DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: B. A. H. -- In Loss of Nationality Proceedings

Decided by the Board November 28, 1986

Appellant, a native-born United States citizen, moved to Canada in 1968 and obtained naturalization there in 1975. Nine years later she sought advice about her citizenship status from the Consulate General at Toronto, allegedly having become concerned after an American friend told her about the problems he had encountered about his citizenship after becoming a Canadian citizen. She completed a form giving particulars about herself and the expatriative act she performed. The Consulate sent her a pro forma letter shortly afterwards informing her that she might have lost her United States citizenship, and offered her an opportunity to submit evidence with respect to the voluntariness of her act and her intention to relinquish citizenship. She was asked to complete another form to determine citizenship. If she failed to reply to its letter within 30 days, the Consulate Stated, the Department might make a determination of her citizenship status on the basis of such information as was available to it.

The day after she received the Consulate's letter, appellant visited the Consulate and spoke with a consular officer, promising to complete the form within the allotted time. The same day, however, she discovered she needed surgery and in the end did not complete and return the form, believing that after surgery and recovery the time had passed when she might respond to the Consulate's letter. Appellant did not respond. The Consulate therefore executed a certificate of loss of nationality under section 349(a)(1) of the Immigration and Nationality Act. In submitting the certificate to the Department of State, the Consulate expressed the view that appellant's intent to relinquish citizenship was manifested by her failure to respond to the Consulate's letter. The Department approved the certificate a few days after it was received.

HELD: With respect to the sole issue presented for decision - whether appellant intended to relinquish her United States citizenship - the Board concluded that the Department had not met its burden of proof.

The Board observed that neither the Consulate nor the Department had developed the issue of appellant's intent fully and in detail, as mandated by long-established Departmental guidelines. The Consulate erred in not satisfying itself that appellant truly did not intend or wish to submit evidence. The Department compounded

the Consulate's error by not instructing the Consulate to make a further effort to communicate with appellant and establish whether she expressly declined to submit evidence. On appeal the Department quite properly and fairly dismissed appellant's failure to respond to the Consulate's letter as having no bearing on her intent several years previously. The Department argued, however, that appellant's acts of omission - she did nothing from the time of her naturalization in 1975 until she inquired about her status in 1983 to manifest an intention to retain citizenship - demonstrated that she had decided to transfer her allegiance to Canada. The Board was not persuaded by the Department's case on appeal. Naturalization aside, the record showed no specific acts or words of appellant that were inconsistent with United States citizenship. Her acts of omission were insufficient to sustain a finding of intent to relinquish citizenship; such conduct was as readily explainable on grounds having nothing to do with a will and purpose to abandon citizenship as it might be on grounds of such an intent.

The Board reversed the Department's decision that appellant expatriated herself.

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This is an appeal from an administrative determination of the Department of State holding that appellant, B A H, expatriated herself on January 14, 1975 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

A single issue is presented here: whether the Department of State has carried its burden of proving by a preponderance of the evidence that Ms. H intended to relinquish her United States citizenship when she became a Canadian citizen. For the reasons set forth in the deiscussion that follows, we conclude that the Department has not met its burden of proof. We therefore reverse the Department's holding that appellant expatriated herself.

I

Mrs. H was born at [redacted] and so became a United States citizen. In September 1968 she moved with her husband to Canada and was granted landed immigrant status. The United States Consulate General (the Consulate) at Toronto issued her a passport in 1970. She and her husband separated in the same year.

In October 1974 Mrs. H applied for naturalization. She was granted a certificate of Canadian citizenship on January 14, 1975 after making the following oath of allegiance.

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

> Section 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, ...

> "I _____ swear that I will be faithful and bear true allegiance to her Majesty, Queen Elizabeth II, her heirs and successors according to law and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen. So help me God." 2/

Nine years passed. "In April 1983," appellant stated in an affidavit executed March 28, 1984, "a friend mentioned that he had some problems concerning his citizenship after becoming a Canadian citizen. I was concerned, and went to consult the staff of the U.S. Embassy [sic] in Toronto." It appears that she had some discussion with the consular staff about her case, although there is no account of her meeting beyond a notation in the Consulate's records that she completed a citizenship questionnaire on April 25, 1983. In it she gave pertinent details about her personal history; stated that she had held a United States passport from 1970 until it expired; acknowledged that she had obtained naturalization in Canada ("It was difficult to get university teaching jobs in Canada without having Canadian citizenship."); and answered one question - "when and how did you become aware that you may possibly have a claim to United States citizenship" - as follows: "I recently called the Amer. Consulate and was told that becoming a Canadian citizen does not necessarily mean that one loses American citizenship."

