

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: S. A. K. - In Loss of Nationality Proceedings

Decided by the Board November 21, 1985

Appellant, a native-born United States citizen, married a Dutch citizen in the Netherlands in 1982. Shortly before her marriage, she allegedly consulted the United States Consulate General at Rotterdam to inquire what effect naturalization in the Netherlands might have on her United States citizenship and whether it was possible for her to hold both nationalities. On October 4, 1982 appellant was granted Dutch citizenship after she formally declared before a competent official that she was the wife of a Dutch citizen and wished to be a Netherlander. Having been informed by the Dutch authorities of appellant's naturalization, the Consulate General at Amsterdam, where appellant was living, executed a certificate of loss of nationality under section 349(a)(1) of the Immigration and Nationality Act which the Department approved in 1983. A timely appeal was entered.

HELD: Since appellant conceded that she obtained naturalization in the Netherlands voluntarily, the sole issue presented was whether she intended to relinquish her United States nationality.

Central to the Board's conclusion that appellant lacked the requisite intent was her contention, not disputed by the Department, that she had made a pointed, concerned inquiry before naturalization about how she might retain United States citizenship. In her inquiry the Board found plausible contemporary evidence of a lack of intent on appellant's part to abandon United States citizenship. It was the Board's view that the consular employee to whom appellant was referred gave her incorrect advice. He should not, as appellant averred, have told her that she had to choose between Dutch and American citizenship, thus leading her to believe that naturalization would automatically result in her expatriation. Rather, he should have explained that a person's intent at the time the expatriative act is done is of crucial importance, and that foreign naturalization does not result in expatriation if the person can prove lack of the requisite intent. He ought therefore, to have advised her of her right to make her professed lack of a renunciatory intent a matter of official record.

The Board accordingly reversed the Department's holding of loss of appellant's citizenship.

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This is an appeal from an administrative determination of the Department of State that S. A. K. expatriated herself on October 4, 1982 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in the Netherlands upon her own application. 1/

The sole issue presented is whether appellant intended to relinquish her United States citizenship when she became a Netherlands citizen. Having concluded that the Department has failed to prove by a preponderance of the evidence that appellant had the requisite intent, we reverse.

I

Appellant became a United States citizen by birth on [REDACTED] [REDACTED]. She was educated in the United States. In 1979 she went to the United Kingdom to study. In the autumn of 1980 she visited the Netherlands and decided to remain there.

In 1981 appellant met a Dutch citizen to whom she became engaged. Appellant states that before marriage she visited the United

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), reads:

Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --

(1) obtaining naturalization in a foreign state upon his own application, . . .

States Consulate General at Rotterdam in the summer of 1982 to obtain a document attesting that she had not been previously married. It appears that in contemplating marriage appellant also envisioned obtaining her husband's nationality, for she stated in her letter to the Board of May 30, 1984 that:

At that time, I had many questions about nationality: loss of nationality, what it actually would entail were I to ask for the Dutch nationality, what my chances were for obtaining Dutch nationality while being allowed to keep my American nationality. I posed my questions to an employee at the Consulate. He was extremely helpful, but the impression I received was that if I were to request Dutch citizenship, I would immediately lose my U.S. citizenship. According to the man I spoke with, it was very difficult to get permission to have both nationalities; he said that I had to make a decision one way or the other, American or Dutch. Yes, it was possible to request that I retain my U.S. passport alongside the Dutch one, but the chances were very slim that this request would be granted. I found this unfortunate, I care about being a U.S. citizen, my entire family lives there, I was born and raised there. But, I was about to marry, I wanted to establish myself here in Holland, to participate fully in the life of the land where I had chosen to live. So, I decided to, indeed, choose for Dutch nationality....

Appellant was married on September 30, 1982. On October 4, 1982 she appeared at the office of the Mayor of Amsterdam and, in accordance with the provisions of Article 8 of the Netherlands Nationality Act of 1892, declared that she wished to be a Netherlands citizen. 2/ The competent authority certified that appellant was granted Netherlands nationality on October 4, 1982.

2/ Article 8 of the Netherlands Nationality Act of 1892 read as follows:

A non-Netherlands woman whose husband, on the date she contracted marriage, was a Netherlander shall become a Netherlander by giving notice of her wish to this effect to the authority referred to in article 12a, provided the marriage subsists on the date of the notification and the husband is still a Netherlander.

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On the day of her naturalization, appellant applied for a Netherlands passport. On November 4, 1982, the Ministry of Foreign Affairs informed the United States Embassy that she had acquired Netherlands nationality and had been issued a Netherlands passport. The Ministry returned appellant's United States passport to the Embassy.

