



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-00607

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro Se*

11/21/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant continues to possess a valid United Kingdom passport, which does not expire until January 2020. Applicant did not indicate his United Kingdom “passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated” under Adjudicative Guideline (AG) ¶ 11(e). Security concerns pertaining to foreign preference are not mitigated. Eligibility for a security clearance is denied.

Statement of the Case

On June 20, 2014, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF-86). (Item 1) On August 6, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a statement of reasons (SOR) pursuant to Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the AGs, which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF made a preliminary decision to deny or revoke Applicant’s eligibility for access to classified information. Specifically, the SOR set forth security concerns arising under the foreign preference guideline.

The file does not contain a response to the SOR; however, on September 3, 2015, Applicant waived his right to a hearing. (Item 1) On September 23, 2015, Department Counsel completed the File of Relevant Material (FORM). On October 7, 2015, Applicant received the FORM. Applicant provided a November 5, 2015 response to the FORM. On November 12, 2015, Department Counsel stated she had no objection to the Applicant's FORM response. On November 17, 2015, the case was assigned to me. The Government's case consisted of three exhibits. (Items 1-3)

Administrative Notice

I have taken administrative notice of some basic facts concerning the relationship of the United Kingdom to the United States. Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (citing internet sources for numerous facts and documents).

In this case, the source for the facts concerning the United Kingdom is a verbatim quotation from the U.S. Department of State, Bureau of European and Eurasian Affairs, *Fact Sheet U.S. Relations with United Kingdom*, April 30, 2015, available at <http://www.state.gov/r/pa/ei/bgn/3846.htm>. (HE 1)

Findings of Fact¹

In Applicant's FORM response, Applicant said on January 25, 2010, he renewed his United Kingdom passport while he was living in the United States as a permanent resident or green card holder. (SOR ¶ 1.a) He did not indicate that his "passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." See AG ¶ 11(e). He also provided some extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 50-year-old enterprise architect employed by a technology company since April 2014.² He was born in the United Kingdom, and in 1986, he received a degree in the United Kingdom in software engineering. In 1998, he entered

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

²Unless stated otherwise, the source for the information in this paragraph and the next paragraph is Applicant's June 20, 2014 Electronic Questionnaires for Investigations Processing (e-QIP) (SF-86). (Item 2)

the United States. In 2005, he married, and he does not have any children. In 2010, he was naturalized as a U.S. citizen. Applicant and his spouse live in the United States. Applicant has a United Kingdom pension fund with an estimated value of \$110,000. He does not own any real estate in the United Kingdom. (Item 3)

In June 2014, Applicant offered to renounce his United Kingdom citizenship. After Applicant became a U.S. citizen in 2010, he used his United States passport for all foreign travel. (Item 3) There is no evidence of security violations, abuse of alcohol, arrests, convictions, or use of illegal drugs.

The FORM reads as follows:

Absent documentation that Applicant has surrendered or destroyed his foreign passport, this precludes a finding that he is not exercising his rights of foreign citizenship and can be cleared for access to classified information, and establishes the basis for disqualification under Directive 5220.6, Guideline C, Paragraph 10(a)(1). (FORM at 2)

Applicant's FORM explained that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 2) Applicant submitted some additional information about when and why he obtained his United Kingdom passport. However, he did not provide information that his United Kingdom "passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated" under Adjudicative Guideline (AG) ¶ 11(e).

United Kingdom

The first, short-lived British colony in Virginia was organized in 1584, and permanent English settlement began in 1607. The United States declared its independence from Great Britain in 1776. The American Revolutionary War ended in 1783, with Great Britain recognizing U.S. independence. The two countries established diplomatic relations in 1785. The United States broke relations when it declared war on the United Kingdom during the War of 1812; relations were reestablished in 1815.

The United States has no closer ally than the United Kingdom, and British foreign policy emphasizes close coordination with the United States. Bilateral cooperation reflects the common language, ideals, and democratic practices of the two nations. Relations were strengthened by the United Kingdom's alliance with the United States during both World Wars, in the Korean conflict, in the Persian Gulf War, in Operation Iraqi Freedom, and in Afghanistan, as well as through its role as a founding member of the North Atlantic Treaty Organization (NATO). The United Kingdom and the United States continually consult on foreign policy issues and global problems and share major foreign and security policy objectives.