In May 1983 the Consulate asked the Canadian authorities for confirmation of appellant's naturalization. After receiving confirmation, the Consulate wrote to Mrs. H on June 3, 1983 to inform her that by obtaining naturalization in a foreign state she might have lost her United States nationality. She was asked to complete another form, titled "Information for Determining United States citizenship," and to return it within 30 days. "If no reply is received," the letter stated, "the Department of State may make an official determination of your United States citizenship status on the basis of all available information." The Consulate added that if she wished to discuss her case with a consular officer, an appointment would be made for her to do so. Mrs. H signed a postal receipt acknowledging that she received the consulate's letter on June 8, 1983. On June 9th she again visited the Consulate. As noted on the passport and nationality card the Consulate maintained on Mrs. H : "subj came to Congen to discuss citiz with Conoff." Mrs. H gave the following account of what happened thereafter in an affidavit executed March 28, 1984: 3/

2/ There is no copy in the record of the oath of allegiance Mrs. H made. However, the Canadian citizenship authorities informed the Consulate in 1983 that she had sworn the oath of allegiance prescribed by the Canadian Citizenship Act of 1946, as amended, which is the one quoted above.

3/ The consular officer to whom she spoke made no record of their conversation except the above-quoted notation on Mrs. H 's passport and nationality card.

...

...In that meeting, I was told that I had thirty days to turn in a form entitled 'Information for Determining U.S. Citizenship.'

6. I did not answer within time, however. That same day, June 9, 1983, I was told by my physician that I had a lump in my breast that required removal. Surgery was scheduled for July 3, 1984 (delayed by work commitments of the surgeon and myself).. See Exhibit A.

Although my U.S. citizenship is something I treasure, the fear of cancer obliterated all other concerns and I did not even think of the form or the deadline to answer until well after the surgery.

7. I was discharged from the hospital on July 6, and had some further medical procedures done the next day. It took me a few more days to get back on my feet. The lump was benign, but I then learned that I am now in a significantly higher risk category for contracting cancer than before. I was emotionally exhausted, and went to stay with some friends to recover for a few weeks. It was not until I returned to my work and normal routine that I began to focus once again on the question of my citizenship. Realizing that the thirty-day deadline had passed, I believed that I could no longer submit any response.

On September 6, 1983 a consular officer executed a certificate of loss of nationality in appellant's name, as required by section 358 of the Immigration and Nationality Act. 4/ Therein he certified

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4/ 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 Nationalit 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.

that appellant acquired United States nationality at birth; that she obtained naturalization in Canada upon her own application; and concluded that she thereby expatriated herself. He sent the certificate to the Department on September 6, 1983. The Department approved the certificate on September 19, 1983, an action that constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. The appeal was entered through counsel on July 23, 1984. 5/

II

Section 349(a)(1) of the Immigration and Nationality Act prescribes that a national of the United States shall lose his nationality by obtaining naturalization in a foreign state. 6/ The Supreme Court has held, however, that nationality shall not be lost unless the citizen did the expatriative act voluntarily with the intention of relinquishing his nationality. Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967).

There is no dispute that appellant obtained naturalization in Canada upon her own application and thus brought herself within the purview of the Act. Furthermore, she concedes that she acted voluntarily. The single issue for decision therefore is whether appellant's naturalization was accompanied by an intent to surrender her United States citizenship.

Under the statute, 7/ the burden is placed on the Government to prove an intent to relinquish citizenship; this it must do by a

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5/ The delay in the disposition of this appeal was due to the fact that in October 1985 appellant requested oral argument but did not follow up that request by offering specific alternate dates as the Board requested. It was not until May 1986 that counsel finally advised the Board that Mrs. H_ had decided not to appear for oral argument and wished the Board to decide her case on the record.

6/ Text supra, note 1.

7/ Section 349(c) of the Immigration and Nationality Act, 8 U.S.C. 1481(c), provides in pertinent part that:

Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence....

preponderance of the evidence. Vance v. Terrazas, supra, at 267. Intent may be expressed in words or be found as a fair inference from proven conduct. Id. at 260. The intent the Government must prove is the party's intent at the time the expatriating act was performed. Terrazas v. Haig, 653 F.2d 285, 287 (7th Cir. 1981).

