



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-03041

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel

For Applicant: *Pro Se*

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 27, 2007. On August 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline C (Foreign Preference) regarding Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on September 7, 2007. He answered the SOR in writing by a notarized document dated October 9, 2007. In his answer, Applicant admitted all five allegations and waived his right to a hearing. A File of Relevant Materials (FORM), dated November 15, 2007, was received by Applicant on November 21, 2007. The FORM included six documents attached as related items. Applicant did not submit any information within the time period of 30 days after his

receipt of the FORM and the record is now closed. DOHA received the case for assignment to an Administrative Judge for administrative determination on January 28, 2008, and I was assigned the case that same day. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to sensitive information is denied.

Findings of Fact

Applicant is a 71-year-old employee of a defense contractor. He has been with the same company since December 1991 and currently serves as its Chairman of the Board and Vice President. In his Answer to the SOR, signed by the Applicant and notarized on October 9, 2007, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 1.c, 1.d, and 1.e of the SOR, without providing explanations or additional facts. Instead, he responded to the allegations in seriatim, answering each by only stating: "I admit." Because he declined to add additional facts concerning his life or his admissions, there are scant facts of record.

Born in the United Kingdom in 1936, Applicant married his wife in 1962.¹ The couple has two grown children, both United States (U.S.) – United Kingdom dual citizens. While working as a professor of social statistics at a university in the United Kingdom, he received a Ph.D. in 1979. He became a naturalized U.S. citizen in December 1998, the same month he was issued a U.S. passport. He maintains dual citizenship with both the United Kingdom and the U.S.

Applicant has traveled extensively throughout the world. He has used his United Kingdom passport for frequent short visits to the United Kingdom to visit his children and grandchildren. That passport was used as recently as April 2007. Set to expire on January 31, 2008, he has been reluctant to surrender that passport. He uses his U.S. passport for all other travel. Applicant has not indicated when or whether his travel or passport use has been approved by his employer's security authority.

Since 2001, Applicant has received a government pension from the United Kingdom Department of Social Security. His September 2007 e-QIP indicates he has foreign property, business connections or financial interests; maintains bank accounts in the United Kingdom; is or has been employed by or acted as a consultant for a foreign government, firm, or agency; has contact with a foreign government, its establishments, or its representatives other than on official U.S. government business, currently works in the area of statistics with Canadian and South African governments, and has worked in that same area with or in other countries. His international work in the area of statistics is extensive and diverse.

I take administrative notice of the following facts.² The United Kingdom is a highly developed constitutional democracy. It is politically stable, has a modern

¹ Applicant's wife is a citizen of both the U.S. and the United Kingdom.

² See U.S. State Department Background Note: United Kingdom (Jan. 2008) and U.S. State Department Consular Information Sheet (Dec. 12, 2007).

infrastructure, a highly developed market-based economy, and its legal system provided the model for that used in the U.S. The United Kingdom is one of the U.S.' oldest and closest allies, and British foreign policy emphasizes close coordination with the U.S. It was an ally in the Great War, World War II, the Korean conflict, the Persian Gulf War, and Operation Iraqi Freedom. Additionally, the United Kingdom is a founding member of the North Atlantic Treaty Organization. It has a positive record in the areas of human rights and legal process. The government of the United Kingdom does not support or sponsor terrorism or terrorist organizations, but acts of terrorism have occurred within the United Kingdom. The United Kingdom works cooperatively with the U.S. in the fight against global terrorism.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ."³ The burden of proof is something less than a preponderance of evidence.⁴ The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant.⁵

³ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the 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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁷ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁸ 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.

Based upon consideration of the evidence, I find the following adjudicative guideline and the security concern cited in AG ¶ 9 to be the most pertinent to the evaluation of the facts in 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.”⁹

Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

⁶ *Id.*

⁷ *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

⁸ Executive Order 10865 § 7.

⁹ See AG ¶ 9.