Regarding Northern Ireland, which is part of the United Kingdom, “Nationalist” and “Republican” groups seek a united Ireland that includes Northern Ireland, while “Unionists” and “Loyalists” want Northern Ireland to remain part of the United Kingdom. U.S. priorities continue to be supporting the peace process and devolved political institutions in Northern Ireland and encouraging the implementation of the U.S.-brokered 1998 Belfast Agreement, also known as the Good Friday Agreement, and the 2006 St. Andrews Agreement.

U.S. Assistance to the United Kingdom

The International Fund for Ireland (IFI), created in 1986, provides funding for projects to generate cross-community engagement and economic opportunity in Northern Ireland (the United Kingdom) and the border counties of Ireland. Since the IFI's establishment, the United States and EU have contributed the vast majority of funds, with the United States allocating more than \$540 million.

Bilateral Economic Relations

The United Kingdom is a member of the European Union and a major international trading power. The United Kingdom is one of the largest markets for U.S. goods exports and one of the largest suppliers of U.S. imports. The United States and the United Kingdom share the world's largest bilateral foreign direct investment partnerships. The United Kingdom is a large source of foreign tourists visiting the United States. It participates in the Visa Waiver Program, which allows nationals of participating countries to travel to the United States for certain business or tourism purposes for stays of 90 days or less without obtaining a visa.

The United Kingdom's Membership in International Organizations

The United Kingdom and the United States belong to a number of the same international organizations, including the United Nations, North Atlantic Treaty Organization, Euro-Atlantic Partnership Council, Organization for Security and Cooperation in Europe, G-20, G-8, Organization for Economic Cooperation and Development, International Monetary Fund, World Bank, and World Trade Organization. The United Kingdom also is an observer to the Organization of American States.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s 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), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. 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 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, “[W]hen 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.”

AG ¶ 10(a)(1) describes one condition that could raise a security concern and may be disqualifying in Applicant’s case, “(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport.” Applicant did not renew his United Kingdom passport after becoming a U.S. citizen; however, he continues to possess a United Kingdom passport that will be valid until January 2020, establishing AG ¶ 10(a). Consideration of the applicability of mitigating conditions is required.

The Appeal Board concisely explained Applicant’s responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 11 provides conditions that could mitigate security concerns:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(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;

(d) use of a foreign passport is approved by the cognizant security authority;

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and

(f) the vote in a foreign election was encouraged by the United States Government.

None of the mitigating conditions fully apply. Applicant offered to renounce his United Kingdom citizenship. He did not indicate that he planned or had taken any specific steps to renounce his United Kingdom citizenship. Applicant did not invalidate or relinquish his United Kingdom passport. Applicant was advised in the FORM that he could mitigate Foreign Preference concerns through AG ¶ 11(e), however, he did not take action to effectuate this mitigating provision. Foreign preference security concerns are not mitigated.

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) the 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 security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline C, but some warrant additional comment.

Applicant is a 50-year-old enterprise architect employed by a technology company since April 2014. He was born in the United Kingdom, and he entered the United States in 1998. In June 2014, he offered to renounce his United Kingdom citizenship; however, he did not describe any plans or actions to actually do so. He was naturalized as a U.S. citizen in 2010. Applicant and his spouse live in the United States. Applicant has a United Kingdom pension fund with an estimated value of \$110,000. There is no evidence of security violations, violations of his employer's rules, abuse of alcohol, arrests, convictions, or use of illegal drugs.

The U.S. State Department United Kingdom Fact Sheet emphasizes, "The United States has no closer ally than the United Kingdom, and British foreign policy emphasizes close coordination with the United States." The United States and United Kingdom have shared sensitive and classified information and engaged in joint combat operations in Iraq and Afghanistan. There is no reason to believe the United Kingdom government and/or United Kingdom intelligence personnel would violate United Kingdom, United States or international law, by using improper and/or illegal means to obtain classified information from Applicant. The key rationale for denying Applicant's clearance is his continued retention of a valid United Kingdom passport after being clearly advised by Department Counsel that he could mitigate security concerns by ensuring his "passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated" under AG ¶ 11(e). In light of his retention of his United Kingdom passport, I cannot give him full credit for offering to renounce his United Kingdom citizenship.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, and I conclude that it is not clearly consistent with the national interest to grant Applicant security clearance eligibility at this time. Foreign preference security concerns are not mitigated.

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

Conclusion

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

MARK HARVEY
Administrative Judge