The only evidence of record of Mrs. H 's intent contemporaneous with her naturalization is the fact that she applied for and accepted Canadian naturalization and swore a concomitant oath of allegiance. Naturalization, like the other enumerated statutory expatriating acts, may be highly persuasive, but is not conclusive, evidence of an intent to relinquish United States citizenship. Vance v. Terrazas, supra, at 261, citing Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (Black, J. Concurring.) Similarly, making an oath of allegiance to a foreign sovereign or state while alone insufficient to prove intent to relinquish citizenship, also provides substantial evidence of intent. King v. Rogers, 463 F.2d 1188, 1189 (9th Cir. 1972). However, an oath of allegiance that contains only an express affirmation of loyalty to the country whose citizenship is being sought leaves "ambiguous the intent of the utterer regarding his present nationality." Richards v. Secretary of State, CV80-4150 (memorandum opinion, C.D.Cal 1980) at 5.

It is recognized that a party's specific intent to relinquish citizenship rarely will be established by direct evidence, but circumstantial evidence surrounding commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship. Terrazas v. Haig, supra, at 288. Since the direct evidence in this case is meager and insufficient to support a finding of intent to relinquish citizenship, we must examine appellant's conduct subsequent to naturalization to determine whether, as the Department contends, it manifests a renunciatory intent.

We begin by examining the Consulate's disposition of Mrs. H 's case which we consider so perfunctory as to amount to trivialization of her constitutional right. Contrary to long-standing instructions, the consular officer who was charged with Mrs. H 's case failed to develop the matter of her intent fully and in detail. After the Supreme Court decided Afroyim v. Rusk, supra, the Department instructed consular officers to develop the intent issue carefully. "Each of these cases [involving naturalization and certain other statutory expatriating acts] must be fully developed in detail, particularly the issue of 'intent' (see section 224.20(c), Procedures)." 8 Foreign Affairs Manual 224.20(b)(1), 3/21/77. (Emphasis in original). Following the Court's decision in Vance v. Terrazas, supra, the Department again stressed to all diplomatic and consular posts the importance of preparing loss of nationality cases carefully. See Circular Airgram to All Diplomatic and Consular Posts, no. 1767, August 27, 1980, which reads in pertinent part as follows:

> With respect to the cases described in 8 FAM 224.20(b)(1), Procedures, the question of intent is very much in issue, and the facts will have to be brought out in considerable detail. These cases should continue to be processed as provided in 8 FAM 224.20(c)(1), Procedures.
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> We have concluded, however, that a revision of 8 FAM 220 is warranted to streamline its provisions, to emphasize the importance of the citizen's intent,...

Having concluded that Mrs. H did not intend to submit evidence in her own behalf, the Consulate General executed a certificate of loss of nationality and sent it to the Department under cover of the following memorandum:

> Enclosed is the Certificate of Loss of Nationality prepared under Section 349(a)(1) of the INA in the name of B H .
>
> Ms. H failed to respond to the Information for Determining United States Citizenship form dated June 3, 1983. Enclosed is the signed postal receipt returned by the Canadian postal authorities.
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> Ms. H 's intent to relinquish United States citizenship is established as a fair inference from her failure to offer any evidence to the contrary despite having been afforded ample opportunity to do so. Accordingly, the Consulate General requests that the Certificate of Loss of Nationality be approved.

In our judgment, the consular officer erred in terminating proceedings after Mrs. H failed to respond to the Consulate's June 3rd letter. Given Mrs. H 's constitutional right to remain a United States citizen until she relinquished citizenship, the consular officer should have made a further effort before closing the case to ascertain whether Mrs. H did not intend to submit evidence, or whether, as she later alleged, there was a valid reason why she failed to respond. After all, she completed a preliminary questionnaire in April and called at the Consulate to discuss her case in June. Plainly, she showed both her good faith about cooperating with the Consulate and more importantly manifested an interest in retaining her United States citizenship. For the consular officer to posit intent to relinquish citizenship

solely on the dubious proposition that her failure to reply to the Consulate's June 3rd letter manifested such an intent is untenable. 8/ For one thing, Mrs. H was under no legal obligation to complete the questionnaire. For another, the consular officer did not even bother to evaluate Mrs. H 's post-naturalization conduct and then draw a fair inference from it.

The Department's disposition of the case was even more peremptory and therefore more censurable than that of the Consulate.

The certificate of loss of nationality which the Consulate executed in Mrs. H 's name arrived in the Department on September 16, 1983. It was approved three days later on September 19th. There is not a shred of evidence that the Department did more than rubber stamp the Consulate General's summary judgment about Mrs. H 's intent. The official who approved the certificate made no notes to indicate what factors he took into account in endorsing the judgment of the Consulate General. For all we know he simply signed his name after noting that the Consulate General recommended approval of the certificate.