The Consulate General at Amsterdam wrote appellant on December 8, 1982 to inform her that she might have lost her citizenship by obtaining naturalization in the Netherlands. She was asked to complete a form for determining United States citizenship and to return it within 30 days. She was also informed that a consular officer would be pleased to interview her. The letter was addressed to appellant at her husband's place of residence, a boat in Amsterdam. A postal receipt with an illegible signature indicates that the letter reached appellant's address, but she did not make a reply.

Appellant obtained a visa in her Dutch passport on December 3, 1982 and travelled to New York to visit a terminally ill friend. The visa, valid for one entry, bore the notation "Pending Citizenship Investigation." She states that she returned to the Netherlands in January 1983. On April 28, 1983 the Consulate General wrote appellant again, at the same address as its earlier letter, inquiring whether she intended to complete the citizenship questionnaire sent her in December 1982. She did not reply to that letter.

One day earlier, April 27, 1983 the Consulate General executed a certificate of loss of nationality in appellant's name. 3/ The Consulate General certified that appellant became a United States citizen at birth; that she obtained naturalization in the Netherlands upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act.

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

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In forwarding the certificate, the Consulate General reported to the Department as follows:

Attached is a Certificate of Loss of Nationality, in triplicate, with supporting documents in the name of S. A. K., who obtained Netherlands nationality upon her own request on October 4, 1982 after her marriage to the Dutch citizen, A. V. B.

The Ministry of Foreign Affairs, The Hague informed us on November 4, 1982 of Ms. K.'s naturalization and transmitted her US passport H3029291 issued December 14, 1977 at New York. We sent Ms. K. letters on December 8, 1982 and April 28, 1983, but we have not heard from her.

Ms. K. never registered with this Consulate or with Amconsul, Rotterdam, although she has been residing in the Netherlands since November 1980. She never consulted our office concerning the effect Dutch naturalization would have on her US citizenship and did not respond to our letters of December 8, 1982 and April 28, 1983. It is our opinion that Ms. K. obtained naturalization in The Netherlands with the intent to relinquish US nationality.

The Department approved the certificate on July 29, 1983, approval constituting an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. On August 11, 1983 the Consulate General at Amsterdam sent a copy of the approved certificate to appellant by registered mail. The letter was returned "not collected." The certificate was then sent to appellant by ordinary mail on September 7, 1983. 4/

4/ Appellant has stated that she had never received the letters sent her by the Consulate General in December 1982 and April 1983, or the Consulate General's letters of August 11, and September 7, 1983. Her ex-husband held the letters and did not pass them to her until May 1984 when she visited him in Amsterdam.

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In January 1984 appellant and her husband were divorced. She entered the appeal, on May 30, 1984, and requested oral argument which was heard on September 23, 1985. Appellant concedes that she obtained naturalization in the Netherlands voluntarily, but maintains that she did not intend to relinquish her United States citizenship.

II

Since appellant has stipulated that she obtained naturalization in the Netherlands upon her own application and of her own free will, the sole issue for decision is whether she performed this statutory expatriating act with the intention of relinquishing her United States citizenship.

Under the Supreme Court's holding in Vance v. Terrazas, 444 U.S. 252, 270 (1980), the Government must prove by a preponderance of the evidence that the citizen performed the expatriating act with an intent to relinquish citizenship. Intent may be proved by a person's words or found as a fair inference from proven conduct. 444 U.S. at 260. The intent to be proved is the person's intent at the time the expatriating act was done. Terrazas v. Haig, 653 F. 2d 285, 287 (7th Cir. 1981).

The Department submits that appellant demonstrated her intent to forfeit United States citizenship in several ways:

First, voluntary naturalization in a foreign country may be in itself highly persuasive evidence of intent to relinquish citizenship. Attorney General's Statement of Interpretation, 42 Op. Att'y. Gen. 394 (1969). The U.S. Supreme Court has also held that one of the most "obvious and effective forms of expatriation... /Is/ naturalization under the laws of another nation." Savorgnan v. United States, 338 U.S. 491 (1950).

Second, Appellant has demonstrated through her actions her belief that she is no longer a U.S. citizen. For example, Appellant willingly surrendered her U.S. passport to acquire a Dutch passport. Appellant has travelled exclusively using a Dutch passport since her naturalization in the Netherlands. Appellant has entered the U.S. on several occasions using a B-2 tourist visas /sic/. /Appellant obtained a multiple entry visitors visa in October 1983 at the Consulate General in Rotterdam. / These acts

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are uniformly consistent and indicate an abandonment of U.S. citizenship and an attachment to Dutch citizenship.

