card if it means he would not be able to go to Hong Kong as a resident, with the guarantee of an extended stay if necessary. (Tr. 39) It is not that Applicant prefers Hong Kong to the U.S., as he has voluntarily acquired U.S. citizenship and chosen to make his life here. Yet, his concern over the welfare of his family members has led him to act inconsistent with his U.S. citizenship. As long as close family members remain in Hong Kong, future travel on his Hong Kong residency card cannot be ruled out. SOR subparagraphs 1.a. and 1.b. are resolved against him.

**Foreign Influence.** A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or 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. (Directive ¶ E2.A2.1.1.) Although Applicant's spouse is a resident citizen of the U.S., his parents and a maternal uncle to whom he owes about \$90,000 are residents of Hong Kong. His mother and uncle have Hong Kong citizenship. Although Applicant speaks to his father rarely, he has regular contact with his mother. He also has financial and personal ties with his uncle in Hong Kong, from whom he borrowed the rather sizable sum of \$220,000 at repayment terms certainly more advantageous to him than he could have under a conventional loan from a financial institution in the U.S. Applicant's brother, a U.S. naturalized citizen, splits his time between Hong Kong and the U.S. where their uncle's company has offices.

Furthermore, Applicant's spouse's parents and siblings are PRC natives who reside in Hong Kong and are Hong Kong-Chinese citizens. While the extent of Applicant's contacts with his in-laws (visiting them when in Hong Kong and conversing by telephone two to four times yearly) does not suggest a particularly close relationship between Applicant and his in-laws, the DOHA Appeal Board has held it reasonable for the Administrative Judge to consider the significance not only of an Applicant's ties but also of his spouse's ties to a foreign country and the possible effect they may have on Applicant's contacts under Guideline B (*see* ISCR 01-02452, November 21, 2002). Applicant's spouse does not have a close relationship with her siblings. She calls her sisters only once a year (*see* C E2.A2.1.3.3. *Contact and correspondence with foreign citizens are casual and infrequent*). However, she contacts her parents at least once a month and they call her. In determining Applicant's suitability for continued access, DC E2.A2.1.2.1. *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*, and DC E2.A2.1.2.2. *Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists, must be considered.*

Foreign influence concerns raised by the foreign citizenship and/or foreign residency of family members to whom he is bonded by affection or obligation may be mitigated where it can be determined that the relatives 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 (*see* MC E2.A2.1.3.1.). None of Applicant's or his spouse's relations in Hong Kong have ever been agents of a foreign power. Applicant's father works as a manager for a hardware company. His maternal uncle owns a commercial business selling consumer electronics equipment. Applicant's father-in-law is a retired construction foreman, and her siblings do not work for the government.

The inquiry in a foreign influence case is not limited to consideration of whether the foreign contacts or connections are agents of a foreign power. Rather, the foreign contacts or connections must also be evaluated in terms of whether they place an applicant in a position of vulnerability to be influenced by coercive or non coercive means, even if there is no evidence that a foreign country has sought to exploit that vulnerability. (*See* ISCR Case No. 00-0628, February 24, 2003). Little is known of the social acquaintances and activities of Applicant's and his spouse's family members in Hong Kong. Furthermore, as a relatively prosperous business owner in Hong Kong, Applicant's uncle may well have contact with governmental officials or engage in activities which are noted by foreign authorities.

The likelihood of pressure or coercion being placed on the foreign relatives depends, in part, on the nature of the country involved (whether it respects democratic principles and human rights, has friendly relations with the U.S., etc.). With the transfer of Hong Kong sovereignty to the PRC on June 30, 1997, the PRC exerts some influence in Hong Kong, especially in matters related to defense and foreign affairs. The PRC has significant intelligence collection capability of which the U.S. is a primary target,<sup>(8)</sup> and the PRC continues to have a poor human rights record.<sup>(9)</sup> While Hong Kong remains a free and open society where human rights and the rule of law are respected, and courts remain independent,<sup>(10)</sup> Applicant's and his spouse's family members are seen to be more at risk than if Hong Kong was still under British sovereignty. Even foreign governments with the best of relations do not always have the same interests.