It is regrettable that a consular post should ignore standing Departmental instructions; it is unpardonable for the Department to flout its own guidelines concerning proof of the pivotal issue in most loss of nationality cases - the intent with which the expatriative act was done. On such a meager record the Department should never have approved the certificate of loss of nationality that was issued in this case.

Comes now the Department on appeal by Mrs. H and argues that its original decision was sound. We disagree with its position on appeal as emphatically as we do with its September 19, 1983 decision.

The Department now rests its case on the following contentions:

> ...Appellant has amply demonstrated through her actions and inactions of the past 15 years that she intended to relinquish her U.S. citizenship when she naturalized in Canada in 1975. Now, for unknown reasons, she has changed her mind and wants her U.S. citizenship reinstated. Her recent change of heart, however, does not alter her intent at the time she naturalized as a citizen of Canada.

8/ In its brief on the appeal, the Department quite properly and fairly dismisses Mrs. H 's failure to respond to the Consulate General's letter as irrelevant to her intent in 1975 when she obtained naturalization. "In any case, her recent failure to complete and return the questionnaire has no bearing on her intent at the time of her naturalization."

Naturalization aside, the record does not show that Mrs. H did any act patently inconsistent with a will to maintain United States citizenship. Her acts of omission 9/ are insufficient to support a finding of intent to relinquish citizenship. This is so simply because such conduct is readily explainable on grounds having nothing to do with a will and purpose to abandon citizenship. Absent conduct that is more expressive of a renunciatory intent, can one be confident that any one or a combination of factors, totally unrelated to an intent to relinquish citizenship, might not explain her action or non-actions? Such factors as preoccupation with personal problems; lack of knowledge; a belief she acquired a second nationality without forfeiting her birthright; a perception that since she was living in a friendly environment there was no need to document her United States citizenship arguably explain her conduct as satisfactorily as a design to relinquish citizenship.

The Department asserts that the fact Mrs. H raised the issue of her citizenship status in 1983, eight years after her naturalization, was a clear indication that she had believed her actions in 1975 jeopardized her citizenship.

> Had she truly believed that her naturalization in Canada had not affected her U.S. citizenship it would not have been necessary to call the Consulate to determine her status. Rather, she would have believed herself to be a U.S. citizen and would have acted accordingly.

9/ The Department details these acts of omission as follows:

> ...Appellant's conduct since her naturalization reveals that her ties have been overwhelmingly to Canada. It is quite evident from Appellant's conduct between 1968 and 1983 that she fully intended that her life would henceforth be that of a Canadian, and that her life as a U.S. citizen was over. In the initial 15 year period she resided in Canada, she at no time sought to make herself known to the U.S. Consulate as a U.S. citizen. Her U.S. passport, which expired in 1970, was never renewed. Appellant never sought to register with the U.S. Consulate nor to inquire about her possible rights or duties as a U.S. citizen. She never voted absentee in U.S. elections nor filed U.S. income tax returns. She obtained Canadian citizenship without ever verifying with the U.S. Consulate that her actions would not jeopardize her U.S. citizenship. Clearly she transferred her allegiance to Canada.

We find this assertion of the Department unconvincing on the issue of Mrs. H 's intent. Remember, she raised her citizenship status sua sponte, later explaining as follows why she had done so: "...a friend mentioned to me that he had some problems concerning his citizenship after becoming a Canadian citizen. I was concerned and went to consult the staff of the U.S. Embassy at Toronto." It seems to us that such action indicates as much a wish to retain citizenship as a prior intent to abandon citizenship. How prove Mrs. H did not rest secure in the thought for a number of years, until she spoke to her friend,that her naturalization did not jeopardize her United States citizenship? In Mrs. H 's case, the Department simply has not made allowance for the fact that people often do careless things without any particular design.

The Department had inadequate grounds in 1983 to approve the certificate of loss of nationality that was issued in this case. On appeal the Department's case in support of its original action is unpersuasive. Accordingly, we conclude that the Department has failed to carry its burden of proving by a preponderance of the evidence that Mrs. H intended to relinquish her United States citizenship when she obtained naturalization in Canada upon her own application.

III

Upon consideration of the foregoing, we hereby reverse the Department's administrative determination that Mrs. H expatriated herself.

Alan G. James, Chairman

Warren E. Hewitt, Member

George Taft, Member