Third, appellant has submitted written statements acknowledging that she was aware that her naturalization in the Netherlands could result in her loss of U.S. citizenship. For example, in her letter of May 30, 1984 she wrote of her meeting with a U.S. consular official in Rotterdam:

"...the impression I received was that if I were to request Dutch citizenship I would immediately lose my U.S. citizenship." Later in the same letter she wrote, "So, I decided to, indeed, choose for Dutch nationality." "...It was a choice I'd had to make, and ... if it had been possible to keep both nationalities, I'd have certainly done it.

Naturalization in a foreign state may, of course, be highly persuasive evidence of an intent to relinquish United States citizenship, but it is no more than that. Vance v. Terrazas, 444 U.S. at 261. 5/ More concrete evidence of a specific renunciatory intent therefore must be presented.

Using a foreign passport, especially to enter the United States, by one who claims United States citizenship on its face, is inconsistent with United States citizenship. Standing alone, however, it is insufficient evidence of an intent to abandon United States nationality. Appellant states that she believed, on the strength of her conversation with a Dutch employee of the Consulate General at Rotterdam in 1982 before her marriage, that she would lose her United States citizenship when she declared that she wished to be a Dutch national. Having married and decided to make a life in the Netherlands,

5/ The Court said:

In any event, we are confident that it would be inconsistent with Afroyim to treat the expatriating acts specified in section 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. "Of course," any of the specified acts "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J., concurring).

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it appears she considered it would be prudent to obtain a Dutch passport. "I knew that with a Dutch passport I would really have every right of a Dutch citizen. I would be able to work. I wouldn't be hassled by anyone, and that really was a strong enough motive to do it." 6/ As we have seen, to obtain a Dutch passport, appellant was required to surrender her United States passport. Believing that she had lost United States citizenship, her only alternative, appellant has stated, was to use a Dutch passport to visit the United States.

She was unwise not to have retained her United States passport, as apparently she might have done, instead of applying for a Dutch travel document. 7/ We are not persuaded, however, that appellant's obtaining and using a Dutch passport, even with U.S. visas, evidences an intent to relinquish United States citizenship. In the circumstances of this case, it seems to us it might fairly be inferred that appellant resigned herself to using a Dutch passport, believing she might not legally reacquire a United States passport.

Nor do we consider appellant's statements to the effect that she was aware she could lose her United States citizenship by obtaining naturalization to be indicative of an intent to give up United States citizenship. Knowledge that performance of an expatriating act might result in loss of United States citizenship is not, without more, to be equated with an intent to surrender that citizenship. See Richards v. Secretary of State, 752 F. 2d 1413, 1420, (9th Cir. 1985):

6/ Transcript of hearing in the Matter of S. A. K., Board of Appellate Review, September 23, 1985 (hereafter referred to as "TR.") p. 21.

7/ At the hearing, counsel for the Department observed that: "Usually people in the Netherlands use their U.S. passport and a certificate of nationality." To counsel's question: "Were you aware of that?" Appellant replied "No." TR 21.

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The Afroyim principle was reaffirmed in Terrazas, in which the Court stated that, "i/n the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct." 444 U.S. at 260, 100 S. Ct. at 545 (emphasis added). If we were to hold that mere knowledge that Congress has designated an act an expatriating act is enough to make out specific intent, we would in effect be recognizing a congressional power to strip persons of their citizenship. Because, under Afroyim and Terrazas, Congress has no power to declare that the performance of particular acts shall automatically result in expatriation, mere knowledge that Congress has declared an act to be expatriating is not enough. Something more than knowledge that the act is an expatriating act under United States law must be shown.

Persuasive contemporary evidence of a lack of intent to relinquish her United States nationality emerges from appellant's contention unrefuted by the Department, that in 1982 before her marriage and naturalization she specifically asked a Dutch employee of the Consulate General at Rotterdam what the effect naturalization might have on her United States citizenship.

At the hearing appellant described her interview at the Consulate General as follows:

...I went to Rotterdam because I really wanted to know how I could keep my American citizenship. I was planning to do something about the citizenship, but I didn't want to do anything until I knew what was involved and what would be the best possible way to keep both nationalities, and I not only had to be for that reason but I also had to go to the Consulate to get an affidavit, something stating that I had never been married before, something stamped and sealed; and after I got that paper, I said who is the best person to talk to here, who knows about nationality problems, and it was Mr. V., and I went to him and told him my plans and said how can I go about this. What do I have to do to get dual citizenship at this point, and he said, and very kindly, but very firmly, it is impossible or it is practically impossible. Your chances are so slim. They really give it to people who have some kind of business connection, who work in

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Holland, who need to be back and forth because of their work. He said, well, your reasons, as I understand them, they are personal, they are emotional, they are not tangible. I don't think it is going to do any good to do it. Make a choice one way or the other, which was quite a blow because I thought there would be something to do about it, and that was the end of the conversation. It was about half an hour, and I went home and did get married anyway. TR. 13.