Applicant is sufficiently concerned about his relatives to where he is not willing to relinquish his Hong Kong residency card. His loan from his uncle is unsecured and repayment is by verbal agreement, but this significant financial tie increases the foreign influence concerns. Despite an expressed willingness to obtain a conventional loan to alleviate the government's concerns, Applicant has not done so. While Applicant has established significant ties to the U.S., and he has proven to be a valuable asset to his employer, he has failed to overcome the significant Guideline B concerns set forth under SOR ¶¶ 2.a., 2.b., 2.c., 2.d., 2.e., 2.f., 2.g., 2.h., 2.i., 2.j., and 2.m. Guideline B ¶¶ 2.k. and 2.l. are resolved in his favor, as the government did not prove that Applicant initiates any calls with his in-laws or that he or his spouse has a close relationship with her siblings in Hong Kong.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

#### Paragraph 1. Guideline C: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

#### Paragraph 2. Guideline B: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Subparagraph 2.e.: Against the Applicant

Subparagraph 2.f.: Against the Applicant

Subparagraph 2.g.: Against the Applicant

Subparagraph 2.h.: Against the Applicant

Subparagraph 2.i.: Against the Applicant

Subparagraph 2.j.: Against the Applicant

Subparagraph 2.k.: For the Applicant

Subparagraph 2.l.: For the Applicant

Subparagraph 2.m.: 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.

**Elizabeth M. Matchinski**

**Administrative Judge**

- 1.
2. Applicant testified he never acquired a British National Overseas passport as he had already become a U.S. citizen by the time of the transfer of Hong Kong to the PRC.
3. Applicant testified he is not required to maintain a listed residence in Hong Kong to keep the card, and that it is similar to a permanent residency card in the U.S. (Tr. 50) Applicant told a Defense Security Service (DSS) special agent in March 2003 that he renewed his Hong Kong residency card when in Hong Kong in approximately the early 1990's, and that the card is valid for 10 to 15 years. (Ex. 2) He testified inconsistently at his hearing when asked about his renewal of the card. Applicant responded, "I never needed to renew it, unless I lost it or something." He subsequently added that if there was an expiration date, he was unaware of it "because I don't really go back that often, after my 16 year old birthday, so I haven't been told that I need to change it." (Tr. 38) Whether or not Applicant renewed the Hong Kong residency card, the evidence is undisputed that he used it to enter Hong Kong so that he would not have to obtain a visa on his U.S. passport.
4. During his DSS interview, Applicant attributed his use of the Hong Kong residency card to convenience ("I do not need to obtain a Visa and it allows me easy entrance onto the airplane, and I do not need to stand in lines at the airport . . . I can, if necessary, go to Hong Kong on short notice instead of waiting for a travel Visa." *see* Ex. 2). Yet, at his hearing he testified that he did not need a visa to travel to Hong Kong on his U.S. passport unless he was staying for an extended period. (Tr. 55) The U.S. State Department Consular Information Sheet on Hong Kong reports a visa is not required for U.S. citizen tourism travel of up to 90 days.
5. Included in exhibit B are the repayment schedules Applicant drew up. Applicant listed "actual payments" totaling \$9,000 between December 15, 2002, and arch 15, 2003. However, there is no evidence of any payment until a bank transfer of \$130,375 to his uncle on July 16, 2004. While this payment is more than sufficient to cover Applicant's obligation on the loan since December 2002, it was not made until July 2004.
6. It is not clear whether Applicant would be able to enter the PRC using only his Hong Kong residency card. Applicant testified he would need a permit to enter the PRC from Hong Kong. (Tr. 70)
7. On August 16, 2000, the ASDC3I clarified Guideline C as it pertains to foreign passports, indicating that possession and use of a foreign passport in preference to a U.S. passport raises doubts as to whether the person's allegiance to the U.S. is paramount, and it could also facilitate foreign travel unverifiable by the U.S.
8. *See* Operations Security Intelligence Threat Handbook, Section 3.
9. *See* the U.S. State Department's Country Reports on Human Rights Practices-2003 pertaining to China (PRC) including Tibet, Hong Kong, and Macau, released February 25, 2004, by the Bureau of Democracy, Human Rights, and

Labor.

10. See the U.S. State Department publications: *Background Note: Hong Kong*, December 2003, and *Country Reports on Human Rights Practices-2003* pp. 42-55.