Analysis

Guideline C, Foreign Preference

Security concerns relating to the guideline for Foreign Preference arise when an individual acts in such a way as to indicate a preference for a foreign country over the United States. In this event, he may be prone to provide information or make decisions that are harmful to the United States. Here, Appellant has admitted that he possesses and uses a current United Kingdom passport. This admission gives rise to Foreign Preference (FP) Disqualifying Condition (DC) a.1, AG ¶10.a.1 (*possession of a current foreign passport*).¹⁰

Applicant has not presented evidence of refutation, extenuation, or mitigation sufficient to overcome the *prima facie* case against him. Indeed, he has presented neither facts nor argument beyond his direct admissions to the allegations. As noted in the SOR and admitted by Applicant, he exercises dual citizenship and travels on a foreign passport.¹¹ Although a citizen of the United Kingdom by virtue of his birth and parentage, he has purposefully maintained dual citizenship since becoming a U.S. citizen and continued to reap the benefits of that citizenship. Consequently, FP Mitigating Condition (MC) 1, AG ¶ 11.1.a (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*) (emphasis added) does not apply. Applicant has not addressed whether he is willing or unwilling to renounce dual citizenship, but he has articulated his reluctance to surrender his foreign passport. Continued use and possession of that passport is a fruit reaped from his dual citizenship. Therefore, FP MC 2, AG ¶ 11.1.b (*the individual has expressed a willingness to renounce dual citizenship*) does not apply. Moreover, that foreign passport was received when Applicant was an adult and after he became a U.S. citizen; he has since been reluctant to surrender this valid document. Consequently, neither FP MC 3, AG ¶ 11.1.c (*exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor*) nor FP MC 5, AG ¶ 11.1.e (*the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated*) apply. It only has been used for private family trips and no facts have been presented to indicate Applicant's passport use has been approved by a cognizant security authority. Therefore, FP MS 4, AG ¶ 11.1.d (*use of a foreign passport is approved by the cognizant security authority*) does not apply. None of the other FP MCs apply.

¹⁰ In his e-QIP, Applicant also acknowledges he receives a retirement pension from the government of the United Kingdom, a situation which could also give rise to FP DC a.3, AG ¶ 10.a.3 (*accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country*).

¹¹ As previously noted, the record additionally shows Applicant receives a foreign pension and works in a consulting capacity with foreign entities.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Here, little is known about the Applicant because he has declined to expand the record beyond the documents contained in the FORM. What is known is that he is a mature, educated man whose work and expertise has taken him around the world. It also shows that he is truly at home in both the U.S. and the United Kingdom, with regard to his family, his investments, and his interests. He has freely exercised his rights and privileges as a dual citizen as a matter of personal convenience, and has done so through the present time. Although he expressed reluctance to surrender his United Kingdom passport, the record does not reflect whether he will renew that passport upon its expiration at the end of January 2008.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The United Kingdom is a long-time friend and ally of the U.S. The ties between the two are of unique historical and political significance. The record does not contain any assertion that the United Kingdom courts or solicits its citizens to act in a manner antithetical to the U.S. The burden, however, is squarely on Applicant to present evidence of refutation, extenuation, or mitigation sufficient to overcome the *prima facie* case raised by the existence of foreign preference disqualifying conditions.¹² Additionally, he has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³ By simply admitting the allegations against him with no additional explanation, Applicant has failed to meet his burden.

Although the scant facts available do not indicate that Applicant poses a significant threat, any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive

¹² ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

¹³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

information.¹⁴ This resolution is not necessarily a determination as to the loyalty of an applicant,¹⁵ but is an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. Inasmuch as Applicant has failed to meet his burden and mitigate security concerns, I conclude that he has failed to meet his burden, I conclude it is not clearly consistent with national security to grant Applicant a security clearance. Clearance is denied.

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 APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge

¹⁴ *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

¹⁵ Executive Order 10865 § 7.