After appellant had belatedly received the certificate of loss of her nationality in May 1984 from her ex-husband, she states that she returned to see Mr. V. at Rotterdam. She noted to him the appeal procedures on the reverse of the certificate which to her indicated that it might have been possible for her to retain United States nationality upon acquiring Dutch citizenship. She said she asked him: "...why did you tell me it wasn't? I said look at this letter /presumably the transmittal letter of the certificate of loss of nationality explaining the right of appeal/ and he said very nicely, well, I might have said that, but I really don't remember. I might have said it." TR 23.

Continuing, appellant stated that:

...Based upon Mr. V.'s nonadvice I was assuming that if I were to naturalize in Holland that I would lose American citizenship within a month, if not soon after that, which made the decision very difficult because I knew if I took this I would lose that, and I really made a choice. If I had known at that point that there was any possibility to do this, what I am doing now, I would have probably held off on the choice. I would say I would rather start now with the proceeding and worry about Dutch citizenship. I don't know if you can apply for Dutch citizenship and do what I am doing now. You probably can't, but I would have gone about it in a different way. TR 24.

Asked by her counsel whether she would have taken a different course of action if Mr. V. had informed her how she might retain United States citizenship, appellant said: "Yes, of course." TR 27. That was precisely why she had gone to him. Id.

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It is apparent that appellant was not given a complete picture of the complexities of United States nationality law. The local employee should not have informed her that she had to choose between the two citizenships. As counsel for the Department stated at the hearing: "...they [consular officials] are not supposed to tell them [American citizens] to choose between one or another. By doing that they are encouraging the citizen to give up their U.S. citizenship, and they are not to encourage a person to give up their citizenship." TR 38.

Instead, the local employee should, in our opinion, have advised appellant that obtaining naturalization in a foreign state is a statutory expatriating act, performance of which may be evidence of an intent to relinquish United States nationality; that the issue of a party's intent is, however, of fundamental importance in loss of nationality proceedings, and evidence of an intent not to relinquish citizenship at or around the time the expatriating act is done is highly relevant. He should therefore have suggested to her that she execute a statement or affidavit to that effect, in brief, make her professed intention to retain American citizenship a matter of official record. Counsel for the Department, when questioned by the Board, stated that consular officials are instructed to inform citizens of the steps they might take to keep citizenship. After the hearing, the Department submitted, at the request of the Board, a copy of the instructions applicable to situations where a citizen inquires before the event about the effect of obtaining naturalization on his or her United States citizenship. In a memorandum dated October 3, 1985 transmitting the instructions the Department stated that:

...we have attached the requested portions of the Foreign Affairs Manual [sic] (FAM) that relates to naturalization in a foreign state. (Section 225.1.) While the FAM does not specifically require consuls to warn citizens of the consequences of naturalization, it emphasizes through examples that not all naturalizations result in loss of citizenship and further, that citizens can demonstrate their intent not to relinquish U.S. citizenship by speaking with the Embassy officials and executing affidavits to demonstrate intent to retain U.S. citizenship.

In Terrazas v. Haig, supra, the court stated that: "Of course, a party's specific intent to relinquish his citizenship rarely will be established by direct evidence. But, circumstantial evidence

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surrounding commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship." 653 F. 2d at 288.

In the case before the Board, the circumstantial contemporary evidence of appellant's lack of intent to surrender her United States citizenship is found in the explicit and concerned inquiry she made about the consequences of obtaining Dutch naturalization for her United States citizenship shortly before she performed that statutory expatriating act. In her submissions and in candid, credible testimony before the Board appellant consistently asserted it was never her intention to relinquish her United States nationality. Her use of a Dutch passport aside, the record shows no act on appellant's part that would impeach her insistence that it was never her will and purpose to divest herself of United States nationality. The Department has not adduced a preponderance of the evidence to prove that she had such an intent.

III

Upon consideration of the foregoing, we hereby reverse the Department's determination that appellant expatriated herself when she obtained naturalization in the Netherlands upon her own application.

Alan G. James, Chairman

Howard Meyers, Member

George Taft, Member